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[1] On leave of absence to enter military service.

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23 Cal.2d 170

MIRAMAR CO. v. CITY OF SANTA BARBARA.
L. A. 18349.

Supreme Court of California.
Nov. 3, 1943.

Rehearing Denied Dec. 2, 1943.

Eminent domain ⚷2(10)

The erection of a breakwater by city of Santa Barbara which interrupted flow of sand carried to land of littoral owner and caused erosion of sand previously deposited opposite littoral owner's uplands was not a "taking of private property for public use" within the meaning of constitutional provision prohibiting such taking without just compensation. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Taking of Private Property for Public Use".

CARTER, CURTIS, and SCHAUER, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, Santa Barbara County; Ernest D. Wagner, Judge.

Action by the Miramar Company against the City of Santa Barbara for damage to real property as the result of erection and maintenance of a breakwater. Judgment for defendant, and plaintiff appeals.

Affirmed.

Prior opinion, 122 P.2d 643.

Leland Crawford and Robert M. Jones, both of Santa Barbara, for appellant.

Hanna & Morton, Byron C. Hanna, James Kirby, and David E. Hinckle, all of Los Angeles, amici curiae for appellant.

Norris Montgomery, City Atty., Heaney, Price, Postel & Parma, and Francis Price, all of Santa Barbara, for respondent.

TRAYNOR, Justice.

Plaintiff owns littoral lands, adjacent to Miramar Bay and about two and one-half miles east of the city of Santa Barbara, upon which it operated cottages and a hotel known as Miramar Beach Hotel. On June 8, 1927, the city of Santa Barbara commenced the construction, about three miles west of plaintiff's property, of a permanent breakwater to extend from the shore bank approximately 2,500 feet into the Pacific Ocean.

The complaint alleged that since the littoral drift along the shore line is from west to east, the effect of the breakwater was to stop the natural flow of sand and to wash away the sand that was there. This action was continuous and progressive, always taking sand but never depositing any to replace that carried away. In time plaintiff's property was denuded of sand and covered by the sea so that the line of ordinary high tide was advanced. With the disappearance of the sand the hotel ceased to be a beach resort.

On May 15, 1937, seven years after the completion of the breakwater, plaintiff filed its verified claim for loss of property with the Santa Barbara City Council for the sum of $750,000. The claim was disallowed and on October 4, 1939, plaintiff filed the present action on the rejected claim. Following the overruling of its demurrer the defendant filed an answer consisting of a general denial and six separate affirmative defenses. The case was tried before the court without a jury, pursuant to written stipulation of the parties, upon the issues created by the complaint and the 4th and 5th special defenses. The 4th special defense alleged that plaintiff did not comply with the provisions of act 5149 ([Deering's Gen.Laws, 1937]; Stats. 1931, p. 2475) requiring the filing of a verified claim with the secretary of the City Council within ninety days after the occurrence of the injury upon which the alleged cause of action is based. The 5th special defense was based upon an ordinance of defendant city limiting the time of the filing of certain claims for damages against the city to six months. The trial court made no finding on that defense but did find that the plaintiff failed to file its claim in compliance with the provisions of act 5149. The court also held that the complaint did not state facts sufficient to constitute a cause of action. Plaintiff made a motion for a new trial, which was denied. The present appeal was then brought upon the judgment roll.

The complaint charges that "solely as the result of the erection and maintenance by defendant of said breakwater, and immediately and proximately caused thereby, the natural and normal action of the tides, currents, waves, and waters of the Pacific Ocean in that vicinity was changed, and the natural and normal drift of sand in a general easterly direction along the shore was intercepted by said breakwater, and by cutting off and depriving the said Miramar Beach of its natural and normal supply of sand, and causing the waters of the Pacific Ocean gradually, continuously and progressively to come upon, inundate and wash away and destroy during the five (5) years next preceding the filing of the claim attached hereto marked Exhibit 'A' all of the sandy beach, included in the real property described in Paragraph III hereof, * * * That said property so inundated, washed away and taken, consists of approximately all of the sandy beach commonly known as Miramar Beach, used in conjunction with said hotel. That defendant at all times knew and was put upon notice that the erection and maintenance of said breakwater would inundate, wash away, destroy, damage and take the said property, as herein described. * * *"

This case is not one where private property has been flooded or washed away by the diversion of currents independent of the stoppage of sand. The breakwater brought about a stoppage of the normal flow of sand that in turn led to the erosion of plaintiff's sandy beach and the flooding of plaintiff's property, and this sequence is the essence of the complaint. The complaint is attended by some confusion at the point where it states "and by cutting off and depriving the said Miramar Beach of its natural and normal supply of sand, and causing the waters of the Pacific Ocean gradually, continuously and progressively to come upon, inundate and wash away and destroy * * *" etc. This language, meaningless in itself because it is not co-ordinated with the rest of the sentence, nevertheless retains the association of stoppage of sand and erosion. The plaintiff itself at page 2 of its opening brief sets forth the cause and effect relationship between the two as the basis of its action:

"The littoral drift and current along the shore line involved is from west to east, and the effect of defendant's breakwater was to stop the normal and natural flow of sand, so that plaintiff's property, in the course of time, was denuded of sand, leaving rocks in place of the sands normally and naturally covering the shore of plaintiff's property.

"The loss of sand, by reason of the stoppage of littoral drift by defendant's breakwater, caused the waters of Miramar Bay to advance shoreward, advancing the ordinary high tide line until practically all of plaintiff's property had eroded away, and the water of Miramar Bay covered the property of plaintiff, formerly covered and protected by sand." See, also, page 2 of plaintiff's petition for hearing by this court.

A littoral owner may have a right as against an individual to the uninterrupted flow of sand carried to his land by the ocean currents in their natural state (see Katenkamp v. Union Realty Co., 6 Cal.2d 765, 59 P.2d 473; Katenkamp v. Union Realty Co., 11 Cal.App.2d 63, 53 P.2d 387), but he has no such right as against the state. Littoral rights must give way to any use of the tide lands and water flowing over them that serves the public right of navigation. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed. 1083; Scranton v. Wheeler, 179 U.S. 141, 163, 21 S.Ct. 48, 45 L.Ed. 126; United States v. Chandler-Dunbar W. P. Co., 229 U.S. 53, 62, 33 S.Ct. 667, 57 L.Ed. 1063; Greenleaf-Johnson Lbr. Co. v. Garrison, 237 U.S. 251, 35 S.Ct. 551, 59 L.Ed. 939; Bedford v. United States, 192 U.S. 217, 24 S.Ct. 238, 48 L.Ed. 414; Gibson v. United States, 166 U.S. 269, 271, 17 S.Ct. 578, 41 L.Ed. 996. The federal government has the paramount right to regulate and control the improvement of navigable waters, but the states also may improve their navigable waters, subject to federal control. Henry Dalton & Sons Co. v. Oakland, 168 Cal. 463, 466, 143 P. 721; People v. California Fish Co., 166 Cal. 576, 600, 138 P. 79;

People v. Banning Co., 167 Cal. 643, 649, 140 P. 587; Oakland v. E. K. Wood Lumber Co., 211 Cal. 16, 292 P. 1076, 80 A. L.R. 379; see 26 Cal.Jur. 308. Ownership of tide lands is governed by state law (Weber v. State Harbor Comm'rs, 18 Wall. 57, 85 U.S. 57, 21 L.Ed. 798; Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L. Ed. 331; Borax Consolidated v. City of Los Angeles, 296 U.S. 10, 56 S.Ct. 23, 80 L.Ed. 9), and in California "the state is the owner of all land below tide-water * * *." Cal.Civ. Code, sec. 670. The littoral rights of an upland owner who owns no title to tide lands adjoining his property are subject to termination by whatever disposition of the tide lands the state chooses to make. Boone v. Kingsbury, 206 Cal. 148, 273 P. 797; City of Newport Beach v. Fager, 39 Cal.App.2d 23, 28, 102 P.2d 438. Since navigable waters are held by the state in trust for all the people, any conveyance of tide lands is taken by the grantee subject to the public right of navigation. The state retains "the right to enter upon such lands and make such erections thereon, or changes therein, as it may find necessary or advisable to adapt the premises for use in navigation, and provide access thereto for that purpose, or in furtherance thereof." People v. California Fish Co., 166 Cal. 576, 588, 138 P. 79, 84; Cal.Const. art. XV, sec. 2; City of Oakland v. Buteau, 219 Cal. 745, 752, 29 P.2d 177; People v. Southern Pac. Co., 166 Cal. 627, 138 P. 103; People v. Banning Co., 167 Cal. 643, 140 P. 587; Patton v. Los Angeles, 169 Cal. 521, 147 P. 141; see Nichols, Eminent Domain, 2d Ed., p. 419 et seq.

The state may delegate to a city the power to make improvements in aid of navigation. City of Long Beach v. Lisenby, 175 Cal. 575, 166 P. 333; City of Oakland v. Buteau, 219 Cal. 745, 753, 29 P.2d 177; City of Los Angeles v. Anderson, 206 Cal. 662, 668, 275 P. 789; Patton v. City of Los Angeles, 169 Cal. 521, 147 P. 141. The plaintiff in the instant case does not question the right of the city of Santa Barbara to build the breakwater (see Cal. Stats. 1925, p. 181; Charter of the City of Santa Barbara, sec. 2(11); Cal.Stats. 1927, p. 2061) but alleges that it was constructed and maintained for the purpose of creating a harbor for pleasure yachts and fishing boats. The right of the public to use navigable waters, however, is not limited to any particular type of craft. Pleasure yachts and fishing boats are used for navigation and the state, or the city as its representative, can provide harborage for them as well as for merchant vessels and steamers.

Whatever the effect of the breakwater upon the sand, the littoral owner obtained sand only because of the proximity of its land to the water. The relationship between the land and the water can shift as easily as the sand, and the state can alter it by a variety of improvements. It can ever bar access to the water from the land. Henry Dalton & Sons Co. v. Oakland, 168 Cal. 463, 468, 143 P. 721; Koyer v. Miner, 172 Cal. 448, 156 P. 1023; Muchenberger v. City of Santa Monica, 206 Cal. 635, 643, 275 P. 803; Boone v. Kingsbury, 206 Cal. 148, 170, 273 P. 797; City of Oakland v. Buteau, 219 Cal. 745, 29 P.2d 177; City of Newport Beach v. Fager, 39 Cal.App.2d 23, 28, 102 P.2d 438; see Nichols, Eminent Domain, 2d Ed., p. 421. Since it is free to set up a barrier that leaves the land without access to water, and therefore without access to the sand, it can clearly erect an improvement that merely checks the flow of sand to the land. There can thus be no vested right in such future accretions. Cohen v. United States, C.C., 162 F. 364, 370, 371; Western Pac. R. Co. v. Southern Pac. Co., 9 Cir., 151 F. 376, 398–400, 80 C.C.A. 606; see 25 Cal.Jur. 1048.

Inevitably the washing away of sand in tide lands must advance the high-water mark if the owner of the uplands takes no steps to prevent that consequence. Plaintiff's insistence that the high-water mark preceding the erection of the breakwater must be maintained is in effect a claim that the state has no right to check the flow of sand and must maintain the tideland sand as a buffer for the upland sand. Such a claim could not be recognized without creating a servitude in the tide lands inconsistent with the state's title and its right to erect improvements in the interest of navigation.

The improvement in question was erected at a distance of about three miles from plaintiff's land. The damage to the land resulted neither from direct invasion nor subjection to public use but as an incidental consequence of the construction of a breakwater. Southern Pac. Co. v. United States, 58 Ct.Cl. 428, aff'd 266 U.S. 586, 45 S.Ct. 124, 69 L.Ed. 454; cf. Pumpelly v. Green Bay, etc., Co., 13 Wall. 166, 80

U.S. 166, 20 L.Ed. 557. The erosion that changed the face of plaintiff's land was a gradual process in which the continuous ebb and flow of clear water over a period of years denuded plaintiff's land of the sand that had been deposited there in years past by the ebb and flow of sandy water. Such transformations are continually occurring up and down the thousand miles and more of California's seashore and reflect the changes in the action of the ocean resulting from natural causes and public improvements. Plaintiff's littoral right to sandy water, like its littoral right to access to the ocean, was derived entirely from the proximity of plaintiff's land to the ocean. It gave to plaintiff's land the advantage of sandy accretions. Nevertheless, the enjoyment of that advantage did not constitute a right to its perpetuation, for plaintiff's littoral rights were always subordinate to the state's right to improve navigation. The duration of the sandy accretions depended entirely upon the continuation of the littoral right, which from the beginning was subject to termination by the state. The withdrawal of the sandy accretions, constituting the damage to plaintiff's land, was an incidental consequence of the state's use of the public domain for a public interest that was at all times superior to private littoral rights. There has therefore been no taking or damaging of private property for public use within the meaning of article I, section 14, of the California Constitution. Henry Dalton & Sons Co. v. Oakland, 168 Cal. 463, 466, 467, 468, 143 P. 721; People v. Banning Co., 167 Cal. 643, 140 P. 587; People v. Southern Pac. Co., 166 Cal. 627, 138 P. 103; Koyer v. Miner, 172 Cal. 448, 156 P. 1023; Boone v. Kingsbury, 206 Cal. 148, 273 P. 797; Cory v. City of Stockton, 90 Cal.App. 634, 266 P. 552; City of Newport Beach v. Fager, 39 Cal.App.2d 23, 102 P.2d 438; Southern Pac. v. United States, 58 Ct.Cl. 428, aff'd 266 U.S. 586, 45 S.Ct. 124, 69 L.Ed. 454; United States v. Chandler-Dunbar W. P. Co., 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1063; Bedford v. United States, 192 U.S. 217, 24 S.Ct. 238, 48 L.Ed. 414; Gibson v. United States, 166 U.S. 269, 17 S.Ct. 578, 41 L.Ed. 996; Scranton v. Wheeler, 179 U.S. 141, 21 S.Ct. 48, 45 L.Ed. 126.

The judgment is affirmed.

GIBSON, C. J., and EDMONDS, J., concur.

SHENK, Justice.

I concur in the judgment of affirmance on the ground that the loss alleged to have been suffered by the plaintiff did not amount to a taking of private property for a public use as contemplated by our Constitution and that the timely filing of a claim under the Statutes of 1931, page 2475 was required.

By stipulation of the parties the trial was confined to the special defense which alleged that the action was barred for failure of the plaintiff to comply with the claim statute. This course was pursued for the obvious reason that if this defense were sustained the trial of the case otherwise on the merits would be obviated. The trial court found that a claim should have been filed pursuant to the statute, and that a claim had not so been filed. Judgment was rendered for the defendant on that ground. The question on the appeal, as I see it, is whether the trial court correctly concluded that the case was one which required the filing of a claim under the statute.

The plaintiff asserts its right to recovery for the destruction of the sandy beach by virtue of the provisions of section 14 of article I of the California Constitution providing that private property may not be taken or damaged for public use without compensation first having been paid to the owner, and notice to the defendant pursuant to Statutes of 1923, page 675.

The plaintiff alleges that solely as the result of the construction and maintenance of the breakwater, the normal course of the ocean currents was changed, causing the waters gradually, continuously and progressively to wash away its sandy beach three miles below the breakwater.

To state a cause of action under the constitutional provision it is necessary to allege a taking or a damaging of the plaintiff's property for a public use. The plaintiff attempts to support its theory or conclusion that the loss was a taking for public use upon the failure of the ocean currents to carry a compensating load of sand to its beach. The mere statement of the contention of the plaintiff that the city of Santa Barbara was thus taking the far off sandy beach for a public use is a demonstration of the futility of the claim. What public use the city was or is to make of that beach is not disclosed, and the assertion that the construction and maintenance of the breakwater has resulted in such a taking is a mere conclusion which is negatived by the other allegations in the complaint.

The general rule is that acts done, as here, in the proper exercise of governmental powers and not directly encroaching upon private property, though their consequences may impair its use, are not a taking within the meaning of the constitutional provision. See Northern Transportation Co. v. Chicago, 99 U.S. 635, 642, 25 L.Ed. 336; Gibson v. United States, 166 U.S. 269, 17 S.Ct. 578, 41 L.Ed. 996; Scranton v. Wheeler, 179 U.S. 141, 21 S. Ct. 48, 45 L.Ed. 126; Bedford v. United States, 192 U.S. 217, 24 S.Ct. 238, 48 L.Ed. 414; Sanguinetti v. United States, 264 U. S. 146, 44 S.Ct. 264, 68 L.Ed. 608; Franklin v. United States, 6 Cir., 101 F.2d 459; Goodman v. United States, 8 Cir., 113 F. 2d 914; Green v. State, 73 Cal. 29, 11 P. 602, 14 P. 610; Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625, 2 Am.St.Rep. 775. Cases in which damage has been held to be a taking involved a direct physical invasion or encroachment. See Pumpelly v. Green Bay, etc., Co., 13 Wall. 166, 80 U.S. 166, 20 L.Ed. 557; United States v. Lynah, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539; United States v. Cress, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746; United States v. Wabasha-Nelson Bridge Co., 7 Cir., 83 F.2d 852; Carpenter v. Board of Commissioners, 56 Minn. 513, 58 N.W. 295, 45 Am.St.Rep. 494; Morrison v. Clackamas County, 141 Or. 564, 18 P.2d 814. Thus decisions permitting recovery under the Fifth Amendment of the United States Constitution providing for compensation for a taking only, are confined to cases involving a direct physical invasion of or encroachment upon the property. The doctrine of taking under the Fifth Amendment has never been extended beyond the rule stated, and certainly there is no necessity for doing so under a constitutional provision which provides compensation for both taking and damaging.

It is obvious from the foregoing cited cases and from a consideration of the provision of the state Constitution that a taking of property is not effected unless the property is directly utilized in the public improvement. Damage which is not caused by a direct invasion or utilization of the private property in the improvement is not a taking. The plaintiff has not alleged, and apparently cannot allege, facts from which it may properly be concluded that there was a direct physical invasion of or encroachment upon its property resulting from the construction of the breakwater. The allegations of the complaint fall far short of stating a cause of action for a taking of private property for public use. It has been held directly that damage such as is here alleged is indirect and consequential and therefore not a taking. Bedford v. United States, Franklin v. United States, supra. Whatever loss the plaintiff sustained, if compensable at all, was for damages. The question then remains whether, on account of such loss, a timely claim was required to be filed under the 1931 statute.

It is settled in this state that a cause of action for either a taking or damaging of private property for public use under the constitutional provision is subject to the operation of a claim statute or charter provision, provided the terms thereof are broad enough to embrace it. Rose v. State of California, 19 Cal.2d 713, 725, 123 P.2d 505; Powers Farms, Inc. v. Consolidated Irr. Dist., 19 Cal.2d 123, 126, 119 P.2d 717, citing numerous cases; Davis v. East Contra Costa Irr. Dist., 19 Cal.2d 140, 119 P.2d 727; Crescent Wharf & Warehouse Co. v. Los Angeles, 207 Cal. 430, 278 P. 1028; Los Angeles Athletic Club v. Long Beach, 128 Cal.App. 427, 17 P.2d 1061. The statute of 1931 provides that a claim for damages to property "as a result of the dangerous or defective condition of any public * * * works," must be filed within the time specified "after such accident has occurred." Concededly this statute is not broad enough to include a claim for taking private property for public use; but the statute seems to be broad enough to cover all damage ensuing from the construction or maintenance of public works which in its essence may not be deemed a taking. It was decided in the cases of Powers Farms, Inc., v. Consolidated Irr. Dist. and Davis v. East Contra Costa Irr. Dist., supra, that liability for dangerous or defective condition of property of the district covered a general liability, including a liability accruing by virtue of the exercise of the power of eminent domain, without reference to negligence. The general liability having thus been provided for may not be relegated to the field of tort liability alone by the addition in the statute of the words "after such accident has occurred." The quoted words refer to the time when the claim must be filed, and do not limit established general liability. The foregoing cited cases likewise establish that damage is caused by the dangerous or defective condition of public works, within the meaning of the statute, if the condition of the public works is dangerous to the plaintiff's property without reference to negligence.

It follows that, since the alleged cause of action is not for a taking of private property as distinguished from damage thereto, a timely claim should have been filed pursuant to the statute, and the trial court's findings and judgment are correct. It is not necessary to express an opinion on whether any damage alleged is merely damnum absque injuria.

CARTER, Justice (dissenting).

I dissent. It appears from plaintiff's complaint that it is the owner of littoral lands adjacent to Miramar Bay, an inlet of the Pacific Ocean, and lying 2½ miles east of defendant city of Santa Barbara. It operated a hotel business on its lands known as the Miramar Beach Hotel. A portion of plaintiff's property consists of a beach. On June 8, 1927, defendant commenced, and on June 30, 1930, completed, and has since maintained, a breakwater extending from a point on the shore about three miles west of plaintiff's property into the ocean, a distance of 2,500 feet. The complaint alleges: "* * * that said breakwater was constructed and is maintained solely for the purpose of creating a harbor for pleasure yachts and fishing boats, and for the purpose of rendering for defendant's profit, anchorage space in the harbor thus created, protected and improved; that solely as the result of the erection and maintenance by defendant of said breakwater, and immediately and proximately caused thereby, the natural and *normal action of the tides, currents, waves, and waters of the Pacific Ocean in that vicinity was changed,* and the natural and normal drift of sand in a general easterly direction along the shore was intercepted by said breakwater, and by cutting off and depriving the said Miramar Beach of its natural and normal supply of sand, *and causing the waters of the Pacific Ocean gradually, continuously and progressively to come upon, inundate and wash away* and destroy during the five (5) years next preceding the filing of the claim attached hereto marked Exhibit 'A,' all of the sandy beach, included in the real property described in Paragraph III hereof, said real property being described as follows, to-wit: * * * That said property so *inundated, washed away and taken,* consists of approximately all of the sandy beach commonly known as the Miramar Beach, used in conjunction with said hotel. *That defendant at all times knew and was put upon notice that the erection and maintenance of said breakwater would inundate, wash away, destroy, damage and take the said property as herein described."* (Emphasis added.)

It is conceded by both parties that if plaintiff has stated a cause of action in its complaint it must be based upon the constitutional provision that private property shall not be taken or damaged for a public use without the payment of just compensation. Cal.Const. art. I, sec. 14. In support of its contention that plaintiff cannot recover thereunder defendant invokes its right as a political subdivision and agency of the state to maintain the breakwater pursuant to its power of control over navigation. Liberally interpreted, the complaint may be said to allege that the breakwater has caused two things, namely, the washing away of the sand on the beach on plaintiff's property by reason of the resulting change in the currents and the prevention of the replacement of the sand on the beach by sand bearing water. *It must be assumed that said beach is upland property,* that is, land above mean high tide, inasmuch as it is alleged that the beach is "included in that real property" particularly described in the complaint. Even assuming that the two conditions occurred simultaneously and are inseparable, the result is the same. If the complaint be interpreted to mean that under normal conditions the action of the current and the waters washed away the beach, but at the same time repaired the damage by depositing other sand in its place which is carried by the water, the end result is the same. If the breakwater so changed the action of the water that after its construction the sole effect was a washing away of the sand with no compensating deposit, the condition created is not substantially different than a diversion of the currents with a result that the upland was washed away. It is not a case of being deprived merely of future accretions where the abutting property owner is depending upon the possibility that they might increase the area of his land. Rather, it is simply the loss of his upland which he already possesses by the change in the action of the water. Hence, we have a case where a littoral owner's upland property is being taken from him as the result of the maintenance of the breakwater which changes the action of the water.

A public agency may not take a littoral owner's upland property by flooding, erosion or otherwise in the exercise of its control over navigation or in exercise of any other power without the payment of just compensation. United States v. Lynah, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539; Pumpelly v. Green Bay, etc., Co., 13 Wall. 166, 80 U.S. 166, 20 L.Ed. 557; Carpenter v. Board of Comm'rs, 56 Minn. 513, 58 N.W. 295, 45 Am.St.Rep. 494; Goodman v. United States, 8 Cir., 113 F.2d 914; United States v. Wabasha-Nelson Bridge Co., 7 Cir., 83 F.2d 852; Mashburn v. St. Joe Improvement Co., 19 Idaho 30, 113 P. 92, 35 L.R.A., N.S., 824; 1 Nichols on Eminent Domain, § 138; 18 Am.Jur., Eminent Domain, §§ 163, 165; United States v. Chicago, B. & Q. R. Co., 8 Cir., 82 F.2d 131, 106 A.L.R. 942, certiorari denied 298 U.S. 689, 56 S.Ct. 957, 80 L.Ed. 1408; Conger v. Pierce County, 116 Wash. 27, 198 P. 377, 18 A.L.R. 393; see United States v. Great Falls Mfg. Co., 112 U.S. 645, 5 S.Ct. 306, 28 L.Ed. 846; Monongahela Navigation Co. v. United States, 148 U.S. 312, 13 S.Ct. 622, 37 L.Ed. 463; United States v. Cress, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746; United States v. Chicago, M., St. P. & P. R. Co., 312 U.S. 592, 313 U.S. 543, 61 S.Ct. 772, 85 L.Ed. 1064; United States v. Appalachian Elec. Power Co., 311 U.S. 377, 427, 61 S.Ct. 291, 85 L.Ed. 243; Los Angeles Athletic Club v. Long Beach, 128 Cal.App. 427, 432, 17 P.2d 1061; St. Regis Paper Co. v. New Hampshire Water R. Board, 92 N.H. 164, 26 A.2d 832, 838.

Generally the public agency is required to pay just compensation where a public improvement in a navigable stream has caused the flooding or erosion of his property. Morrison v. Clackamas County, 141 Or. 564, 18 P.2d 814; City of Los Angeles v. Aitken, 10 Cal.App.2d 460, 52 P.2d 585.

There is confusion on the subject in the decisions of the United States Supreme Court resulting from the giving of a too narrow interpretation of the words "taking" and "property" as used in the Fifth Amendment to the Constitution of the United States which requires the payment of compensation for the taking of property, the view being taken in some cases that real property includes only the actual physical land or soil itself rather than a bundle of legal rights, a concept embracing many factors other than the physical land. See 41 Yale Law Journal 221; 50 Yale Law Journal 668; 52 Harv. LawRev. 1176; 25 Va.LawRev. 854. The result has been such cases as Bedford v. United States, 192 U.S. 217, 24 S.Ct. 238, 48 L.Ed. 414; Franklin v. United States, 6 Cir., 101 F.2d 459; Scranton v. Wheeler, 179 U.S. 141, 21 S.Ct. 48, 45 L.Ed. 126; and Gibson v. United States, 166 U.S. 269, 17 S.Ct. 578, 41 L.Ed. 996. Hence, taking has been said to mean an actual dispossession or ouster from the land itself or title thereto or a removal of it.

It may be true that ordinarily the state is the owner of tide lands along the seashore. 26 Cal.Jur. 315 et seq. The *littoral* rights of a person owning property on navigable waters are subject to the superior control of the state over navigation. Those rights embrace the right of access which may be taken under the power over navigation without the payment of compensation. Koyer v. Miner, 172 Cal. 448, 156 P. 1023; Henry Dalton & Sons Co. v. Oakland, 168 Cal. 463, 143 P. 721; Patton v. City of Los Angeles, 169 Cal. 521, 147 P. 141; Muchenberger v. City of Santa Monica, 206 Cal. 635, 275 P. 803; Boone v. Kingsbury, 206 Cal. 148, 273 P. 797; City of Oakland v. Buteau, 219 Cal. 745, 29 P.2d 177; City of Newport Beach v. Fager, 39 Cal.App.2d 23, 102 P.2d 438; 26 Cal.Jur. 301. It may be that the abutting owner has no vested right in *future* accretions, that is, possible future additions to his land, as against the state. Cohen v. United States, C.C., 162 F. 364; Western Pac. R. Co. v. Southern Pac. Co., 9 Cir., 151 F. 376, 80 C.C.A. 606. But certainly he has a vested right in past accretions, they having then become his upland, which may not be taken without the payment of compensation. See Strand Improvement Co. v. Long Beach, 173 Cal. 765, 161 P. 975; City of Los Angeles v. Anderson, 206 Cal. 662, 275 P. 789; Dana v. Jackson Street Wharf Co., 31 Cal. 118, 89 Am.Dec. 164.

Most of the cases refusing compensation were instances in which the public agency was exercising its right to the *bed* of the tide lands or was interfering solely with *littoral* rights which as we have seen, may be subject to the power of navigation. In

Gibson v. United States, supra, the improvement of a navigable stream consisted of a dike which resulted in the landowner losing *access and landing* privileges, an element of his *littoral* right. In Scranton v. Wheeler, supra, the improvement consisted of a pier built on the submerged lands, and the interference was with landowner's right of access. Lewis Blue Point Oyster Cultivation Co. v. Briggs, 229 U.S. 82, 33 S.Ct. 679, 57 L.Ed. 1083, involved the deepening of a channel lying under navigable waters, while the owner was merely using the bed of the channel to propagate oysters pursuant to a state license. In none of those cases was there involved the littoral owner's rights in the upland. Similar comment is applicable to the cases of United States v. Chandler-Dunbar W. P. Co., 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1063; Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251, 35 S.Ct. 551, 59 L.Ed. 939; Henry Dalton & Sons Co. v. Oakland, supra; People v. California Fish Co., 166 Cal. 576, 138 P. 79; People v. Banning Co., 167 Cal. 643, 140 P. 587; Oakland v. E. K. Wood Lumber Co., 211 Cal. 16, 292 P. 1076, 80 A.L.R. 379; Boone v. Kingsbury, supra; City of Newport Beach v. Fager, supra; City of Oakland v. Buteau, supra; People v. Southern Pac. R. Co., 169 Cal. 537, 147 P. 274; and Patton v. City of Los Angeles, supra; and County Sanitation Dist. No. 2 v. Averill, 8 Cal.App.2d 556, 47 P.2d 786.

The cases of Green v. Swift, 47 Cal. 536; Lamb v. Reclamation Dist. No. 108, 73 Cal. 125, 14 P. 625, 2 Am.St.Rep. 775; Green v. State, 73 Cal. 29, 11 P. 602, 14 P. 610, and Gray v. Reclamation District No. 1500, 174 Cal. 622, 163 P. 1024, are relied upon by defendant in support of its contention that any damage suffered by plaintiff as the result of the construction of the breakwater is damnum absque injuria. These cases are clearly distinguishable from the case at bar. They were all actions for damages brought against the state or a state agency to recover damages alleged to have been suffered to real property as the result of the construction or maintenance of a public improvement designed to prevent future damage to large areas of the state as the result of seasonal flooding. In each of these cases this court stated that it could not be said that any of plaintiff's property had been taken in the construction or maintenance of the public improvement, but that the damages claimed by plaintiff were indirect and consequential and in the Gray case that they were prospective and temporary. All of these cases except the Gray case arose prior to the amendment to section 14 of article I of the Constitution of California permitting recovery for the damaging as distinguished from the taking of private property for public use. In the case of Green v. State, supra, the court said at page 35 of 73 Cal., at page 613 of 14 P.: "The damage is plainly not the natural consequence of the work which could and ought to have been anticipated and expected as the result. It was remote and consequential,—a purely incidental and unexpected effect. There was not enforced occupation of the property or interference with it. The owner was left in full possession, and there was done to the land or left upon it nothing to obstruct its use."

The discussion in Cory v. City of Stockton, 90 Cal.App. 634, 266 P. 552, is dictum, and when the same issue was previously before the Supreme Court of the United States in Sanguinetti v. United States, 264 U.S. 146, 44 S.Ct. 264, 68 L.Ed. 608, that court merely determined that the damage was only temporary and no permanent injury was inflicted.

Police power generally, that is, other than in the sense of the power over navigation, may not be invoked to escape the payment of compensation. It was said by this court in Rose v. State of California, 19 Cal.2d 713, 730, 123 P.2d 505, 515: "Generally, it may be said that police power operates in the field of regulation, except possibly in some cases of emergency such as conflagration or flood when private property may be temporarily used or damaged or even destroyed to prevent loss of life or to protect the remaining property of an entire locality. There is obviously no element of regulation involved in the case at bar, and no suggestion of anything in the nature of an emergency. The damage to plaintiffs' property here involved was the result of a public improvement constructed by the state in the exercise of its power of eminent domain." See, also, City of Los Angeles v. Aitken, 10 Cal.App.2d 460, 471, 52 P.2d 585; Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 701, 22 P.2d 5. In the case of O'Hara v. Los Angeles County Flood etc. District, 19 Cal.2d 61, 119 P.2d 23, a public emergency resulting in the flooding of great areas of land was involved. There is no such degree of public necessity in the instant case.

It follows that the complaint in the instant case states a cause of action. The beach was owned by plaintiff and was a part of its upland. That upland was washed away and inundated. It is clear that there was an actual taking of plaintiff's property in even the more narrow sense. It is so alleged in the complaint. Plaintiff's beach, the actual soil itself is lost. The point of mean high tide is thus raised and the land that was formerly a privately owned beach becomes tide lands and is owned by the state. The title to a portion of plaintiff's property is thus lost as the result of the construction and maintenance of a public improvement, namely, the breakwater.

Turning to the opinion of Mr. Justice Traynor, there appears the statement: "Inevitably the washing away of sand in tide lands must advance the high-water mark if the owner of the uplands takes no steps to prevent that consequence. Plaintiff's insistence that the high-water mark preceding the erection of the breakwater must be maintained is in effect a claim that the state has no right to check the flow of sand and must maintain the tideland sand as a buffer for the upland sand. Such a claim could not be recognized without creating a servitude in the tide lands inconsistent with the state's title and its right to erect improvements in the interest of navigation." First, that assertion is contrary to the complaint, which expressly alleges that the breakwater caused plaintiff's *upland* to be *washed away* and *inundated.* Second, even if it be assumed that the change in the current caused the loss of a compensating sand deposit and hence the flooding of the upland, it is a technicality without substance to argue that the plaintiff's upland has not been taken. No servitude would be imposed upon the state's title to the tidelands. To allow recovery would be nothing more than protecting plaintiff's upland from being washed away. It is not a case of plaintiff claiming a right to have the *area* of its land *increased* by the action of water, but rather that its land shall not be decreased by the change caused by the breakwater. The essential point is that the breakwater causes the loss of formerly existing upland. The opinion is based primarily on the proposition that littoral rights must give way to either state or federal exercise of control over navigation; that the owner has no right to compensation for the loss of the sand deposited on his upland, and that there was no invasion of his property right. This ignores the *washing away* of the sand already there as the result of a change in the ocean currents caused by the breakwater.

None of the authorities relied upon supports the proposition that the state or other public agency is immune from liability for damages under the eminent domain provisions of the Constitution caused by structures erected in the course of the improvement or regulation of navigation. Lewis Blue Point Oyster C. Co. v. Briggs, 229 U. S. 82, 33 S.Ct. 679, 681, 57 L.Ed. 1083, involved the deepening of the *channel* lying under navigable waters, while the property owner was merely using it to cultivate oysters with the state's consent. It was not a question of invading or damaging property other than tidelands. The court was concerned solely with lands submerged by navigable waters. The court there quoted with approval the following excerpt from Scranton v. Wheeler, 179 U.S. 141, 21 S.Ct. 48, 45 L.Ed. 126 (also cited in Justice Traynor's opinion) recognizing the distinction between upland and submerged tidelands: "'Whatever the nature of the interest of a riparian owner in the *submerged* lands in front of his upland bordering on a public navigable water, his title is not as full and complete as his title to *fast land which has no* direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, *as is his upland,* but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.'" The same comment is applicable to the following cases: United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53, 33 S.Ct. 667, 57 L.Ed. 1063; Greenleaf-Johnson Lumber Co. v. Garrison, 237 U.S. 251, 35 S.Ct. 551, 59 L.Ed. 939; Gibson v. United States, 166 U.S. 269, 17 S.Ct. 578, 41 L.Ed. 996; Henry Dalton & Sons Co. v. Oakland, 168 Cal. 463, 143 P. 721; People v. California Fish Co., 166 Cal. 576, 138 P. 79; People v. Banning Co., 167 Cal. 643, 140 P. 587; Oakland v. E. K. Wood Lumber Co., 211 Cal. 16, 292 P. 1076, 80 A.L.R. 379; Boone v. Kingsbury, 206 Cal. 148, 273 P. 797; City of Newport Beach v. Fager, 39 Cal.App.2d 23, 102 P.2d 438; City of Oakland v. Buteau, 219 Cal. 745, 29 P. 177; People v. Southern Pac. R. R. Co., 166 Cal. 627, 138

P. 103, and Patton v. City of Los Angeles, 169 Cal. 521, 147 P. 141.

It is reasoned that because the public agency may in the interests of navigation deprive an owner of land on navigable waters of access thereto, it may erect structures which prevent accretions. Assuming that to be true, there still is the question of diverting the currents of the ocean in such a fashion *as to wash away plaintiff's land.* The right to have his land free from the diversion of currents with the result of the washing away of his land is not a part of his littoral rights nor dependent thereon. All the cases cited in the opinion involve an interference with the owner's littoral rights. *Not one of them,* except as hereinafter mentioned, involves the washing away or flooding of the upland land as a result of the diversion or obstruction of the current of a navigable stream. The exceptions above mentioned are Bedford v. United States, 192 U.S. 217, 24 S.Ct. 238, 48 L.Ed. 414, and Gibson v. United States, supra. Those cases were based upon the proposition that there could be no compensation where there was merely a *damaging* as distinguished from a *taking,* that is, a *consequential damage.* See United States v. Cress, 243 U.S. 316, 329, 37 S.Ct. 380, 61 L.Ed. 746. This same thought is stated in Justice Traynor's opinion, where it is said: "The damage to the land resulted neither from direct invasion nor subjection to public use but as an incidental consequence of the construction of a breakwater." That is not the law in California, and our state Constitution provides that compensation must be paid where there is a *damaging* or taking. Cal.Const. art. I, § 14. It is said in 10 Cal.Jur. 335: "Under the present constitution by which compensation is recoverable where property is 'damaged,' the owner is entitled to compensation even though there has been no actual taking and the only injury suffered is indirect and consequential and for which damage he had no right of recovery at the common law."

It is said in Goodman v. United States, supra, at page 917 of 113 F.2d: "* * * and the government's right to improve such rivers in aid of navigation is paramount to the rights of riparian owners in the beds of all navigable streams. Pike Rapids Power Co. v. Minneapolis, St. P. & S. S. M. R. Co., 8 Cir., 99 F.2d 902, 909. But the government may not for the purpose of aiding navigation permanently convert to the public use, by means of dams and other structures, the land of the riparian owner above the mean high-water line without just compensation. Pumpelly v. Green Bay Co., 13 Wall. 166, 20 L.Ed. 557; United States v. Lynah, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539; United States v. Cress, 243 U.S. 316, 37 S.Ct. 380, 61 L.Ed. 746; Willink v. United States, 240 U.S. 572, 580, 36 S.Ct. 422, 60 L.Ed. 808; Union Bridge Co. v. United States, 204 U.S. 364, 390, 27 S.Ct. 367, 51 L.Ed. 523; Shively v. Bowlby, 152 U.S. 1, 14 S.Ct. 548, 38 L.Ed. 331."

It is said in United States v. Cress, supra, at page 319 of 243 U.S., at page 381 of 37 S.Ct., 61 L.Ed. 746: "The states have authority to establish for themselves such rules of property as they may deem expedient with respect to the streams of water within their borders, both navigable and non-navigable, and the ownership of the lands forming their beds and banks * * *, subject however, in the case of navigable streams, to the paramount authority of Congress to control the navigation so far as may be necessary for the regulation of commerce among the states and with foreign nations * * *; the exercise of this authority *being subject,* in its turn, to the inhibition of the 5th Amendment against the taking of private property for public use without just compensation. * * *"

It is said in Nichols on Eminent Domain, vol. 1, § 138, at page 417: "Even the public right to improve navigation, which is paramount to all private rights in the waters or bed of a navigable watercourse, cannot be exercised in such a way as to 'take' land above high water mark without payment of compensation. In improving navigable streams the public authorities cannot trespass upon the lands of riparian proprietors, cut timber or *dig away the banks.* It is of course well settled that, apart from the peculiar doctrine already noted in respect to the mill acts, the construction of a dam raising the waters of a stream to such an extent as to permanently flood riparian land naturally dry is a 'taking' in the constitutional sense, and no exception to this rule is made when the level of the stream is raised for the purpose of making navigation more safe and convenient. In such case the owners of riparian land that is thereby flooded are constitutionally entitled to compensation. The owner of the upland bordering upon a watercourse has however no greater protection from injury resulting from the construction of public improvements than the owner of any other land, and he is not entitled to compensation if his land is merely damaged as the result of the improvement of the watercourse, if it is not taken in the constitutional sense. Thus the erection of a dam for the purpose of improving navigation, which increases the liability of riparian land to overflow in time of freshets but does not keep it permanently submerged, gives the owner of such land no right to compensation. When the natural *consequence of the erection of structures upon one bank of the stream, or in its bed, will be to deflect the current* upon the other bank and to gradually wash it away, it is held by the federal and by some of the state courts that such injury is not a taking, since the owner might protect his land by piles or a sea-wall. In other states however it has been held that such injury constitutes a taking, and *at all events, when the constitution provides that property cannot be damaged without compensation, such an injury is within the protection of the constitution.*" (Emphasis added.)

In its answer to plaintiff's complaint defendant pleaded as its fourth separate defense that plaintiff's cause of action is barred by its failure to file a claim with defendant within ninety days after the occurrence of the damage as required by California Statutes of 1931, page 2475, Deering's General Laws, Act No. 5149, and as a fifth separate defense it pleaded an ordinance of the city of Santa Barbara providing that in actions for damages against the city a claim must be filed within six months unless a shorter period of time is otherwise provided by law.

Pursuant to stipulation between the parties the issues raised by these defenses were tried by the trial court and a judgment rendered in favor of defendant based upon the fourth defense above mentioned. No other issues were tried. The judgment further determined "that plaintiff's complaint does not state facts sufficient to constitute a cause of action, * * * that plaintiff is not entitled to any relief herein," and "that plaintiff take nothing by this action and that the same be dismissed."

From what I have said in the foregoing opinion, it is obvious that the complaint states a cause of action in inverse condemnation for compensation for the portion of its property taken as the result of the construction of the improvement, and also for severance damages to the property not taken.

The material part of the above-mentioned claim statute relied upon by defendant reads: "Whenever it is claimed that any person has been injured or any property damaged as a result of the *dangerous or defective condition* of any public street, highway, building, park, grounds, works or property, a verified claim for damages shall be presented in writing and filed with the clerk or secretary of the legislative body of the municipality, county, city and county, or school district, as the case may be, within ninety days after such accident has occurred. Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." (Emphasis added.) The claim statute involved in Powers Farms, Inc. v. Consolidated Irr. Dist., 19 Cal.2d 123, 119 P.2d 717, was phrased practically the same as the one here invoked. It was there held that a claim need not be filed where there is a taking of the property under the eminent domain provision of the Constitution. It has been shown that there was a taking in the instant case. Furthermore, it was held in the Powers case that there must be a dangerous or defective condition in the improvement before the statute applies. The statute here involved also refers only to damage to property as a result of a dangerous or defective condition. In the instant case there is no allegation that the breakwater was in any manner dangerous or defective, and it does not appear to have been in such condition. In the Powers case the seepage from a canal was caused by the dangerous and defective condition of the canal. See, also, Davis v. East Contra Costa Irr. Dist., 19 Cal.2d 140, 119 P.2d 727. The reason given in the Powers case for applying the claim statute where there was a damaging, but not where there was a taking, is that in the latter case the agency constructing the improvement *knew* it was *taking* the property and therefore required no notice. In the instant case it is alleged that defendant knew that the breakwater would result in the taking of plaintiff's beach.

It is conceded by respondent that the 1931 claim statute pleaded as its fourth defense, and not the ordinance pleaded as its fifth defense, must be relied upon in support of the judgment. From what I have said in the foregoing opinion, said statute is not applicable to the case at bar, and the ordinance, which is no broader than the statute, is likewise not applicable.

I am unable to follow the argument of Mr. Justice SHENK in his concurring opinion in this case. He concedes that the claim statute upon which defendant relies applies only to a damage resulting from a dangerous and defective condition of public property. He does not say that the breakwater in question is dangerous or defective; in fact, he cannot fairly say so, because there is no allegation or finding to that effect. Such being the case there is no basis whatever for his conclusion that the claim statute is applicable and that plaintiff's action is barred for its failure to file a claim.

Mr. Justice SHENK states: "The general liability having thus been provided for may not be relegated to the field of tort liability alone by the addition in the statute of the words 'after such accident has occurred.' The quoted words refer to the time when the claim must be filed, and do not limit established general liability. The foregoing cited cases likewise establish that damage is caused by the dangerous or defective condition of public works, within the meaning of the statute, if the condition of the public works is dangerous to the plaintiff's property *without reference to negligence.*" (Emphasis added.) That conclusion is clearly erroneous. The claim statute is clearly related to and contemplates *only* those liabilities created by the 1923 Public Liability Act (Stats. 1923, p. 675, Deering's Gen.Laws, 1937, Act 5619) or for liability arising out of a proprietary function. Helbach v. City of Long Beach, 50 Cal.App.2d 242, 244, 123 P.2d 62. The wording of the two acts is identical. In the 1923 act liability is imposed for "injuries to persons and property resulting from the dangerous or *defective* condition" of public works. It was said in Johnson v. City of Glendale, 12 Cal.App.2d 389, 393, 55 P.2d 580, 581: "The act of 1931, in so far as it requires the presentation of claims within ninety days after the happening of an accident, *merely prescribes rules of procedure for the enforcement of claims arising under the 1923 act; no such rules having been prescribed by that act.*" (Emphasis added.) The liability under the 1923 act does not exist unless the agency has *notice* of the dangerous or defective condition. The liability is imposed *solely for negligence.* If the 1931 claim act applies to inverse condemnation cases where *no notice* is necessary but still calls those conditions dangerous or defective, then there is liability for a dangerous or defective condition regardless of whether the agency has notice. The gravaman of the liability referred to in the claim statute is *negligence.* See 9 Cal.Jur. Ten-year Supp., Public Officers, §§ 178-189.

The judgment should be reversed.

CURTIS and SCHAUER, JJ., concur.

Rehearing denied; CURTIS, CARTER, and SCHAUER, JJ., dissenting.

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23 Cal.2d 193

NATURAL SODA PRODUCTS CO. v. CITY OF LOS ANGELES et al. (two cases).

L. A. 18066.

Supreme Court of California.

Nov. 4, 1943.

Rehearing Denied Dec. 2, 1943.

1. Waters and water courses 🔑84

Generally, one who makes substantial expenditures in reliance on long-continued diversion of water by another has right to have diversion continued if his investment would otherwise be destroyed.

2. Waters and water courses 🔑167(1)

Where owner maintains dam but alters flow to increase his profit at expense of those below him, or merely to be arbitrary, it is reasonable to require that alterations shall not injure those who have relied on customary operation of dam in the past.

3. Waters and water courses 🔑195

Evidence that city of Los Angeles had diverted water of river from lake for many years by dam and digging of wells and drainage ditches, and that diversion appeared to be permanent, authorized plaintiff, which had acquired properties for purpose of extracting chemicals from subsurface of lake, and which had constructed plants to carry on operations in reliance upon the diversion, to recover damages ty for permitting river water to flow into [illegible]

4. Waters and water courses 🔑144

The constitutional and statutory provisions designed to insure a reasonable division of limited water supply do not require a particular disposition of surplus water, least of all a disposition harmful to recipient. Civ.Code, § 1411; Const. art. 14, § 3.

5. Waters and water courses 🔑144

The constitutional mandate forbidding waste or unreasonable use or unreasonable method of use of water forbids a disposition of surplus water that would entail not only waste of water but damage to valuable natural resources. Civ.Code, § 1411; Const. art. 14, § 3.

6. Waters and water courses 🔑195

City of Los Angeles, which had diverted flow of river from lake for so many years that diversion appeared permanent, could not justify its act in permitting water to again flow into lake to damage of a company which in reliance upon city's diversion had acquired properties for purpose of extracting chemicals from subsurface of lake on ground that as a riparian owner city had right to full flow of river past its lands below dam, where city made no claim that it had any beneficial use for the water. Const. art. 14, § 3.

7. Damages 🔑40(1)

The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what probable earnings would have been had there been no tort.

8. Damages 🔑40(1)

If there has been operating experience sufficient to permit a reasonable estimate of probable income and expenses, damages for loss of prospective profits are awarded.

9. Damages 🔑40(1)

Where defendant's tort made it impossible for plaintiff to realize any profits, defendant could not complain if probable profits were of necessity estimated.

10. Damages 🔑40(3)

Fact that in years immediately preceding defendant's tort, damaging plaintiff's plant for extracting chemicals from subsurface of lake, plaintiff did not make a profit from its business, did not preclude inclusion of prospective profits as an element of damage, where plaintiff had been engaged during years immediately preceding the tort in converting its plant and had maintained its sales position by selling soda products purchased elsewhere, and it could be concluded that profits were probable upon completion of alterations and sale of products from its own plant.

11. Trespass 🔑50

The determining of damages on basis of opinion evidence concerning value of plaintiff's properties before and after tort is usual method for determining damages for trespass to realty, but it yields to others if they are more appropriate.

12. Damages 🔑109

In the case of a reparable injury, a frequent measure of damages is the cost of making repairs plus value of the use of the premises for period during which tort has deprived owner of the property.

13. Evidence 🔑18, 20(1)

It is common knowledge that plants for extracting chemicals from subsurface of lake do not frequently change hands, and that in a sale the price is likely to be based on considerations peculiar to the plant.

14. Damages 🔑109

In determining damages to plaintiff which had constructed plant for purpose of extracting chemicals from subsurface of lake in reliance on diversion of flow of river from lake by city of Los Angeles, for permitting river water to again flow into lake, use of an estimate of loss of prospective profits directly as the measure of damages was proper, as against the contention that damages should have been determined on basis of opinion evidence concerning value of plaintiff's properties before and after the tort.

15. Municipal corporations 🔑741(1)

The provision in charter of city of Los Angeles requiring that a claim against city for civil wrong committed by city's officers or employees be presented to municipal authority empowered to provide for its payment is satisfied by presentation to a subordinate who represents the authority for receipt of such claims from the public.

16. Municipal corporations 🔑741(1)

Under provision of charter of city of Los Angeles requiring that a claim against city for civil wrong committed by city's officers or employees be presented to municipal authority empowered to provide for its payment, a claim may be presented by registered mail.

17. Waters and water courses 🔑195

Where plaintiff mailed to department of water and power its claim against city of Los Angeles for permitting water of river which had been diverted by city for considerable length of time to again flow into lake thereby damaging plaintiff's plants for extraction of chemicals from subsurface of the lake, and thereafter the claim passed through hands of several other municipal authorities before it was sent to board of water commissioners by deputy city attorney in charge of water matters, plaintiff's claim was properly filed with appropriate officer.

18. Municipal corporations 🔑741(1)

The principal purpose of provision in charter of city of Los Angeles requiring that a claim against city for civil wrong committed by city's officers or employees be presented to municipal authority empowered to provide for its payment within six months after occurrence from which the damage arose is to provide city with full information concerning rights asserted against it, so that it may settle those of merit without litigation.

19. Municipal corporations 🔑741(1)

The "occurrence from which the damage arose", as used in provision of charter of city of Los Angeles requiring that a claim against city for civil wrong committed by city's officers or employees be presented to municipal authority empowered to provide for its payment within six months after occurrence from which the damages arose, is regarded as the entire sequence of events giving rise to the injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Occurrence from Which the Damage Arose".

20. Eminent domain 🔑166

A municipality can prescribe reasonable procedures for enforcement of right to compensation for damaging of property for public use, but cannot enact legislation that would operate to prevent or unduly hamper enforcement of such right. Const. art. 1, § 14.

21. Waters and water courses 🔑195

Plaintiff's claim against city of Los Angeles for permitting water of river which it had diverted for considerable length of time to again flow into lake thereby damaging plaintiff's plant for extraction of chemicals from subsurface of lake was filed within six months after the "occurrence from which the damage arose", as required by city charter, where it appeared that city opened gates in its dam intermittently beginning on February 6 until the last day of June, that water reached its peak in May and did not entirely disappear until some time in September, and that plaintiff's claim was filed on December 30.

22. Waters and water courses 🔑195

The statute requiring filing of claim with officer and city within 90 days for injuries or damages resulting from dangerous or defective condition of any public property was inapplicable to plaintiff's claim against city for permitting water of river which it had diverted for considerable length of time to again flow into lake thereby damaging plaintiff's plant for extraction of chemicals from subsurface of lake. Gen. Laws 1931, Act 5149, § 1.

23. Waters and water courses 🔑195

The statutes relating to acquisition of title by adverse possession were not applicable to plaintiff's action against city for permitting water of river which it had diverted for considerable length of time to again flow into lake thereby damaging plaintiff's plant for extraction of chemicals from subsurface of lake, where defendant city submitted no evidence that it had acquired a title by adverse possession. Code Civ.Proc. §§ 315, 316.

24. Waters and water courses 🔑195

Code Civ.Proc. § 320 was not applicable to action against city of Los Angeles for permitting water of river which it had diverted for considerable length of time to again flow into lake thereby damaging plaintiff's plant for extraction of chemicals from subsurface of lake. Code Civ.Proc. § 320.

25. Limitation of actions 🔑55(7)

Action against city of Los Angeles for permitting water of river which it had diverted for considerable length of time to again flow into lake thereby damaging plaintiff's plants for extraction of chemicals from subsurface of lake was not barred by limitations. Code Civ.Proc. §§ 338(2), 339(1), 343.

SHENK, J., dissenting.

In Bank.

Appeals from Superior Court, of Inyo County; Wm. D. Dehy, Judge.

Consolidated actions by Natural Soda Products Company against City of Los Angeles and others for injunction against, and for damages caused by, flooding of a lake by waters of a river. From a judgment for plaintiff for damages, the defendants appeal.

Affirmed.

Prior opinion, 132 P.2d 553.

Ray L. Chesebro, City Atty., S. B. Robinson, Chief Asst. City Atty., and Samuel Poorman, Jr., and Rex B. Goodcell, Jr., Deputy City Attys., all of Los Angeles, and A. E. Chandler, of San Francisco, for appellants.

Kenneth Ferguson, of San Francisco, and Jess G. Sutliff, of Independence, for respondent.

Robert W. Kenny, Atty. Gen., Everett W. Mattoon, Asst. Atty. Gen., and Gilbert F. Nelson and Burdette J. Daniels, Deputy Attys. Gen., amici curiae on behalf of appellants.

TRAYNOR, Justice.

In 1913, the defendant city of Los Angeles completed its aqueduct to the Owens River Valley and, from 1919 to 1937, diverted into it virtually all the flow of the Owens River, which formerly emptied into Owens Lake, a body of salt water without outlet. As a result the lake dried up and its subsurface became a crystalline cake impregnated with brines containing valuable chemicals. On the shores of the dry lake plaintiff had two plants to which brines pumped from wells on the bed of the lake were piped for the production of soda products. Plaintiff acquired the older of the two plants in 1932, when it leased mineral rights in the lake from the State of California. Plaintiff subsequently extended its pipe lines several miles farther along the bed of the lake, drilled wells, and installed pumps and brine heaters, acquiring the necessary leases and rights of way from the state. The brines thus made available were of higher alkalinity and therefore of greater value than those previously obtained. To improve its efficiency in extracting chemicals from the brines so as to increase production, plaintiff built a new plant and adopted a new process.

Plaintiff's operations were possible because of the dehydrated state of the lake bed, the continuation of which depended on the absence of any substantial flow of water from Owens River into the lake. The extent of the flow was determined by the manner in which defendant operated its aqueduct. Its dam across Owens Valley, forming Tinnemaha Reservoir, served to regulate the flow of the river. Below the dam, the water, which flowed through its natural channel until it reached Intake, could be directed into the aqueduct proper by means of defendant's diversion dam, or into Owens Lake if the gates in the dam were opened.

On February 6, 1937, before plaintiff's new plant could be put into operation, defendant opened the gates at Intake thereby causing a large amount of water to flow into the lake. Defendant continued to direct the water into the lake intermittently until July 1, 1937, and the surface of the lake became flooded to a depth of three or four feet. The water inundated much of plaintiff's plant, causing substantial physical damage and reducing the alkalinity, and therefore the value, of the subsurface brines by keeping them at a low temperature. As its properties were wholly inaccessible until July, 1937, and partly so until September, 1937, plaintiff was unable to resume operations until October, 1937. Defendant released altogether approximately 50,000 acre feet of water into the lake. There was evidence that it could have stored some of this water in Tinnemaha Reservoir for later release down the Santa Clara River or onto the Mojave Desert, and could have spread the remainder in the Owens River Valley.

On December 17, 1937, plaintiff brought suit for an injunction. On December 30, 1937, plaintiff's claim for damages was received by the mailing clerk of the water department, and upon its rejection plaintiff filed its action for damages. These actions were consolidated for trial. The injunction was denied, and judgment was entered awarding plaintiff $153,578.85. From this judgment defendant appeals.

[1] It is generally recognized that one who makes substantial expenditures in reliance on long-continued diversion of water by another has the right to have the diversion continued if his investment would otherwise be destroyed. Chowchilla Farms, Inc., v. Martin, 219 Cal. 1, 25 P.2d 435; Matheson v. Ward, 24 Wash. 407, 64 P. 520, 85 Am.St.Rep. 955; Pere Marquette Ry. Co. v. Siegle, 260 Mich. 89, 244 N.W. 239;

Mathewson v. Hoffman, 77 Mich. 420, 43 N.W. 879, 6 L.R.A. 349; Kray v. Muggli, 84 Minn. 90, 86 N.W. 882, 54 L.R.A. 473, 87 Am.St.Rep. 332; Peter v. Caswell, 38 Ohio St. 518; Delaney v. Boston, 2 Har., Del., 489; Shepardson v. Perkins, 58 N.H. 354; Hammond v. Antwerp Light & Power Co., 132 Misc. 786, 230 N.Y.S. 621, 634; Ford v. Whitlock, 27 Vt. 265; Smith v. Youmans, 96 Wis. 103, 70 N.W. 1115, 37 L.R.A. 285, 65 Am.St.Rep. 30. Thus in the Chowchilla Farms case the court held, in recognition of the rights of those with lands riparian to a changed channel, that the flow could not be returned to its former bed. It has also been held that the rights of those who improve land previously submerged would be infringed if the land were submerged again. Matheson v. Ward, supra; see cases collected in 88 A.L.R. 142, et seq.; San Gabriel V. C. Club v. Los Angeles, 182 Cal. 392, 397, 188 P. 554, 9 A.L.R. 1200. A change in the flow of a stream that appears to be permanent usually leads to costly adjustments by those interested, as they come to regard the artificial condition as permanent. It is therefore reasonable that they should receive as much protection as if the condition were natural. See Chowchilla Farms, Inc., v. Martin, supra, and cases there cited.

[2] Some jurisdictions do not afford this protection if the diversion can be continued only by maintaining a structure such as a dam (Drainage Dist. v. City of Everett, 171 Wash. 471, 18 P.2d 53, 88 A.L.R. 123), apparently because it would be an excessive burden for one to maintain a dam that is of no further use to him. When the owner maintains the dam but alters the flow to increase his profit at the expense of those below him, or merely to be arbitrary, it is reasonable to require that the alterations shall not injure those who have relied on the customary operation of the dam in the past. Kray v. Muggli, supra; Smith v. Youmans, supra; Pere Marquette Ry. Co. v. Siegle, supra; Hammond v. Antwerp Light & Power Co., supra; see Marshall Ice Co. v. La Plant, 136 Iowa 621, 633, 111 N.W. 1016, 12 L.R.A.,N.S., 1073; Greisinger v. Klinhardt, 321 Mo. 186, 9 S.W.2d 978; Mitchell Drainage Dist. v. Farmers' Irrigation Dist., 127 Neb. 484, 256 N.W. 15.

[3] In the present case defendant not only diverted the flow of the Owens River for many years, but augmented it by such activities as the digging of wells and drainage ditches, so that the diversion appeared to be permanent. The gates in defendant's dam did not dispel the impression of permanence, for it was evident from the continued dryness of the lake that they were kept closed. Reliance on the permanence of the diversion was therefore natural; moreover, it was highly desirable, for it motivated the development of natural resources of substantial value. The findings, amply supported by the evidence, establish that defendant could easily have found an outlet for the surplus water instead of causing it to flow into the lake. While the flow of water was unusually large for a brief period, it would have been within the capacity of the aqueduct had it been stored temporarily in available space, and gradually released where it could do no harm. Defendant attempted to prove that it released the water with a high boron content to lower the boron content of the water flowing into the aqueduct. There was evidence, however, that the boron content of the water used by defendant had never been high and that it was not substantially lowered by releasing the water. In any event, defendant could have released the boron-bearing water elsewhere. These findings are sufficient to establish liability, and it is therefore unnecessary to consider the additional finding that defendant was negligent in failing to construct sufficient headwater storage.

[4, 5] Defendant contends that since an appropriative right is limited by the needs of the appropriator (Cal.Const., art. XIV, sec. 3; Civ.Code, sec. 1411), it was under an obligation to release the water that it did not need into the Owens river channel at Intake. These constitutional and statutory provisions, designed to insure a reasonable division of a limited water supply, have never been construed as requiring a particular disposition of surplus water, least of all a disposition harmful to the recipient. The constitutional mandate forbidding "the waste or unreasonable use or unreasonable method of use of water," far from requiring, actually forbids a disposition that would entail not only waste of water but damage to valuable natural resources.

[6] Defendant also contends that as a riparian owner it had the right to the full flow of the Owens River past its lands below Intake. Such a right, however, would clearly exceed that allowed by the Constitution, which provides that "the right to

water * * * shall be limited to such water as shall be reasonably required for the beneficial use to be served * * *" (Cal. Const., art. XIV, sec. 3), for defendant makes no claim that it has any beneficial use for the water.

[7-9] In addition to other items, plaintiff was awarded damages for loss of profits, which defendant contends was not proved with certainty. The award of damages for loss of profits depends upon whether there is a satisfactory basis for estimating what the probable earnings would have been had there been no tort. If no such basis exists, as in cases where the establishment of a business is prevented, it may be necessary to deny such recovery. California P. Mfg. Co., Inc., v. Stafford Packing Co., 192 Cal. 479, 485, 221 P. 345, 32 A.L.R. 114; Gibson v. Hercules Mfg. Co., Inc., 80 Cal.App. 689, 252 P. 780. If, however, there has been operating experience sufficient to permit a reasonable estimate of probable income and expense, damages for loss of prospective profits are awarded. Sobelman v. Maier, 203 Cal. 1, 9, 262 P. 1087; Pacific, etc., Co. v. Alaska Packers Ass'n., 138 Cal. 632, 72 P. 161; Landon v. Hill, 136 Cal.App. 560, 29 P.2d 281; Pye v. Eagle Lake Lumber Co., 66 Cal. App. 584, 227 P. 193; Hacker Pipe & S. Co. v. Chapman V. Mfg. Co., 17 Cal.App. 2d 265, 61 P.2d 944. In the present case plaintiff's probable gross receipts could be estimated from its sales in the preceding two years, in view of the evidence that prices were stable. Its unit costs could be estimated on the basis of detailed figures concerning actual expenses, such as labor, depreciation, insurance, taxes, and royalties for the limited operations carried on in 1938. Its plant capacity was conservatively estimated at 90 tons per day, since plaintiff's old plant, using the "carbonating process" had a proved capacity of from 35 to 40 tons a day, and the capacity of the new "Mono Process" plant had been increased from 50 to 100 tons a day. Awards of prospective profits have been sustained on the basis of much less satisfactory evidence. See Pacific, etc., Co. v. Alaska Packers Ass'n, supra; Shoemaker v. Acker, 116 Cal. 239, 48 P. 62; Hacker v. Chapman Mfg. Co., supra; Landon v. Hill, supra; Story Parchment Co. v. Paterson, etc., Co., 282 U.S. 555, 51 S.Ct. 248, 75 L. Ed. 544; Barrett Co. v. Panther Rubber Co., 1 Cir., 24 F.2d 329. Since defendant made it impossible for plaintiff to realize any profits, it cannot complain if the probable profits are of necessity estimated. Sobelman v. Maier, supra, 203 Cal. at page 9, 262 P. 1087; Schumann v. Karrer, 184 Cal. 50, 57, 192 P. 849; Meer v. Cerati, 53 Cal. App. 497, 200 P. 501.

[10] Defendant relies on the fact that in the years immediately preceding the flooding plaintiff did not make a profit. A comparable problem was presented in Buxbaum v. G. H. P. Cigar Co., 188 Wis. 389, 206 N.W. 59, where the defendant broke a contract giving the plaintiff a right to sell cigars of the defendant's manufacture. Although no profit had previously been recovered from the sale of the cigars, the plaintiff was able to show that its expenses in the year the contract was broken were low enough to have permitted a gain from sales in that year, and recovery of prospective profits was allowed. In the present case plaintiff was engaged during the two years immediately preceding the tort in converting its plant, and it maintained its sales position by selling the soda products purchased elsewhere. The court might well have concluded that profits were probable, since the completion of alterations enabled plaintiff to sell products from its own plant.

[11-14] Defendant contends that plaintiff's damages should be determined on the basis of opinion evidence concerning the value of plaintiff's properties before and after the tort. While this method is the usual one for determining damages for trespass to real property, it yields to others if they are more appropriate to a particular situation. See McCormick, Damages, p. 482, et seq.; 15 Am.Jur. 514. In the case of a reparable injury, a frequent measure of damages is the cost of making repairs plus the value of the use of the premises for the period during which the tort has deprived the owner of the property. Linforth v. San Francisco Gas & Electric Co., 156 Cal. 58, 103 P. 320, 19 Ann.Cas. 1230; Green v. General Petroleum Corp., 205 Cal. 328, 270 P. 952, 60 A.L.R. 475; Higgins v. Los Angeles Gas & Electric Co., 159 Cal. 651, 662, 115 P. 313, 34 L.R.A.,N.S., 717; Kell v. Jansen, 53 Cal.App.2d 498, 127 P.2d 1033. Similarly, in the present case damages were given for the physical destruction resulting from the tort, and the value of the use of plaintiff's properties was properly estimated on the basis of the probable profits that would have been derived from their operation. Moreover, plaintiff's properties are a complex aggregation of real and personal property, of pumps, plant, pipe lines, and mineral rights. It is common knowledge that such plants do not frequently change hands, and that in a sale the price is likely to be based on considerations peculiar to the plant. Expert opinion as to the market value of such a plant is likely to be based on nothing more substantial than the probable returns from the operations of the plant. A more accurate assessment of damage can be obtained by estimating loss of profits directly. Inyo Chemical Co. v. City of Los Angeles, 5 Cal.2d 525, 55 P.2d 850; Teller v. Bay & River Dredging Co., 151 Cal. 209, 90 P. 942, 12 L.R.A.,N.S., 267, 12 Ann.Cas. 779; Sacchi v. Bayside Lumber Co., 13 Cal.App. 72, 73, 84, 108 P. 885; see Weill, "Value of the Use" in Non-Renting Localities, 13 Cal.L.Rev. 373.

[15-17] Defendant invokes section 363 of the Charter of Los Angeles, providing that "Every claim and demand against the city shall be first presented to and approved in writing by the board, officer or employee authorized by this charter to incur the expenditure or liability represented thereby," and section 376, providing that "No suit shall be brought on any claim for money or damages against the City of Los Angeles, or any officer or board of the city, until a demand for the same has been presented, as herein provided, and rejected in whole or in part. * * * Except in those cases where a shorter period is otherwise provided by law, all claims for damages against the city must be presented within six (6) months after the occurrence from which the damages arose. * * *" Plaintiff presented his claim by mailing a copy of it to the Department of Water and Power. Upon receiving it the mailing clerk of the department gave it to the chief clerk of the legal division, who forwarded it to the deputy city attorney in charge of water matters, and the latter sent it to the board of water commissioners, advising its rejection.

It is settled that the board of water commissioners is "the board * * * authorized by this charter to incur the expenditure" here involved. Douglass v. City of Los Angeles, 5 Cal.2d 123, 134, 53 P.2d 353, 356; Continental Ins. Co. v. City of Los Angeles, 92 Cal.App. 585, 268 P. 920; see Huey v. City of Los Angeles, 137 Cal.App. 48, 29 P.2d 918. It is likewise settled that the requirement that a claim be presented to such a board is satisfied by presentation to a subordinate who represents the board for the receipt of such claims from the public. Douglass v. City of Los Angeles, supra; McCandless v. City of Los Angeles, 10 Cal.App.2d 407, 52 P.2d 545; Sandstoe v. Atchison T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216. It is the function of the board to supervise the water department, which operates the waterworks of Los Angeles and controls the water revenue fund (Los Angeles Charter, sec. 71; 220 (1) (7)), and the members of the department are therefore the subordinates of the board and may represent it in receiving claims. McCandless v. City of Los Angeles, supra; see Douglass v. City of Los Angeles, supra, 5 Cal.2d at page 134, 53 P.2d 353. A claim may be presented by registered mail, as in the present case (see Metcalf v. Metropolitan Life Ins. Co., 1 Cal.App.2d 481, 37 P.2d 115, 38 P.2d 401), and the mailing clerk of the water department is the subordinate charged with receiving claims so presented. The fact that the claim passed through many hands before it was actually considered by the board of water commissioners signifies merely that the board wished to be advised of the merits of claims before considering them. Plaintiff's claim was therefore filed with the appropriate officer.

The question remains whether it was filed "within six months after the occurrence from which the damage arose." Beginning on February 6th, defendant opened the gates in its dam intermittently until the last day of June. The water reached its peak in May, and did not entirely disappear until some time in September. The claim was filed on December 30th.

[18, 19] The principal purpose of the requirement that claims be filed is to provide the city with full information concerning rights asserted against it, so that it may settle those of merit without litigation. Western Salt Co. v. City of San Diego, 181 Cal. 696, 699, 186 P. 345; Sanstoe v. Atchison T. & S. F. Ry. Co., 28 Cal.App.2d 215, 223, 82 P.2d 216; see 18 Cal.Jur. 1109. That purpose is best served if the entire sequence of events giving rise to the injury is regarded as the "occurrence from which the damage arose," for damages can be assessed accurately only when the sequence is completed and the total injury taken into account. Thus, in the present case the injuries continued to accumulate but were not entirely apparent so long as

water remained on the lake bed. See Haigh v. City of Los Angeles, 139 Cal.App. 595, 34 P.2d 779.

[20, 21] Defendant contends that the case of Powers Farms v. Consolidated Irrigation District, 19 Cal.2d 123, 119 P.2d 717, requires a different construction of the charter provision. That case, however, involved a different statute, and since no claim had been filed the court was concerned with determining, not the time within which a claim had to be filed, but whether the presentation of any claim was required. To hold that plaintiff was required to present a claim for the entire damage to its property by September 6th, six months after the initial flooding established the inevitability of damages, would require an unreasonable construction of the language of the charter provision, for the last flooding contributed to the injury as well as the first, and it would therefore be inaccurate to say that the first flooding was "the occurrence from which the damage arose." Moreover, the lake was still partially inundated on September 6th, and some of the damage was yet to occur. Since plaintiff's plant was wholly inaccessible until July, and partly so until September, plaintiff would have had only a brief interval in which to ascertain and evaluate the damage and could hardly have prepared a claim by September 6th, in compliance with the charter provision that "No demand can be approved * * * unless it specify each several item, with the date and amount thereof." Los Angeles Charter, sec. 368. Hence, if plaintiff were required to present a claim by that date, the charter would have the effect of denying plaintiff the right to recover for much of the injury to his property. The state Constitution, however, provides for the right to compensation for the damaging of property for the public use (Cal.Const., art. I, sec. 14). A municipality can prescribe reasonable procedures for the enforcement of this right (Crescent Wharf, etc., Co. v. City of Los Angeles, 207 Cal. 430, 278 P. 1028), but cannot enact legislation that would operate to prevent or unduly hamper the enforcement of such a right. Douglass v. City of Los Angeles, 5 Cal.2d 123, 128, 53 P.2d 353; Geimann v. Board of Police Comm'rs, 158 Cal. 748, 112 P. 553; see Rafferty v. City of Marysville, 207 Cal. 657, 665, 280 P. 118; see 5 Cal.Jur. 780; 34 Am.Jur. 32. The same considerations apply to defendant's contention that plaintiff was required to file its claim within six months from the day in May that the water reached its peak. Additional water was released after that day augmenting the injury.

[22] Defendant contends that plaintiff's rights are barred on the ground that it failed to comply with the statute providing that "whenever it is claimed that any person has been injured or any property damaged as a result of the dangerous or defective condition of any public street, highway, building, park, grounds, works or property, a verified claim * * * shall be presented * * * with the clerk * * * of the legislative body of the municipality * * * within ninety days after such accident has occurred." Stats. 1931, p. 2475, Deering's Gen. Laws, Act 5149, § 1. This statute is inapplicable, however, for the damage in the present case arose, not from the dangerous condition of any public property, but from defendant's acts. Ogando v. Carquinez G. School Dist., 24 Cal.App.2d 567, 75 P.2d 641; Jackson v. City of Santa Monica, 13 Cal.App.2d 376, 57 P.2d 226.

[23-25] Defendant invokes as statutes of limitation sections 315, 316, 320, 338(2), 339(1), and 343 of the Code of Civil Procedure. Sections 315 and 316 relate to the acquisition of title by adverse possession, but defendant has submitted no evidence that it has acquired such title. Section 320 relates to certain rights under Mexican Land Grants (see the note by the Code Commissioners in Code Civ.Proc. 1872, sec. 320) and is inapplicable here. Plaintiff's action was brought well within the period prescribed by the other sections.

The judgment is affirmed.

GIBSON, C. J., and CURTIS, CARTER, and SCHAUER, JJ., concurred.

SHENK, Justice.

I dissent. The prevailing opinion holds that the requirement that a claim be presented within six months "after the occurrence from which the damages arose" is met when the claim is presented within six months after the last of a series of occurrences which caused the damage, and, presumably, that recovery may be had for the entire damage including the damage arising from acts occurring more than six months prior to the presentation of the claim. I agree that a claim may properly be presented within six months from the last occurrence giving rise to damage, but

I do not agree with the holding that recovery may be had for damage arising from occurrences which happened prior to the beginning of the six months' period.

The purpose of the requirement for filing claims is not only to provide the municipality with information so that it may settle claims without litigation. Another very important purpose, in a case of continuing damage, such as the present one, is to give the city an opportunity to provide protection against damage by the continued acts complained of, should it deem itself liable. Therefore the rule stated in Powers Farms v. Consolidated Irr. Dist., 19 Cal.2d 123, 129, 119 P.2d 717, 721, that "where the time and extent of injury are uncertain, a statutory period of limitation begins to run when the fact that damage is occurring becomes apparent and discoverable, even though the extent of the damage may still be unknown," has a sound basis in reason and months prior to the presentation of the justice. If, as was apparent in the present case, a continuation of the acts would result in a loss to the plaintiff, either total or partial, both reason and justice required that the municipality be apprised of the first occurrence causing damage at least within the time required by law, rather than that the plaintiff be permitted to remain silent until the damage mounted to a total loss. To hold the plaintiff thus to the requirement is not at all to effect a disregard of the language of the charter provision. On the contrary, it is a compliance with the plain terms thereof. It does not follow that to require compliance would be to deprive the plaintiff of a constitutional right to compensation for damaging private property for public use. It is settled that although the constitutional provision is selfexecuting, the Legislature may properly set up a procedure for the recovery of the damages, and that the filing of a claim within a specified period of limitations is a proper step in such procedure. "Although the Constitution grants the right to compensation, it does not specify the procedure by which the right may be enforced. Such procedure may be set up by statutory or charter provisions, and when so established, a failure to comply with it is deemed to be a waiver of the right to compel the payment of damages." Powers Farms v. Consolidated Irr. Dist., supra, 19 Cal.2d 123, 126, 119 P.2d 717, 720; Davis v. East Contra Costa Irrigation Dist., 19 Cal.2d 140, 119 P.2d 727; Rose v. State of California, 19 Cal.2d 713, 725, 123 P.2d 505; Crescent Wharf & Warehouse Co. v. Los Angeles, 207 Cal. 430, 278 P. 1028; Los Angeles Athletic Club v. Long Beach, 128 Cal.App. 427, 17 P.2d 1061.

Rehearing denied; SHENK and EDMONDS, JJ., dissenting.

23 Cal.2d 146

EMDE et al. v. SAN JOAQUIN COUNTY CENTRAL LABOR COUNCIL et al.

Sac. 5602.

Supreme Court of California.

Nov. 2, 1943.

Rehearing Denied Nov. 29, 1943.

1. Constitutional law 🔑90

The publicizing of facts of a labor dispute in peaceful manner is within "freedom of speech" guaranteed by Fourteenth amendment, but party to controversy has no absolute privilege to discuss such matters so as to avoid civil responsibility for injury to another caused by malicious and false statements made in course of differences between them. Civ.Code, § 47, subd. 3; U.S.C.A.Const. Amend. 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Freedom of Speech".

2. Torts 🔑10

The peaceful inducement of both public generally, and of union members in particular, to boycott an employer who is party to a labor controversy, is a form of economic pressure which labor organizations may properly employ in pursuit of a lawful end.

3. Torts 🔑10

Controversy between dairy and labor union involving dissatisfaction of organized labor with system of distributing milk products which avoids minimum wages and hours, workmen's compensation, and social security benefits was legitimate matter of labor dispute, and union and those connected with the labor cause had right to urge public and members of organized labor to refrain from buying the dairy's products.

4. Libel and slander ⚷48(1)

Where dairy owners, notwithstanding contract with union, decided to change method of operation and negotiated with drivers to distribute milk on different basis, newspaper article containing statement that dairy had nonunion milk wagon drivers and that under new arrangement drivers were put on straight commission plan was fair comment. Civ.Code, § 47, subd. 3.

5. Libel and slander ⚷48(1)

Where dairy owners, notwithstanding contract with union, decided to change method of operation and negotiated with drivers to distribute milk on different basis, newspaper article stating that in instituting the plan the minimum wage guaranties were wiped out, although status of drivers as employees remained unchanged, was a fair comment. Civ. Code, § 47, subd. 3.

6. Libel and slander ⚷19

In determining whether newspaper article charging that dairy owners violated contract with union was libelous, statement in article that status of drivers as employees of dairy remained unchanged was to be considered in light of preceding statement relating the changes as to manner of compensation and ownership of vehicle. Civ. Code, § 47, subd. 3.

7. Libel and slander ⚷48(1)

Where dairy owners, notwithstanding contract with union, decided to change method of operation and negotiated with drivers to distribute milk on different basis, newspaper comment that a peaceful settlement of difficulty had been sought for three months, but that dairy managers had refused to make any concession, was not an abuse of conditional privilege of labor to express views on labor controversy. Civ. Code, § 47, subd. 3.

8. Libel and slander ⚷48(1)

Where dairy owners, notwithstanding contract with union, decided to change method of operation and negotiated with drivers to distribute milk on different basis, newspaper statement that dairy had initiated a destructive labor policy, when viewed in connection with subsequent observation that destruction of minimum wages was a threat to gains made by organized labor, was not abuse of conditional privilege of labor to express views on labor controversy. Civ. Code, § 47, subd. 3.

9. Libel and slander ⚷48(1)

Where labor dispute existed, inclusion of statements in newspaper article urging all friends of labor to discontinue their patronage of dairy and thus help maintain union established, and union protected wage scales and working conditions, was justified by aim of union to insure maintenance of minimum wage for drivers delivering the dairy's milk. Civ. Code, § 47, subd. 3.

10. Libel and slander ⚷86(4)

Where dairy owners, notwithstanding contract with union, decided to change method of operation and negotiated with drivers to distribute milk on different basis, statement in newspaper article that dairy had violated its contract with union was not an abuse of conditional privilege of labor to express views on labor controversy although dairy owners pleaded that publication was intended to convey charge that they were dishonest. Civ. Code, § 47, subd. 3.

11. Libel and slander ⚷86(4)

An innuendo cannot ascribe a meaning to assertedly defamatory matter other or broader than the words themselves naturally bear and it cannot add to, enlarge, or change the sense of the published words.

12. Libel and slander ⚷54

It is immaterial whether publisher believed his statements were true at the time they were published, so long as they in fact were true.

13. Libel and slander ⚷55

It is not necessary to prove the literal truth of an allegedly libelous accusation in every detail, so long as the imputation is substantially true so as to justify the gist or sting of the remark.

14. Libel and slander ⚷48(1)

Where dairy owners, notwithstanding contract with union, decided to change method of operation and negotiated with drivers to distribute milk on different basis, statement in newspaper article that while contract was in force management openly violated its word by hiring nonunion milk wagon drivers was within permissible limitations of fair comment. Civ.Code, § 47, subd. 3.

15. Libel and slander ⚷45(1)

Even if charge of employers' violation of contract with labor union were false insofar as it referred to the hiring of nonunion employees, publication thereof in a newspaper devoted exclusively to interests of organized labor was conditionally privileged. Civ. Code, § 47, subd. 3.

16. Libel and slander ⚿51(1)

Where publication is conditionally privileged, no right of action arises because publication is false, unless publishers were actuated by malice, and malice is not inferred from the publication. Civ. Code, § 47, subd. 3; § 48.

CURTIS and SHENK, JJ., dissenting.

◆

In Bank.

Appeal from Superior Court, San Joaquin County; Warren Steel, Judge.

Action for libel by George W. Emde and others against San Joaquin County Central Labor Council, an unincorporated association, and others. Judgment for plaintiffs and defendants appeal.

Reversed.

Prior opinion, App., 132 P.2d 279.

James F. Galliano, of Oakland, and Clarence E. Todd and Henry C. Todd, both of San Francisco, for appellants.

Mathew Tobriner, of San Francisco, amicus curiae on behalf of appellants.

Rogers & Clark, Webster V. Clark, and R. J. Hecht, all of San Francisco, for respondents.

EDMONDS, Justice.

During a labor dispute between George W. Emde and Lois E. Marshall, the owners of a dairy business, and Teamsters' Local No. 439, the Stockton Labor Journal published an article stating that, because of a violation of their contract with the teamsters' union, the employers had been placed upon the "We Don't Patronize" list. Certain labor organizations and their officers, against whom compensatory and punitive damages were awarded, assert that they had nothing to do with the publication of the article. As additional grounds for reversal of the judgment, they and the owners of the newspaper, who were also found liable, rely upon truth and privilege as defenses, and the questions for decision concern the scope and effect of the announcement sued upon.

At the time of the publication complained of and the commencement of this action, as stated in the respondents' complaint, Emde and Marshall were co-partners, carrying on a dairy business under the name of Happyholme Farms. International Brotherhood of Teamsters, Chauffeurs, Stablemen and Helpers of America, a voluntary unincorporated association, was a labor union affiliated with the American Federation of Labor. Teamsters' Local No. 439, also a voluntary unincorporated association, was a labor union chartered by the international organization. The San Joaquin County Central Labor Council was a voluntary unincorporated association consisting of local trade and labor unions affiliated with the American Federation of Labor, including Teamsters' Local No. 439, and was maintained to influence public opinion in favor of organized labor.

C. C. Allen was secretary-treasurer of the local union. William J. Conboy, as international organizer of the brotherhood, was in the sole and exclusive charge and control of all the affairs and activities of the local. Joseph Bredsteen and W. R. Tosh, doing business under the firm name of Bredsteen and Tosh, were publishers of the Stockton Labor Journal, which was a weekly newspaper, devoted to the interests of organized labor, and the duly authorized organ of the labor council for publishing its pronouncements and communicating its activities to the public and to all union members and sympathizers in San Joaquin County.

According to the complaint, these labor organizations and individuals "printed and published in said Stockton Labor Journal" an article reading as follows:

"Happyholme Dairy Violates
Contract with Teamsters

"Unionists Urged not to
Patronize by Local Council

"Action Comes After Three Months' Negotiations Fail to Bring Peaceful Settlement from Operators.

"Because it had violated its signed agreement with Teamsters Local 439, hiring nonunion drivers and initiated a destructive labor policy, the Happyholme Dairy, located on the Sacramento Road at Lodi and serving the entire Stockton area, was placed on the official 'We Don't Patronize' list of the San Joaquin County Central Labor Council Monday night.

"All friends of organized labor are urged not to patronize this dairy. All other milk distributors in Stockton are operating on a union-basis, so there is no excuse for dealing with a non-union firm.

"According to officials of the Teamsters Union, the Happyholme dairy had been working under an agreement with the organization for several months. On July 1, however, while the contract was still in force, the management openly violated its word by hiring non-union milk wagon drivers.

"In addition, drivers were made to furnish their own vehicles and were put on a straight commission plan. This move wiped out the minimum wage guarantees established in the agreement with the Union, although the status of the drivers as employes of the dairy remained unchanged. The destruction of wage minimums is a threat to gains made by organized labor throughout the district.

"A peaceful settlement of the difficulty has been sought for three months by the Teamsters Union, but the dairy managers have refused to make any concessions. Their persistent refusal to work out a mutually satisfactory arrangement has forced the Union and the Central Labor Council to deny the dairy the patronage of organized labor.

"In Stockton, the Happyholme Dairy operates out of the Bobb Inn, 1147 North El Dorado, a non-union eating place.

"All friends of labor now getting milk from the Happyholme dairy are urged to take their patronage elsewhere immediately and thus help maintain union-established and union-protected wage scales and working conditions."

By this article, the complaint continues, the appellants meant that the respondents had violated their agreement with the local union. In failing to keep their promise to employ only members of it at the scale specified by the contract, they were dishonest and had failed to perform their legal obligations. The owners of the dairy are operating a non-union business, and are opposed to organized labor, whereas all other persons conducting similar businesses are conforming to the union agreement. The appellants also meant, says the complaint, that Emde and Marshall had persistently refused to work out any mutually satisfactory arrangement with the local, and in order to protect union wage scales and working conditions in Stockton, it was necessary for all members of unions and their sympathizers to withdraw patronage from the respondents.

The article was false and defamatory in each of these particulars, the complaint charges, and was printed and published by the appellants, wickedly and maliciously and with full knowledge of its falsity on the part of each of them, with the intent and design to injure the owners of the dairy in their occupation and to destroy their business. Categorical denials of the truth of each statement in the article follow.

Concerning the damage claimed to have been suffered, the value of the dairy is placed at $25,000, and it is asserted that the profit, and in fact the very existence of the business directly depends upon the good will of purchasers of milk and milk products in San Joaquin county. By reason of the publication, certain named customers ceased to patronize the dairy, at a loss of $1,900, computed on an annual basis; a number of persons unknown to the respondents who had formerly been purchasers of Happyholme products withdrew their patronage, occasioning a further loss of $1,348 on the same basis. Further damage in an annual amount of $3,613 is charged because three wholesale customers discontinued business relations. The respondents valued the asserted general injury to their business and reputation at $25,000 and demanded $10,000 additional as exemplary damages because of the express malice on the part of the appellants, and each of them.

The unions, Allen and Conboy joined in an answer which admitted the allegations concerning the existence and general purposes of the labor organizations. The pleading also conceded that Allen and Conboy held the offices and performed the duties specified by the complaint. But all of the respondents' other charges were denied although it was stated that the article pleaded in the complaint "appeared or was published or printed in the Stockton Labor Journal."

Joseph Bredsteen, "individually and as co-partner of the firm of Bredsteen & Tosh," in part for the reason of lack of information or belief, denied all of the allegations of the complaint except those relating to ownership of the Stockton Labor Journal but admitted publication of the article. By amendment of his answer, Bredsteen pleaded as special defenses the truth of the words claimed to be defamatory and that their publication was privileged in that it constituted a communication, without malice, to members of organized labor by one also interested in its purposes. Furthermore, says the answer, Bredsteen stood in such relation to the members of organized labor as to furnish reasonable ground for supposing that the motive for the communication was at all times innocent. Another defense pleaded is that he made the communication at the request of organized labor in San Joaquin county, who were the persons interested in it. The answer also asserts that the item complained of was published without malice.

The labor organizations and their officers, by stipulation, filed an amended answer also pleading truth and privilege as defenses. Further, they alleged that, prior to the publication, the respondents and Local No. 439 were parties signatory to a collective bargaining agreement concerning milk wagon drivers, which provided that no employee shall be required or permitted to make any written or verbal contract in conflict with it. The respondents had three milk routes, and made an agreement with some of their drivers whereby each of them purchased one of the dairy's trucks and distributed milk on a commission basis.

Upon the issues framed by these pleadings, a jury returned a verdict awarding Emde and Marshall compensatory damages of $15,000 and $5,500 punitive damages against the unions and the individuals charged with responsibility for publication of the article. On motion for a new trial the amount of the compensatory damages was reduced to $7,000. Separate appeals were taken from the judgment and the orders denying motions for judgment notwithstanding the verdict.

The unions and their officers contend that none of them procured the publication of the article said to be libelous. All of the appellants insist that the article was not libelous per se or by innuendo; that it was true, publication was privileged, and no express malice was either pleaded or proved. On the issues of damages, they argue that there is no proof of any damage suffered by the respondents as the result of the publication, nor any basis for awarding punitive damages against all of them.

The respondents assert that by the plea of privilege the labor organizations and their officers admit procuring publication of the article sued upon. And the evidence shows, they say, that the unions were engaged in a combination to injure them, and Allen and Conboy brought about the publication of the article in furtherance of that purpose. They also insist that all of the appellants are responsible for the publication, which was false and libelous per se, even though it was made in the course of a labor dispute. And the allegations of the complaint charging malice on the part of each of the appellants is supported by the evidence, which defeats a defense of qualified privilege and justifies the award of punitive damages.

The controversy between the parties originated when the dairy changed the method of distributing milk to its customers. There is no dispute concerning the essential facts. It appears that in November, 1937, the respondents and three other employers engaged in the same business at Stockton signed an agreement with the International Brotherhood and the local union covering wages and working conditions of employees. By this agreement, which was for a one-year period, drivers were to be paid $160 per month with additional amounts for overtime and requirements concerning hours when deliveries should be made, payment for uniforms and other working conditions. A provision of the agreement was: "No employee shall be required or permitted to make any written or verbal contract that will conflict with this agreement."

In May, 1938, Emde and Marshall were distributing their product on three routes. Through their manager they proposed that the drivers of these routes take them over and thereafter operate as "independent contractors." Two of the three drivers, all of whom were then members of Local 439, agreed to do so; the third man preferred to continue under the conditions then existing. By the middle of June, except for minor details, an agreement was worked out. It was stated in letters of the same form, dated June 30th, addressed to the Stockton Savings and Loan Bank, and signed by each of the two union drivers who had decided to accept the new arrangement. By his letter, each of them applied for a loan to be evidenced by a promissory note guaranteed by Happyholme dairy. According to the letter, each applicant was to use the money borrowed by him to purchase "the milk truck which he is presently using as an employee of Happyholme Farms in delivering its milk to its customers in the route or territory which he is working" and also "the total accounts receivable due it from its customers" served in that area.

During the negotiations concerning the proposed contracts, the officers of the local union had heard of the contemplated transactions and liked no part of them. Prior to July 1st, by telephone, both Allen and Conboy had discussed the matter with the dairy's manager, and each of them had endeavored to dissuade the two drivers from undertaking the new arrangement. Shortly after July 1st, the union took these drivers' union cards from them. By July 20th one of the men who had applied to the bank for a loan to finance the distribution contract decided that he would give up the route he was operating. According to his testimony this was due to threats made by the union officials to him. One of the ranch hands employed by the dairy asked for this route, and on July 23d he and the former union driver went to the bank and each signed a promissory note, a conditional sale contract for the purchase of a dairy truck then owned by the dairy, and a distribution contract. The man who was to distribute the Happyholme products on the third route was ill at that time, but later he signed a note and contracts in the same form as those executed by the other two. Each of the three men was licensed by the California Department of Agriculture as an independent milk distributor.

In an attempt to settle the dispute according to the procedure specified by the union contract, the matter was submitted to a committee having three representatives from each side. It met on August 23d and the question at issue was stated as: "Are present operators of Happyholme routes employees of Happyholme?" The three employer representatives voted in the negative and the three persons representing the union in the affirmative. On September 26th the Central Labor Council placed the dairy on the unfair list and four days later the offending article was published.

[1] Although the publicizing of the facts of a labor dispute in a peaceful manner is within the liberty of free discussion guaranteed by the Fourteenth Amendment to the United States Constitution, a party to the controversy has no absolute privilege to discuss such matters so as to avoid civil responsibility for injury to another caused by a malicious and false statement made in the course of the differences between them. See Washer v. Bank of America, 21 Cal.2d 822, 832, 833, 136 P.2d 297. Because, however, the peaceful settlement of labor contention is a matter of vital public concern, the parties to such a controversy must be accorded the right to make fair comment upon the facts involved, at least so long as the criticism is based upon a true or privileged statement of fact. See Snively v. Record Publishing Co., 185 Cal. 565, 198 P. 1; 3 Rest., Torts, sec. 606; 33 Am.Jur., Libel and Slander, sec. 161, p. 155; for a discussion of the conflict as to whether the right of public discussion is limited to comment or opinion, or whether it in addition extends to false assertions of fact made with an honest belief in their truth, see Prosser on Torts (1941), sec. 94, pp. 839, 840; note, 10 So.Cal.L.Rev. 520, 521, 522; 33 Am.Jur., Libel and Slander, sec. 162, p. 156. And even greater protection is accorded one who makes a statement, in a reasonable manner and for a proper purpose, to persons having a common interest with him in the subject matter of the communication, and the publication is of a kind reasonably calculated to protect or further it. Civ. Code, sec. 47, subd. 3; 3 Rest., Torts, sec. 596; Prosser on Torts, sec. 94, p. 837; see also 3 Rest., Torts, secs. 594, 595. For this conditional privilege extends to false statements of fact, although the occasion may be abused and the protection of the privilege lost, by the publisher's lack of belief, or of reasonable grounds for belief, in the truth of the defamatory matter, by excessive publication, by a publication of defamatory matter for an improper purpose, or if the defamation goes beyond the group interest.

[2, 3] The peaceful inducement of both the public generally and of union members in particular to boycott an employer who is party to a labor controversy, is a form of economic pressure which labor organizations may properly employ in pursuit of a lawful end. C. S. Smith Met. Market Co. v. Lyons, 16 Cal.2d 389, 395, 106 P.2d 414; McKay v. Retail Auto S. L. Union No. 1067, 16 Cal.2d 311, 326, 327, 106 P.2d 373. And it may not be denied that the particular controversy between the dairy and the union in the present action, involving as it does the dissatisfaction of organized labor with a system of distributing milk products which avoids minimum wages and hours, workmen's compensation and social security benefits, is a legitimate matter of labor dispute. Bakery & P. Drivers Local v. Wohl, 315 U.S. 769, 62 S. Ct., 816, 86 L.Ed. 1178; Milk Wagon Drivers' Union v. Lake Valley Farm Products, 311 U.S. 91, 61 S.Ct. 122, 85 L.Ed. 63. Therefore, the union, and those directly interested in and connected with the labor cause, had the right to urge the public and, of course, the members of organized labor, to refrain from buying the dairy's products unless the dairy abandoned the system of

distribution which it had undertaken and rehired union drivers in accordance with the terms of the existing contract, whether or not the employer-employee relation then existed between the members of the union and the dairy. American Federation of Labor v. Swing, 312 U.S. 321, 61 S.Ct. 568, 85 L. Ed. 855; C. S. Smith Met. Market Co. v. Lyons, supra, 16 Cal.2d page 401, 106 P.2d 414; McKay v. Retail Auto. S. L. Union No. 1067, supra, 16 Cal.2d 326, 327, 106 P.2d 373. Of course, as a result of the lawful application of economic pressure, the resisting employer may suffer definitely ascertainable damage for which he may obtain no legally recognized compensation from those inflicting it. C. S. Smith Met. Market Co. v. Lyons, supra, 16 Cal.2d pages 398, 399, 106 P.2d 414.

In the light of these factors, the difficulties in determining when the conditional privilege of capital and labor to express their views on labor controversies has been abused and in segregating the compensable items of damage from the noncompensable are readily apparent. And since such disputes, realistically considered, normally involve considerable differences of opinion and vehement adherence to one side or the other, a necessarily broad area of discussion without civil responsibility in damages must be considered an indispensable concomitant of the controversy.

Summarizing the uncontradicted facts underlying the publication which is the basis for the present suit, it appears that the dairy, notwithstanding its contract with the union, decided to change its method of operation and negotiated with the union drivers then in its employ to distribute milk to the same customers on the same routes upon a different basis. Under the new plan, the drivers were to buy from the dairy the trucks which were then being used in servicing the existing routes, although the dairy agreed to repurchase them upon termination of the agreement. The drivers were to purchase the milk for their deliveries from the dairy at the published retail and wholesale prices posted with the Director of Agriculture, less specified discounts, although they were given the right to return and receive credit for undisposed products so long as the returns did not exceed a "reasonable" amount. Whenever the agreement was concluded, the dairy agreed to buy the uncollected but collectable accounts from the drivers. The contracts prohibited the "distributor" from selling, transferring or disclosing to any one the names, addresses, or requirements of the customers on his route, and from handling competing products on his route or in any other area. Furthermore, each driver agreed to return to the dairy all route books and customers' lists in his possession and to refrain from engaging in the distributing of dairy products or in the soliciting of patronage therefor either on his own or another's behalf in the route covered by the agreement for a period of two years following the termination of the arrangement. The drivers also were required to use only the telephone number of the dairy in their business and to handle all telephone calls through the dairy's headquarters at the Bobb Inn. As "distributors" the route men had no minimum wage, nor were their hours of delivery regulated under the new plan as they were under the then existing contract with the union.

Of the three union drivers working for the dairy, although two at first agreed to accept the dairy-proposed arrangement, only one of them signed the dairy's contract and distributed milk in accordance with its terms. Because of his failure to accede to the union's objections to the new plan, this man's union card was lifted; and neither of the two new drivers was a union man. During the subsequent negotiations in which the union sought to induce the dairy to abandon the new arrangement, although the dairy had considered, as a means of settling the difficulty, the inclusion of a minimum wage guarantee in its contracts with the drivers, it finally decided not to do so. After this impasse was reached, the dairy was placed upon the unfair list of the San Joaquin County Central Labor Council.

Measuring these facts against the published statement of them, the difference is largely a matter of interpretation or opinion. The statements contained in the newspaper fall generally into statements of probative fact, conclusions of fact, and conclusions of law. For example, no element of personal interpretation is included in the statements that the dairy was placed on the "We Don't Patronize" list of the San Joaquin County Central Labor Council on the specified date; that the dairy and the Teamsters' Union for several months had been working under an agreement which was still in force on July 1; and that, since July 1, the drivers were required to furnish their own vehicles. And these facts are undeniably true.

[4] Statements of fact involving an element of opinion, however, include the following: The dairy on July 1 hired non-union milk wagon drivers; that, under the new arrangement, the drivers were put on a straight commission plan. The word "hired" is to some extent an opinion but, in any event, is justified regardless of whether the drivers under the new arrangement be considered as employees or independent contractors. An equally permissible conclusion is that since at least one route man under the new arrangement had no union card on July 1, and since at the time of and for some days before the publication of the article, all three servicing the dairy's routes were not members of the union, the dairy was "hiring" non-union milk wagon drivers. And the words "straight commission plan" do not inaptly describe the financial arrangement whereby the drivers were to buy the dairy products necessary for their routes at a specified retail or wholesale price, less a designated discount.

[5, 6] In instituting this plan, continues the article, the minimum wage guarantees established by the union were "wiped out," although the status of the drivers as employees of the dairy remained unchanged. As there was no minimum wage guarantee under the new arrangement, the first clause of this sentence is obviously not false. The second clause involves the statement of an opinion as to a mixed question of law and fact. Considering the limited powers of the distributor and many qualifications in the contracts prepared by the dairy, the status of the men who had signed them presents a difficult legal question. See Pacific Lbr. Co. v. Industrial Acc. Comm., 22 Cal.2d 410, 139 P.2d 892. Under these circumstances, the position of the union in maintaining that the drivers were employees and not independent contractors was certainly within the area of fair comment upon an undisputed factual basis. The assertion that the status of the drivers as employees of the dairy "remained unchanged" must be considered in the light of the preceding statements relating the changes as to the manner of compensation and ownership of the vehicles. So viewed, the only reasonable conclusion is that the article merely meant that the same routes were being serviced by men in a similar physical manner as under the union contract.

[7] The newspaper's comment, "a peaceful settlement of the difficulty as been sought for three months by the Teamsters Union, but the dairy managers have refused to make any concessions," also truthfully reports the facts stated within permissible limits. Unquestionably, at several different times, the union's officers presented their objections to the use of the distribution contracts. They joined in the appointment of arbitrators to determine the question in controversy. And the dairy finally refused to pay the "distributors" a minimum amount each month. This was at least one concession considered and refused.

[8, 9] The declaration that the dairy had "initiated a destructive labor policy" should be read in connection with the subsequent observation, "The destruction of wage minimums is a threat to gains made by organized labor throughout the district." Such a statement is similar to the designation "unfair to organized labor." Although some conflict exists upon the question (see Consolidated Terminal Corp. v. Drivers, etc., Union, D.C., 33 F.Supp. 645, 650; Axton-Fisher Tobacco Co. v. Evening Post Co., 169 Ky. 64, 183 S.W. 269, L.R.A.1916E, 667, Ann.Cas.1918B, 560), by far the preponderance of judicial decisions supports the rule that the use of the word "unfair" in connection with labor controversies does not impute want of moral integrity or business capacity, but merely is a characterization of an employer who refuses to conduct his business in the manner desired by the union. J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581, 592, 98 P. 1027, 21 L.R.A.,N.S., 550, 16 Ann.Cas. 1165; C. S. Smith Met. Market Co. v. Lyons, supra, 16 Cal.2d page 395, 106 P.2d 414; Blossom Dairy Co. v. International Brotherhood of Teamsters, W.Va., 23 S.E.2d 645, 650; John R. Thompson Co. v. Delicatessen & C. W. Union, Local 410, 126 N.J.Eq. 119, 123, 8 A.2d 130, 133; Cinderella Theater Co. v. Sign Writers' Local Union, D.C., 6 F.Supp. 164, 172; Watters v. Retail Clerks Union No. 479, 120 Ga. 424, 427, 47 S.E. 911, 912; Labor Review Pub. Co. v. Galliher, 153 Ala. 364, 373, 374, 45 So. 188, 191, 15 Ann.Cas. 674; Campbell v. Motion Picture Mach. Operators' Union, 151 Minn. 220, 226, 186 N.W. 781, 785, 27 A.L.R. 631; Steffes v. Motion Picture Mach. Operators' Union, 136 Minn. 200, 202, 161 N.W. 524; 1 Teller, Labor Disputes and Collective Bargaining [1940], sec. 126, pp. 389–392; and cf. Sullivan v. Warner Bros. Theaters, 42 Cal.App.2d 660, 663, 109 P.2d 760, 762. Upon analogy, the designation of an employer's labor policy as a "destructive" one merely

indicates that it is a practice which does not meet with labor's approval. Such language cannot be made the basis of an action for libel so long as it is occasioned, as in the present case, by the existence of a bona fide labor controversy. And as the United States Supreme Court has recognized that the application of economic pressure by labor to induce an employer to abandon the "peddler" system is the pursuit of a legally justifiable end (Bakery & P. Drivers Local v. Wohl, supra; Milk Wagon Drivers' Union v. Lake Valley Farm Products, supra), the inclusion of the statements in the newspaper article urging all friends of labor to discontinue their patronage of the dairy "and thus help maintain union-established and union-protected wage scales and working conditions," was justified by the aim of the union to insure the maintenance of a minimum wage for the drivers delivering the dairy's milk.

[10, 11] The only remaining statement subject to challenge is that the dairy violated its contract with the union. Again, the question of violation of contract is a legal conclusion, but, by innuendo, the respondents have pleaded that the publication was intended to convey the charge that the respondents were dishonest. An innuendo, however, cannot ascribe a meaning to assertedly defamatory matter other or broader than the words themselves naturally bear; it cannot add to, enlarge, or change the sense of the published words. Bates v. Campbell, 213 Cal. 438, 442, 443, 2 P.2d 383; Chavez v. Times-Mirror Co., 185 Cal. 20, 25, 195 P. 666; Grand v. Dreyfus, 122 Cal. 58, 62, 54 P. 389; Jackson v. Underwriters' Report, Inc., 21 Cal.App.2d 591, 597, 69 P.2d 878; Pollard v. Forest Lawn Mem. Park Ass'n, 15 Cal.App.2d 77, 81, 59 P.2d 203; Vedovi v. Watson & Taylor, 104 Cal.App. 80, 88, 285 P. 418; Pyper v. Jennings, 47 Cal.App. 623, 635, 191 P. 565; Pollock v. Evening Herald Pub. Co., 28 Cal.App. 786, 788, 154 P. 30; Des Granges v. Crall, 27 Cal.App. 313, 315, 149 P. 777.

[12] Restating the facts underlying the asserted breach of contract, it appears that, despite the clause that no employee of the dairy "be required or permitted to make any written or verbal contract that will conflict with the agreement," while the union contract was in effect the respondents suggested that the union drivers enter into this new arrangement, under which there would be no minimum wage guarantee. Two of the union drivers orally agreed to become parties to the new proposal, and one of the two actually entered into it. To this extent the dairy violated the union contract. And in urging that the appellants did not rely upon such action as constituting the violation of contract referred to in the article until after the trial of the action, the respondents ignore the rule that it is immaterial whether the publisher believed his statements were true at the time they were made, so long as they in fact were true. 3 Rest., Torts, sec. 582, comment g; Prosser on Torts, sec. 95, p. 854; 33 Am.Jur., Libel and Slander, sec. 117, p. 118.

[13, 14] More open to question, however, is the specific charge that "while the contract was still in force, the management openly violated its word by hiring non-union milk wagon drivers." It is generally agreed that it is not necessary to prove the literal truth of an allegedly libelous accusation in every detail, so long as the imputation is substantially true so as to justify the "gist" or "sting" of the remark. Hearne v. De Young, 119 Cal. 670, 52 P. 150, 499; Kurata v. Los Angeles News Pub. Co., 4 Cal.App.2d 224, 227, 40 P.2d 520; Mortensen v. Los Angeles Examiner, 112 Cal.App. 194, 203, 296 P. 927; Skrocki v. Stahl, 14 Cal.App. 1, 5, 110 P. 957; 3 Rest., Torts, Sec. 582, Comment 2; Prosser on Torts, sec. 95, pp. 855, 856. And, in the present action, it may not be denied that, while a contract existed between the Teamsters' Union and the dairy requiring that drivers should be members of Local 439, the employers put into effect a plan under which union men could not continue their employment. Such an interpretation may fairly be characterized as the "gist" of the charge, or at least within the permissible limitations of fair comment.

[15, 16] But even if the charge of violation of contract were false insofar as it referred to the hiring of non-union employees, since the comment was published in a newspaper devoted exclusively to the interests of organized labor, its publication was conditionally privileged. Civ. Code, sec. 47, subd. 3; Bereman v. Power Publishing Co., 93 Colo. 581, 27 P.2d 749, 92 A.L.R. 1024; note, 92 A.L.R. 1029-1032. The communication being qualifiedly privileged, no right of action arose unless the publishers were actuated by malice, and malice "is not inferred from the communication or publication." Civ. Code, sec. 48; Bereman v. Power Publishing Co., supra; Cooksey v. McGuire, Tex.Civ.App., 146 S.W.2d 480, 483. And the record shows no evidence which supports a verdict upon that ground.

The asserted republication of the article in two subsequent issues of the labor journal consisted of nothing more than legitimate "follow-up" stories to inform the recipients of the paper of continuing developments in the controversy. Furthermore, one of the two articles specifically states that the "dairy says it has sold its routes in good faith," thus giving the employer's version of the dispute. And the testimony that Conboy told the respondents' business manager that if the new plan was not abandoned "You will never sell much milk," and that "We are going to make them take them back," discloses only an adherence to the legitimate purpose of exercising labor's power of compulsion to induce the dairy to accede to the union's demands. Nothing in the testimony indicates a want of belief upon the part of any one of the appellants in the statements contained in the publication; on the contrary, it reveals that they uniformly and consistently in good faith believed in the propriety and truth of their position. If the dairy considered the union publicity to be unfair or misrepresentative, its remedy was to answer the charges by counter-publicity of its own, for the constitutional right of free speech is just as clearly a right of employers as of employees. National Labor Relations Bd. v. Reed & Prince Mfg. Co., 1 Cir., 118 F.2d 874, 889; National Labor Relations Bd. v. Ford Motor Co., 6 Cir., 114 F.2d 905, 913–915, certiorari denied, 312 U.S. 689, 61 S. Ct. 621, 85 L.Ed. 1126.

The judgment is reversed.

GIBSON, C. J., and CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

CURTIS, J., dissenting.

I dissent. This action was tried by a jury, and a verdict was returned in favor of the plaintiffs for both compensatory and punitive damages. The appeal is from a judgment, modified in amount only, rendered upon said verdict. All questions of fact in the case supported by substantial evidence are foreclosed by reason of the verdict of the jury.

The published article which it is claimed was libelous was the outgrowth or, it might be properly said, was the culmination of a dispute between the plaintiffs and various labor groups represented by the defendants. This dispute followed certain transactions by which the plaintiffs purported to sell to each of three individuals, one of whom had been in the employ of the plaintiffs as a driver of one of their milk routes, a truck which had previously been used by the plaintiffs in the delivery of milk in the city of Stockton. It was claimed by defendants that this transaction was not a bona fide sale of the trucks, but was a mere subterfuge whereby the plaintiffs sought to evade certain obligations as employers, such as minimum wages which they were under agreement to pay their drivers, and workmen's compensation, unemployment benefits and other advantages to which an employee is entitled under the law of this state. On the other hand, the plaintiffs contended that the transactions in dispute were bona fide sales of their trucks to the three individual vendees, and that the latter in the operation of their respective trucks were no longer their employees but independent contractors. Whether these transactions were or were not actual sales of the trucks was a question of fact for the jury, and its verdict in favor of the plaintiffs was a finding that the transactions were bona fide sales and the purchasers of the trucks in their subsequent operations delivering milk over the three routes were not employees of plaintiffs.

The plan under which the plaintiffs proposed to dispose of their milk by means of the sale thereof in wholesale quantities to truck owners, who resold the same at retail to milk consumers, has been referred to as the "vendor system" and it has been held, as stated in the majority opinion, that the application of economic pressure by labor to abandon such a system is the pursuit of a legally justifiable end, citing among other cases Milk Wagon Drivers' Union v. Lake Valley Farm Products, Inc., 311 U.S. 91, 61 S.Ct. 122, 85 L.Ed. 63. Had the published article been confined to statements charging that the plaintiffs had adopted such a plan of doing business, no contention could be made as to its truthfulness, and under the decision last mentioned, the defendants would have been justified in publishing an article embodying the facts of that controversy. But a reading of the article shows that no mention is made of this new plan under which the plaintiffs were then doing business, but certain definite and positive statements were made regarding the plaintiffs which they now contend were false and maliciously made, and accordingly libelous.

Among these alleged libelous statements appearing in said article the following may be mentioned: 1. Happyholme Dairy violates contracts with teamsters. 2. Because it had violated its signed agreement with Teamsters Local 439. 3. Hired non-union drivers. 4. Drivers were made to furnish their own vehicles. 5. Drivers were put on a straight commission plan. 6. The status of the drivers remained unchanged. 7. The management (Happyholme Dairy) openly violated its word by hiring non-union milk wagon drivers.

The last statement will first be given consideration. There can be no question that if this statement was false and unprivileged, it was libelous, and not even by the most ingenious course of reasoning may it be made to appear otherwise.

In the latest attempt of this court to correctly define libel as defined by section 45 of the Civil Code it is stated that " 'Libel is a false and unprivileged publication by writing * * * which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation.' Civ.Code, § 45. * * * These definitions have been held to include almost any language which, upon its face, has a natural tendency to injure a person's reputation, either generally, or with respect to his occupation (Bates v. Campbell, 213 Cal. 438, 441, 2 P.2d 383; Stevens v. Snow, 191 Cal. 58, 62, 214 P. 968; Schomberg v. Walker, 132 Cal. 224, 227, 64 P. 290; Tonini v. Cevasco, 114 Cal. 266, 272, 46 P. 103), and words clearly conveying a meaning within one of the statutory categories are actionable per se." Washer v. Bank of America N. T. & S. Ass'n, 1943, 21 Cal.2d 822, 827, 136 P.2d 297, 300.

That the statement charging that plaintiffs had openly violated their word by hiring non-union milk wagon drivers was false is practically conceded by the majority opinion. But the opinion holds "that it is not necessary to prove the literal truth of an allegedly libelous accusation in every detail, so long as the imputation is substantially true so as to justify the 'gist' or 'sting' of the remark." The "sting" in the accusation against plaintiffs was that they violated their word. The evidence shows that while under their contract with the local union to employ only union drivers, plaintiffs sold all their trucks to third persons so that thereafter they had no need of drivers, and did not thereafter employ in their business any drivers, either union or non-union. Proof of plaintiffs' sale of their trucks and that thereafter they had no need of truck drivers was not substantial or any proof of the charge that they had violated their word which was the "sting" in the article.

The majority opinion cites the case of Hearne v. De Young, 119 Cal. 670, 52 P. 150, 499, in support of the statement just quoted respecting the degree of proof required to show that the article claimed to be libelous was true. That case furnishes a clear illustration of just what is meant by the terms "gist" and "sting" is an article claimed to be libelous. In that case the defendant published what purported to be an account of a divorce trial between the plaintiff and his wife. The article published stated that the evidence showed that defendant committed an assault upon his wife by hurling dishes at her. It appeared at the trial of the libel action that defendant was not able to show that plaintiff in that suit committed an assault upon his wife by hurling dishes at her, but offered to prove that the evidence in the divorce action did show that defendant in said action committed an assault upon his wife by other means than hurling dishes. The trial court denied the offer and on appeal the judgment in plaintiff's favor in the libel suit was reversed. In so deciding the court held (page 675 of 119 Cal., page 152 of 52 P.): "The sting, the hurt to the plaintiff, is found in the fact that he is charged by the publication with having assaulted his wife. * * * Substantially stated, the charge here is that the plaintiff assaulted his wife by hurling dishes at her. An assault of any kind upon the wife by use of force and violence upon the part of the plaintiff would prove the charge." In the case before us the "sting," the hurt to the plaintiffs, is found in the fact that they were charged in the article published with violating their word. Defendants were unable to prove in support of this charge that plaintiffs had hired non-union drivers, but contend that they did prove that plaintiffs, while under contract with Local No. 439 to hire union drivers only in their milk business, had sold their trucks to third parties and thereafter had no need to hire drivers for their trucks, and did not after said sales hire any driver, either union or non-union. The "sting" in the libel was the charge that plaintiffs violated their word, and proof that plaintiffs had put into effect a plan under which they would no longer need drivers cannot be said to be substantial or any proof of the charge, so as to remove the sting from the publication. The article therefore was false as found by the jury.

The majority opinion holds that even if false, the publication was conditionally privileged, and was therefore not libelous, as there was no evidence that the publication was actuated by malice, and therefore the record shows no evidence which supports a verdict in plaintiffs' favor on that ground. Said opinion holds that the asserted republication of the article in two subsequent issues of the labor journal consisted of nothing more than legitimate "follow up" stories to inform the recipients of the paper of continuing developments of the controversy. No authorities are cited in support of the above statement. Presumably none are to be found. The question is not new in this state. In the early case of Norris v. Elliott, 39 Cal. 72, at page 74, a case for slander, the court held as follows: "Nor did the Court err in admitting proof that the slanderous words were repeated after the action was commenced. This proof was offered and admitted only as a proof of malice and was competent for that purpose. [Citing authorities.]" Again this question came before this court in the case of Chamberlin v. Vance, 51 Cal. 75, also a case for slander. On page 84 of the opinion it is stated: "The words testified to by the witness Abbott, do not enlarge the meaning of the words of the complaint, if construed in accordance with the averment above recited. The words testified to by the witness were spoken after the commencement of the action, but as they were substantially the same as those declared on, they were admissible to prove the quo animo with which the alleged slander was originally published. The words spoken after were of similar import to those spoken before this action was brought. They may be considered a repetition, and so were admissible on the question of malice. [Citing authorities.]" In the case of Harris v. Zanone, 93 Cal. 59, page 69, 28 P. 845, likewise an action for slander, the law is stated as follows: "Upon this issue the plaintiff was at liberty to introduce any competent evidence of express malice, as fully as though it had been alleged in her original complaint, and denied in the answer of the defendant; and other utterances of words of similar import would be competent evidence for that purpose. Evening Journal Ass'n v. McDermott, 44 N.J.L. 430, 43 Am.Rep. 392; Chamberlin v. Vance, 51 Cal. [75] 84; 2 Greenl. Ev., § 418; Townsh. Sland. & L. § 392."

A still later case than those just cited is the case of Hearne v. De Young, 119 Cal. 670, 677, 52 P. 150, 499, already mentioned. Plaintiff sued to recover damages alleged to have been sustained by reason of a publication of an article claimed by plaintiff to have been libelous. The trial court admitted in evidence a second publication of the alleged libelous article made after the institution of said action. It was contended that the admission of this subsequent publication was error, but this court held to the contrary, as follows (page 677 of 119 Cal., page 152 of 52 P.): "When we consider that these publications are only admissible for the single purpose of proving malice actuating the defendant in the original publication, it is difficult to see substantial grounds why the commencement of the action should be a bar to the admission of publications made thereafter; but, whatever may be the rule in other jurisdictions, in this state we deem the matter settled by the adjudications." The court then cites Norris v. Elliott, supra; Chamberlin v. Vance, supra; and Harris v. Zanone, supra, in support of its statement that the rule is deemed settled in this state.

Davis v. Hearst, 160 Cal. 143, 116 P. 530, was also to the same effect. That case was approved in Scott v. Times-Mirror Co., 181 Cal. 345, at page 362, 184 P. 672, at page 680, 12 A.L.R. 1007, in the following language and which admits of no uncertainty: "If the eivdence has such logical import, and is not otherwise incompetent, it must be received, and it is for the triers of the fact to determine the weight to be given to such evidence. The fact that it may also tend to establish the publication of other distinct libels, published either before or after the one constituting the cause of action, is to be regarded as merely incidental and as not furnishing ground for the exclusion of the evidence. Nor is it material that other actions may thus be shown to exist against the party. Hence, where punitive or exemplary damages are sought in an action for civil libel any evidence (which in no other respect is objectionable), having a logical tendency to prove that the publication was prompted by actual malice, is material, competent, and relevant. This is the plain meaning of Davis v. Hearst, supra, and if there was any question about the state of our law on the subject prior to that decision there is none now. It is inconceivable that since the law provides for recovery upon publications made with actual malice the existence of the fact may not be established by the very best evidence—namely, evidence of other libels tending to show a malicious and vindictive attitude of mind toward the injured party. To hold otherwise would be to recognize a right in the party defamed but deny to him a full opportunity to establish and enforce it."

In the present case there were publications both before and after the commencement of this action, so that the above rule as to their admission to prove malice applies. This evidence being admissible the question of malice then became a question for the jury. Scott v. Times-Mirror Co., supra; Clark v. McClurg, 215 Cal. 279, 282, 9 P.2d 505, 81 A.L.R. 908. The verdict of the jury cannot be construed in any other light than a finding that the statement in the published article that plaintiffs had violated their word was false and malicious. If false and malicious, it was not privileged under subdivision 3, section 47 of the Civil Code, or under any other provision of said section, or under any other law of this state. This finding being supported by substantial evidence is therefore binding on this court.

Other testimony in the record supporting the finding of the jury that the article was published maliciously relates to the statement made by Conboy to the plaintiffs that if the new plan was not abandoned "You will never sell much milk." In other words it was a threat to ruin the business of the plaintiffs, which the evidence shows represented an investment of over one hundred thousand dollars, and by which the plaintiffs were supplying a large portion of the inhabitants of the city of Stockton with fresh milk, and employing a number of employees in addition to the former drivers of their trucks. These words could not have been spoken in response to any feeling of good will or indifference toward the plaintiffs. They clearly indicate but one sentiment and that was a feeling of ill will and resentment against the plaintiffs, an intention and willingness to vex and hurt those who opposed the wishes of the person uttering them. Their utterance clearly indicated a malicious intent on the part of the latter. "Malice in fact is a state of mind arising from hatred or ill will, evidencing a willingness to vex, annoy or injure another person." 16 Cal.Jur. 33, sec. 10.

From what has been said above, it is clear that the statement in the published article that the plaintiffs had violated their word was false and malicious. It is therefore not necessary to go into detail respecting the other statements set out in the previous part of this dissent which were of the same general character as that just discussed. While it may be that they were less injurious and therefore less objectionable, they were nevertheless uttered with the same disregard for truthfulness and with the same willingness to injure the person against whom they were directed. The same penalty must therefore be visited upon those responsible for their publication as is imposed for the publication of the more serious and more objectionable matter set forth in the published article.

While not discussed in the majority opinion, the contention is made by the defendants other than the publishers of the Labor Journal that, conceding all that is said regarding the libelous character of the published article, there is no evidence that said defendants either printed or published, or procured its publication.

The evidence in this case shows that for some three months before the boycott was declared, these defendants were working together in order to persuade the plaintiffs to abandon their new plan of doing business. They held several meetings in which all were present. They had interviews with the plaintiffs and the latter's employees, and the new drivers of plaintiffs' trucks. Finally after all their efforts failed, and as a result of the combined efforts of these defendants, it was found necessary to declare a boycott and one was declared against the plaintiffs. But declaring the boycott would have but slight effect upon plaintiffs' business unless the union labor people of the vicinity were informed of that fact. The most effective way to reach these people was through the columns of the Labor Journal. It was not only the official organ of the Labor Council, but was taken by the union labor people generally throughout the city of Stockton and nearby communities. The published article appeared in the Labor Journal immediately after the boycott was declared. The only reasonable inference to be drawn from this evidence is that the article was published by these defendants. They were the only persons interested in its publication, and its publication was necessary in order to make effective the boycott which they had declared against the plaintiff.

The verdict of the jury finding that these defendants published said article in my opinion is fully supported by the evidence. If the findings of the fact finding body are supported by inferences which may be fairly drawn from the evidence, the reviewing court is without power to disturb such findings. Pacific Lumber Co. v. Ind.Acc. Comm., 22 Cal.2d 410, 422, 139 P.2d 892.

In closing it may be appropriate to call attention to a statement in the dissenting opinion by Chief Justice Stone in which Justices Roberts and Frankfurter concurred in the case of Schneiderman v. United States, 320 U.S. 118, 63 S.Ct. 1333, 87 L.Ed. 1796. On page 1358 of 63 S.Ct. will be found the statement referred to and which is as follows: "I think these findings are abundantly supported by the evidence, and hence that it is not within our judicial competence to set them aside—even though, sitting as trial judges, we might have made some other finding. The judgment below, cancelling petitioner's citizenship on the ground that it was illegally obtained, should therefore be affirmed. The finality which attaches to the trial court's determinations of fact from evidence heard in open court, and which ordinarily saves them from an appellate court's intermeddling, should not be remembered in every case save this one alone."

In my opinion the judgment should be affirmed against all of the defendants.

SHENK, J., concurred.

Rehearing denied; SHENK and CURTIS, JJ., dissenting.

61 Cal.App.2d 388

Ex parte BREWER.

Cr. 1845.

District Court of Appeal, Third District, California.

Nov. 17, 1943.

1. Extradition 🔑34

Request of Governor of Kansas reciting that accused was charged with desertion and nonsupport of wife and child committed in Kansas and fled from justice of Kansas and took refuge in Placer County, Cal., was insufficient as not complying with statutes. Pen.Code, §§ 1548.2, 1549.1; U.S.C.A.Const. art. 4, § 2.

2. Extradition 🔑29, 30, 34

No person may be lawfully removed from one state to another under constitutional provision pertaining to extradition unless he is charged in demanding state with treason, felony or other crime, and has fled from justice and a demand is made for his delivery to the demanding state, and in absence of any of such conditions the person sought to be removed is entitled to his liberty. U.S.C.A.Const. art. 4, § 2.

3. Habeas corpus 🔑92(2)

A state court in habeas corpus to test validity of extradition proceeding must administer the law prescribed by the Constitution and federal statute pertaining to extradition. 18 U.S.C.A. § 662; U.S.C.A. Const. art. 4, § 2.

4. Extradition 🔑30

To constitute one a "fugitive from justice" from a given state, it is essential to show that at time of commission of alleged crime in demanding state accused was bodily present or incurred guilt therein, and that he left such state and is within jurisdiction of state from which his return is demanded, and if accused was only constructively in demanding state, committing a crime against it while not personally within its borders, he has not fled from it and is not a fugitive from justice. Pen. Code, § 1548 et seq.; 18 U.S.C.A. § 662; U.S.C.A.Const. art. 4, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Fugitive from Justice".

5. Habeas corpus 🔑111(1)

Where it appeared that petitioner was not in state of Kansas at time of commission of offense alleged to have been committed by him in that state, petitioner was entitled to discharge by habeas corpus from custody under extradition warrant. Pen. Code, §§ 1548.2, 1549.1; 18 U.S.C.A. § 662; U.S.C.A.Const. art. 4, § 2.

Original proceeding in the matter of the application of Owen E. Brewer for a writ of habeas corpus to test the validity of his detention under an extradition warrant, opposed by the Sheriff of Placer County.

Petitioner discharged.

Charles A. Tuttle, of Auburn, for petitioner.

Robt. W. Kenny, Atty. Gen., T. G. Negrich, Deputy Atty. Gen., and Lowell L. Sparks, of Auburn, for respondent.

ADAMS, Presiding Justice.

On June 24, 1943, Velda S. Brewer filed in the County Court of Cloud County, Kansas, a complaint in two counts, charging in the first count that on or about April 15, 1943, in said County of Cloud, State of Kansas, petitioner Owen E. Brewer, the husband of said Velda S. Brewer, without just cause, did unlawfully, wilfully and feloniously refuse to provide for the support and maintenance of his wife who was then and there and now is in necessitous circumstances, contrary to the form of the statutes in such cases made and provided, etc.; and in a second count that on the same date and in the same place the said Owen E. Brewer, the father of Marion Eugene Brewer, a minor child under the age of sixteen years, did without lawful excuse unlawfully, wilfully and feloniously refuse to provide for the support and maintenance of said minor child who was then and there and now is in necessitous circumstances. A writ was thereupon issued to the Sheriff of said Cloud County for the arrest of Brewer, and a request for his extradition to Kansas was made by the Governor of said State, to the Governor of California, the Governor of Kansas alleging that Brewer's apprehension and delivery were sought "pursuant to the provisions of the Constitution and Laws of the United States in such cases made and provided," and that "it has been represented to me that he has fled from justice of this State, and taken refuge within the limits of the County of Placer, State of California."

Upon his arrest by the Sheriff of Placer County, petitioner filed in this court his verified petition for a writ of habeas corpus, alleging that his arrest and subsequent detention by said sheriff were illegal in that the warrant charging him with the offense aforesaid and the demand for extradition, both fail to allege in writing that he was present in the demanding state of Kansas at the time of the commission of the alleged crime, and also alleging that on April 15, 1943, he was, and had been for more than one year prior thereto, a resident of Roseville, California, employed by the Southern Pacific Company as a brakeman, and that he is not and never has been a fugitive from justice within the meaning of the Uniform Criminal Extradition Act.

The writ having issued, the Sheriff of Placer County answered, alleging that he arrested petitioner and took him into custody "by virtue of executive authority of the Governor of the State of California in an extradition proceeding." He attached to his answer copies of the complaint filed in Kansas, the request of the Governor of Kansas for the extradition of petitioner, the writ or warrant issued by the court of Cloud County, Kansas, and a statement sworn to by Velda E. Brewer before the Judge of said County. No record of any proceedings before the Governor of this state was presented. Also, respondent made no denial of the allegations of the petition filed herein. On stipulation of the parties, argument in this court was waived and the matter was submitted on the records and briefs on file.

Petitioner contends that as he was not in the State of Kansas at the time of the alleged offense, but was and had been for more than a year prior thereto a resident of California, he is not and could not be a fugitive from the justice of the State of Kansas; and that neither the warrant charging him with failure to provide, nor the request for his extradition, alleges that he was present in Kansas at the time of the commission of the alleged offense. He cites Art. IV, Sec. 2, of the Constitution of the United States, Hyatt v. People of State of New York ex rel. Corkran, 188 U.S. 691, 23 S.Ct. 456, 47 L.Ed. 657, and sections 1548.2 and 1549.1 of the California Penal Code.

Respondent satisfies himself by citing but one case, In re Gornostayoff, 113 Cal. App. 255, 298 P. 55, and section 1549.1 of the Penal Code above mentioned. He argues from the Gornostayoff case that it was not necessary for petitioner to be in the demanding state at the time of the alleged offense in order for him to commit same, and, apparently, assumes that petitioner comes within the provisions of section 1549.1, supra, and that it is unnecessary to allege or show that he was in the demanding state or that he fled from the justice thereof.

The matter is not, however, so simple as respondent assumes it to be. Section

1548.2, supra, provides that "No demand for the extradition of a person charged with crime in another State shall be recognized by the Governor unless it is in writing *alleging that the accused was present in the demanding State at the time of the commission of the alleged crime, and that thereafter he fled from that State.*" (Italics ours.)

Section 1549.1 provides that "The Governor of this State may also surrender, on demand of the executive authority of any other State, any person in this State charged in such other State in the manner provided in section 1548.2 of this code with committing an act in this State, or in a third State, intentionally resulting in a crime in the State whose executive authority is making the demand. The provisions of this chapter, not otherwise inconsistent, shall apply to such cases, even though the accused was not in the demanding State at the time of the commission of the crime, and has not fled therefrom. Neither the demand, the oath, nor any proceedings under this chapter pursuant to this section need state or show that the accused has fled from justice from, or at the time of the commission of the crime was in, the demanding or other State."

[1] The request made by the Governor of Kansas does not comply with the requirements of either of these sections. It merely recites "that Owen E. Brewer stands charged by Affidavit and Complaint sworn to before a magistrate with the crime of desertion and non-support of wife and child by parent committed in the County of Cloud, in this State and it has been represented to me that he has fled from justice of this State, and taken refuge within the limits of the County of Placer, State of California." That is not an allegation that Brewer was present in Kansas at the time of the commission of the alleged crime, or that thereafter he fled from that state; nor is it alleged either in the complaint filed in Kansas, or in the demand, that petitioner, a person in this state, committed an act in this state or in a third state intentionally resulting in a crime in Kansas. It is apparent, therefore, that even if under section 1549.1 a person lawfully may be extradited to another state in the absence of a showing that he has fled from the justice of said state, a question which need not be decided here, it is obvious that the provisions of said section are not applicable to this case. Ex parte King, Me., 28 A.2d 562, 564.

Section 2 of Article IV of the Constitution of the United States provides that "A person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up to be removed to the State having Jurisdiction of the Crime."

[2, 3] The Supreme Court of the United States held in Pierce v. Creecy, 210 U.S. 387, 401, 28 S.Ct. 714, 52 L.Ed. 1113, 1120, that no person may be lawfully removed from one state to another by virtue of this provision, unless: 1, He is charged in one state with treason, felony or other crime; 2, he has fled from justice; and 3, a demand is made for his delivery to the state wherein he is charged with crime; and that if any of these conditions is absent the Constitution affords no warrant for a restraint of his liberty. And in State of South Carolina v. Bailey, 289 U.S. 412, 56 S.Ct. 667, 77 L.Ed. 1292, it was held that it is the duty of a state court in habeas corpus proceedings brought by one whose extradition to another state has been sought, to administer the law prescribed by the Constitution and statute of the United States, R.S. § 5278, 18 U.S.C.A. § 662, as construed by the Supreme Court of the United States. Also see In re Letcher, 145 Cal. 563, 79 P. 65.

In Hyatt v. People of State of New York ex rel. Corkran, 188 U.S. 691, 712, 713, 23 S.Ct. 456, 459, 47 L.Ed. 657, 661, 662, it was contended that a person may be guilty of a crime within a state even though not personally present there; but the court said:

"This raises the question whether the relator could have been a fugitive from justice when it is conceded he was not in the state of Tennessee at the time of the commission of those acts for which he had been indicted, assuming that he committed them outside of the state.

"The exercise of jurisdiction by a state to make an act committed outside its borders a crime against the state is one thing, but to assert that the party, committing such act comes under the Federal statute, and is to be delivered up as a fugitive from the justice of that state, is quite a different proposition.

"The language of § 5278, Rev.Stat. (U.S. Comp.Stat.1901, p. 3597 [18 U.S.C.A. § 662]), provides, as we think, that the act shall have been committed by an individual who was at the time of its commission personally present within the state which demands his surrender. It speaks of a demand by the executive authority of a state for the surrender of a person as a fugitive from justice, by the executive authority of a state *to which such person has fled,* and it provides that a copy of the indictment found, or affidavit made before a magistrate of any state, charging the person demanded with having committed treason, etc., certified as authentic by the governor or chief magistrate of the state or territory *from whence the person so charged has fled,* shall be produced, and it makes it the duty of the executive authority of the state *to which such person has fled* to cause him to be arrested and secured. Thus, the person who is sought must be one who has fled from the demanding state, and he must have fled (not necessarily directly) to the state where he is found. It is difficult to see how a person can be said to have fled from the state in which he is charged to have committed some act amounting to a crime against that state, when in fact he was not within the state at the time the act is said to have been committed. How can a person flee from a place that he was not in? He could avoid a place that he had not been in; he could omit to go to it; but how can it be said with accuracy that he has fled from a place in which he had not been present? This is neither a narrow, nor, as we think, an incorrect, interpretation of the statute. It has been in existence since 1793, and we have found no case decided by this court wherein it has been held that the statute covered a case where the party was not in the state at the time when the act is alleged to have been committed. We think the plain meaning of the act requires such presence, and that it was not intended to include, as a fugitive from the justice of a state, one who had not been in the state at the time when, if ever, the offense was committed, and who had not, therefore, in fact, fled therefrom." (Italics by that court.)

The principles asserted in the foregoing cases were asserted by this court in Matter of Application of Shoemaker, 25 Cal. App. 551, 144 P. 985, wherein it was held that whether a person whose extradition is demanded is a fugitive from the justice of the demanding state is a question of fact subject to review in habeas corpus proceedings, and that before a warrant of extradition can be sustained it must appear, as a jurisdictional fact, that the prisoner is a fugitive from justice, that is, that he was actually present in the demanding state when the crime was committed; and that constructive presence there is not enough. And as in that case the evidence showed that petitioner was not in the demanding state on the date of the crime, or at any time within two weeks of that date, he was held to be entitled to his discharge. Also it was said in In re Thurber, 37 Cal.App. 571, 572, 174 P. 112, that if it be made to appear that the accused was not within the territory of the state when he is alleged to have committed the offense charged against him, "then he could not have fled therefrom and could not be a fugitive from justice."

[4] In 35 C.J.S., Extradition, § 10, p. 324, it is said that "To constitute one a fugitive from justice from a given state, it is essential to show that at the time of the commission of the alleged crime in the demanding state he was bodily present, or incurred guilt, therein, and that he left it and is within the jurisdiction of the state from which his return is demanded, * * *. Actual and corporeal former presence in the demanding state is essential; if a person was only 'constructively' in a state, committing a crime against it while not personally within its borders, he has not fled from it and is not a fugitive from justice."

In numerous cases and in many states the foregoing rule has been applied to persons charged with desertion of, or failure to support, a wife or children. See People v. Meyering, 348 Ill. 17, 180 N.E. 560; Drumm v. Pederson, 219 Iowa 642, 259 N. W. 208; Schein v. Gallivan, 321 Mo. 268, 10 S.W.2d 521; People v. Millspaw, 281 N. Y. 441, 24 N.E.2d 117; Ex parte Heath, 87 Mont. 370, 287 P. 636; Ex parte Hawkins, 37 Okl.Cr. 17, 255 P. 718; Ex parte Presley, 116 Tex.Cr.R. 150, 27 S.W.2d 815; Ex parte Hogue, 112 Tex.Cr.R. 495, 17 S. W.2d 1047; State v. Doeppe, 97 W.Va. 203, 124 S.E. 667; Taft v. Lord, 92 Conn. 539, 103 A. 644, L.R.A.1918E, 545; Ex parte King, supra.

No cases holding to the contrary are cited by respondent except In re Gornostayoff, supra, in which case petitioner's extradition was sought for alleged failure to provide for two children in Ohio. Gornostayoff claimed that he was not in the demanding state on the date charged; but the courts said that his presence within the state was not necessary to enable him to commit the offense, and denied his petition for habeas corpus. What, if any, other facts were made to appear in that case is not shown in the opinion; but if it was intended therein to hold that for the sole reason that the presence of petitioner in Ohio was not necessary to enable Gornostayoff to commit the crime charged, he might be extradited without a showing that he had ever been in the demanding state or had fled from its jurisdiction, said decision is in conflict with the rule laid down by the United States Supreme Court and applied in the cases above cited.

[5] Since it is not denied, and is apparently conceded by the return of respondent and the brief in support thereof, that petitioner was not in the state of Kansas at the time of the commission of the offense alleged to have been committed by him in that state, petitioner is entitled to his discharge, and it is so ordered.

THOMPSON, and PEEK, JJ., concur.

TOSCHI v. CHRISTIAN et al.

Civ. No. 12451.

District Court of Appeal, First District, Division 2, California.

Nov. 8, 1943.

Rehearing Denied Dec. 8, 1943.

Hearing Granted Dec. 31, 1943.

1. Appeal and error 🔑927(3)

On appeal from judgment of nonsuit granted on defendants' motion at the close of defendants' case, all conflicts in the statement of facts are resolved in favor of plaintiff.

2. Railroads 🔑350(1)

Evidence that there were flashing mirrors across track which shone in truck driver's eyes immediately before truck was struck by backing engine, which flashes blinded the truck driver, did not establish that granting of nonsuit was error where there was no competent testimony connecting railroad with the flashing mirrors.

3. Railroads 🔑350(32)

In action for damages sustained by truck driver in crossing collision accident, when truck was struck by backing engine, nonsuit could properly be granted on ground that negligence of truck driver in failing to look for the engine was the proximate cause of the accident and on ground that negligence of railroad in failing to have a flagman at crossing was not the proximate cause of the accident.

4. Railroads 🔑327(1)

Where motorist's view is unobstructed before attempting to make railroad crossing, he should look and listen and if necessary should come to a stop.

5. Railroads 🔑330(2)

Where railroad crossing is guarded by signals or flagmen, the quantum of care is less but motorist is still bound to exercise ordinary care for his own safety.

6. Railroads 🔑350(22)

Where motorist's view at railroad crossing is obstructed, negligence generally is a question for the jury.

7. Railroads 🔑330(2)

A motorist who approached railroad crossing where view was unobstructed, and during absence of flagman who was ordinarily present, and without stopping or looking for approaching engine drove upon the track and was struck, was guilty of contributory negligence barring recovery for resulting injuries.

8. Railroads 🔑327(7)

Where motorist did not stop until he approached and was actually on the track on which the engine was approaching, his act of stopping was not in compliance with the rule to "stop, look and listen", since the element of stopping as used in that rule is for the safety of the traveler and it means stopping in a place of safety.

See Words and Phrases, Permanent Edition, for all other definitions of "Stop, Look and Listen".

9. Railroads 🔑327(13)

The rule that a motorist who fails to look and listen is guilty of contributory negligence, where by looking and listening he could have observed the approach of a train, is applicable to urban districts as well as to rural districts.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Mario Toschi against L. L. Christian and others for personal injuries resulting from a collision between plaintiff's truck and a railroad engine. From a judgment of nonsuit granted on defendants' motion at the close of plaintiff's case, plaintiff appeals.

Affirmed.

William E. Ferriter and James C. Purcell, both of San Francisco, for appellant.

Arthur B. Dunne and Dunne & Dunne, all of San Francisco, for respondents.

STURTEVANT, Justice.

[1] The plaintiff sued to recover for personal injuries received in a collision between the truck he was driving and a Southern Pacific Company locomotive at the intersection of the Southern Pacific Company's tracks and Berry Street in San Francisco. In his complaint he named as defendants the Southern Pacific Company, a corporation, and the engineer, and the fireman who operated and drove Locomotive No. 2376. He appeals from a judgment of nonsuit granted on defendants' motion at the close of his case. It should be noted that all conflicts in the statement of facts have been resolved in favor of plaintiff and appellant, pursuant to the well recognized rule of review on appeals from judgments of nonsuit. The sole question presented by the appeal is whether the lower court was correct in determining that plaintiff was guilty of contributory negligence as a matter of law, conceding for the purposes of the appeal that defendants' negligence was sufficiently proved, it being predicated on the failure of the locomotive personnel to sound a warning and the absence of the flagman normally stationed at the crossing to warn approaching cars. The locale of the accident must be depicted in detail in order to understand the grounds of plaintiff's appeal which consists in a plea for the relaxation of the so-called "stop, look and listen" rule in the circumstances of the particular case.

The plaintiff was a truck driver who crossed the Southern Pacific Company's tracks at Berry Street from two to twenty times a day and had been doing so for many years. Therefore he was thoroughly familiar with the crossing, the numerous switching operations taking place there daily, and the presence of the flagman to warn approaching cars when a train would actually cross Berry Street. On the morning of the accident he drove his ready-mix cement truck south on Seventh, looked to his left about 50 feet from its intersection with Berry Street at the Southern Pacific Company's tracks which paralleled Seventh Street at that point. Seventh Street approaches the tracks at a tangent about 100 feet before the Berry Street intersection and then parallels the tracks for several blocks. Therefore by looking to his left plaintiff could not see the locomotive which hit him, without looking over his left shoulder backwards to see the train about 50 feet behind him coming on the curved tracks. He slackened his speed in preparation for the turn and crossing the tracks and shifted to a lower gear. He looked for the flagman before he crossed, saw none, and proceeded onto the south-bound mainline tracks where he was struck by a backing locomotive on the left front side of the engine and cab of the truck. The locomotive was an unattached commuter engine which was backing to the round house.

The plaintiff contends that even though he did not stop, look and listen at the crossing he was not contributorily negligent as a matter of law. He rests his position on the following facts and inferences to be drawn from facts appearing of record: The place at which the accident occurred is a congested mercantile district with commercial vehicles constantly crossing the railroad tracks. There are five railroad tracks at the Berry Street crossing and the start of a split up into six tracks. The four most easterly tracks are used constantly for switching operations of making up trains, both freight and passenger. If an engine is seen approaching the intersection of Berry Street, it still might stop short and reverse itself to go back and pick up other cars on other tracks. The engine which struck plaintiff was a single unattached backing engine, traveling on the south-bound main line track, the track which was closest to him as he started to cross. Therefore the plaintiff asserts that in view of these facts, even if he had looked and had seen the approaching engine, the jury might reasonably have concluded that he could have crossed because the flagman was not present, his presence being the only means of knowing whether the approaching train would cross Berry Street or not. Although not mentioned by appellant, his view is further fortified by the fact, which we must accept on a nonsuit, that neither the whistle nor the bell on the engine sounded a warning that the engine would continue across Berry Street. He urges that to require all commercial traffic to stop while an engine was in sight would be an undue burden on traffic, which burden the railroad recognized. In the light of the switching operations the railway had placed a flagman at each side of the crossing instead of automatic devices.

The defendants contend that the stop, look and listen rule is not relaxed here because although a guarded crossing, the view was unobstructed. They assert that it nowhere appears of record that switching operations take place on the main line tracks and in fact no switching operations do take place on the main line tracks. There is no evidence in the record as to whether switching operations do or do not take place on the main line tracks. They point out that there is a great difference between a switching engine and the through train engine which caused the accident. This difference does not appear of record. But they ask the court to take judicial notice of this difference. They argue that plaintiff, assuming his knowledge of railroad switching operations over these tracks, would have recognized this difference had he looked. They point to plaintiff's testimony that he knew these single engines of commuter trains backed up along the south bound main line tracks to the round house and that he knew the first two tracks he was to cross were the main line tracks.

[2, 3] There is testimony in the record which must be accepted for the purposes of a nonsuit that there were flashing mirrors across the tracks which shined in plaintiff's eyes in the split second before the accident occurred which flashes blinded him. The plaintiff testified that he stopped the minute the flash blinded him and was immediately struck by the engine. There seems to be no merit in the arguments on either side concerning the weight to be given this evidence. Defendants argue that it saved his life because the cab of the truck would have been struck squarely had plaintiff not stopped when he did. Plaintiff asserts that the flash blinded him so that he could not see the train or caused him to stop when he could have cleared in front of the engine. Plaintiff's own testimony of immediacy refutes the first argument. Assuming plaintiff's second theory to be true, there is no competent testimony in the record that could connect the Southern Pacific Company with the mirror's flashing. Therefore the nonsuit would have been properly granted as the negligence, if any, of the plaintiff in failing to look for the engine and the negligence of the Southern Pacific Company in failing to have the flagman at the crossing would not have been the proximate cause of the accident.

[4-6] The plaintiff contends the motion for a nonsuit should not have been granted and that his case should have been submitted to the jury. The defendants reply that the evidence clearly shows the plaintiff was guilty of contributory negligence. They cite and rely on Jones v. Southern Pacific Co., 34 Cal.App. 629, 168 P. 586; Koch v. Southern California Ry. Co., 148 Cal. 677, 84 P. 176, 4 L.R.A.,N.S., 521, 113 Am.St.Rep. 332, 7 Ann.Cas. 795; Wyseur v. Davis, 58 Cal.App. 598, 209 P. 213; Gundry v. Atchison, T. & S. F. Ry. Co., 104 Cal.App. 753, 286 P. 718. The plaintiff replies that this court stated a different rule in Wessling v. Southern Pacific Co., 116 Cal.App. 447, 3 P.2d 22. We think the plaintiff fails to note the difference in the facts. The latter case presented facts showing that the view of the driver of the truck was obstructed. In other words, it rested on an exception to the general rule. The general rule is that when the driver's view is unobstructed before attempting to make the crossing he should look and listen and if necessary should come to a stop. Billig v. Southern Pacific Co., 192 Cal. 357, 362, 219 P. 992. When, as in the instant case, the crossing is guarded by signals or flagmen the quantum of care is less but the driver is still bound to exercise ordinary care for his own safety. 52 C.J. 329. If and when the view of the driver is obstructed the question of negligence generally is a question of fact to be submitted to the jury. Gregg v. Western Pac. R. Co., 193 Cal. 212, 224, 223 P. 553. However, in the instant case there was no claim that the plaintiff's view was obstructed. Under such circumstances Wessling v. Southern

Pacific Co., supra, is not controlling.

Chrissinger v. Southern Pacific Co., 169 Cal. 619, 149 P. 175, was an appeal from a judgment based on an order granting a nonsuit. In that case, as in this case, the plaintiff testified that he looked but did not see. On page 624 of 169 Cal., on page 177 of 149 P., the court said:

"In any view of the testimony we are forced to conclude that had plaintiff used the slightest care the accident would not have happened. True it is that we have his own statement that he looked and listened, but did not see or hear the approaching train, but where, as here, the established facts and conditions make it plain that by looking and listening he must have observed the approach of the train, his testimony that he looked and listened, but did not see or hear, is not enough to support a verdict in his favor. Zibbell v. Southern Pacific Co., 160 Cal. 237, 241, 116 P. 513.

"A person approaching a railway track, which is itself a warning of danger, must take advantage of every reasonable opportunity to look and listen. Undoubtedly the question of contributory negligence or freedom from it is ordinarily one for the jury, but where, as here, the standard of conduct is so obvious as to be applicable to all persons, and the plaintiff has failed to measure up to that standard under the circumstances shown, he is not entitled to have his case go to the jury. Hamlin v. Pacific Electric Co., 150 Cal. 776, 779, 89 P. 1109."

Jones v. Southern Pacific Co., 34 Cal.App. 629, 631, 168 P. 586, is to the same effect.

[7] From the time that the plaintiff drove down Seventh Street and passed King Street had he looked with any care he would have seen the engine backing. The record shows that the engine and its tender were about the only objects in the railway yard comprising a space exceeding one block.

[8] The plaintiff did not stop until he approached and was actually on the track on which the engine was approaching. That act in stopping was not in compliance with the rule to stop, look and listen. The element of stopping as used in that rule is for the safety of the traveler—it means stopping in a place of safety. 52 C.J. 311 "Railroads", § 1888.

Nothing we have said is in conflict with Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183. That case involved a set of facts showing that at the crossing involved ordinarily the defendants maintained a flagman. At the time of the accident no flagman was there. However, prior to said date a flagman had been present and acting, which fact the plaintiff well knew. As pointed out by the court, at the time of the accident a flagman was not present and the defendant company had placed many obstructions which obscured the view of the plaintiff. It was held that the placing of a flagman on guard was in the nature of an invitation for the public to be guided by and act on the presence or absence of a flagman; it was further held that by such acts the railroad company impliedly invited respondent to cross, and assured him no train was approaching. Later it parked its cars so that plaintiff could not see. Still later, the defendants contended that because plaintiff relied and acted on the appearance of safety created by the defendants, the plaintiff was guilty of contributory negligence as a matter of law. The holding of the case is that the plaintiff was entitled to prove, if he could, all facts and circumstances being considered, that he had by the acts of defendants been entrapped. However, as stated above, in the instant case neither the defendants nor anyone else had placed any obstructions cutting off the view of this plaintiff.

[9] Speaking of the doctrine which we have quoted from Chrissinger v. Southern Pacific Co., supra, the plaintiff argues that such is the rule in rural districts, but that it is not, and should not be, the rule in urban districts. He cites no authority directly so holding, but makes the claim in argument. However, a careful reading of the authorities discloses at once that they may not be so distinguished.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

61 Cal.App.2d 396

VOSBURGH v. MEDA.

Civ. 6971.

District Court of Appeal, Third District, California.

Nov. 18, 1943.

1. Appeal and error ⚷1010(1)

Finding of trial court supported by substantial evidence will not be disturbed on appeal.

2. Appeal and error ⚷996

Where different conclusions may reasonably be drawn from the evidence, trial court's findings of fact are conclusive.

3. Landlord and tenant ⚷167(2)

There is no liability on part of landlord for injury from dangers that are obvious, or as well known to the person injured as to the owner or occupant.

4. Landlord and tenant ⚷169(6)

Evidence that tenant was fully aware of the dangerous condition of the stairway on which she tripped and fell was sufficient to sustain finding that her contributory negligence barred recovery from landlord for injuries so sustained.

5. Appeal and error ⚷989

The duty of District Court of Appeal is not to weigh the evidence but to determine whether there is in the record sufficient evidence to sustain trial court's findings.

6. Landlord and tenant ⚷169(10)

In tenant's action against landlord for injuries sustained in falling on stairway, finding that tenant had knowledge of defective condition of stairway and that she was guilty of contributory negligence was not subject to objection that it did not constitute a specific finding of the act which constituted contributory negligence.

7. Trial ⚷395(5)

It is the purpose of "findings" to answer the questions raised by the pleadings, and where allegations of the affirmative defense of contributory negligence were sufficient, findings couched in the language employed in stating such defense were proper, no duty being imposed upon trial court to make findings as to evidentiary details.

See Words and Phrases, Permanent Edition, for all other definitions of "Finding".

8. Appeal and error ⚷1071(1)

Trial court's finding that plaintiff was guilty of contributory negligence barring recovery from landlord for injuries sustained in falling on stairway was not erroneous in that it failed to make specific finding of the acts constituting contributory negligence, where a more detailed finding regarding contributory negligence would not have required a different judgment.

9. Appeal and error ⚷842(2), 1010(1)

Findings of trial court sitting without a jury that plaintiff was guilty of contributory negligence barring recovery was a "finding of fact" not a finding of contributory negligence as a matter of law, and where it found substantial support in the evidence, it was conclusive on appeal.

See Words and Phrases, Permanent Edition, for all other definitions of "Finding of Fact".

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Elva Vosburgh against Eugene Meda for personal injuries sustained by plaintiff when she fell on a stairway of a building owned by defendant and occupied by plaintiff as a tenant. From a judgment for defendant, plaintiff appeals.

Affirmed.

Chas. L. Gilmore, of Sacramento, for appellant.

Archibald D. McDougall, of Sacramento, for respondent.

ADAMS, Presiding Justice.

Appellant sued respondent for damages for personal injuries alleged to have been sustained by her when she tripped and fell on the stairway of a building owned by defendant, the third story of which building was leased by appellant and occupied and used by her as a rooming house. Appellant contended that respondent had permitted the stairway, which was the only means of access to the upper floors of the building, to fall into disrepair and the metal nosings on the edges of the steps to become loose, and that her fall was due to her tripping over one of the loose metal strips at a point where said stairs made what she described as a "pie shaped turn." Defendant denied the allegations of plaintiff's complaint charging him with negligence, and as an affirmative defense alleged that appellant's injuries, if any, were proximately contributed to by her own carelessness and negligence.

The case was tried by the court sitting without a jury and at the conclusion thereof the court found that while respondent had negligently maintained said stairway, appellant was, and had been for a long time prior to the accident, aware of the defective condition of said stairway, and that at the time she tripped and fell she was negligent in the manner in which she was descending said stairs and that such negligence on her part proximately contributed to cause her fall and her resulting injuries. Judgment was entered in favor of defendant. Appellant moved for a new trial, which was denied.

On this appeal it is contended by appellant that the burden was upon defendant in the action to show that plaintiff was guilty of contributory negligence; that the finding of the trial court that she was guilty of such contributory negligence is not sustained by the evidence; and that, as there was no finding of any specific act by plaintiff upon which contributory negligence could be predicated, the court must have determined that she was guilty of such negligence as a matter of law, and that the evidence is insufficient to support such conclusion.

[1, 2] It is too well settled to require the citation of authorities that if findings of a trial court find substantial support in the evidence in a case, the judgment will not be disturbed on appeal. And where different conclusions may reasonably be drawn from the evidence by different minds, the trial court's findings of fact are conclusive. Meindersee v. Meyers, 188 Cal. 498, 502, 205 P. 1078; Raggio v. Mallory, 10 Cal.2d 723, 725, 76 P.2d 660; Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 13, 47 P.2d 462; Toms v. Mercantile Arcade Realty Corp., 24 Cal.App.2d 700, 701, 76 P.2d 153.

Looking then to the evidence, we find that appellant testified that she was aware of the defective condition of the stairway; that the metal nosings were "bad on the edges and easy to catch your feet on;" that she had called defendant's attention to them at different times prior to the accident; that she was familiar with the stairway in every respect; that she had watched the stairs closely and had even repaired them herself; that the nosings were loose in various places so they would catch people's feet; that other people were falling; that there was a railing on the right side of the stairway. Describing the accident she stated she was going down "just the ordinary way of walking down the stairs," that as she made the turn something gave way under her feet and she pitched forward; that at the time she fell her arms were free except that she carried her purse in the crook of her arm; that her arms were by her side, or hanging down—that they were free except for her pocket book; that she was walking a little to the right of the stairway and looking to the right, and at the point where she fell the steps were narrowed at the right end; that she did not have hold of the hand rail, which was on the right side of the stairway. The defective condition of the stairway was testified to by plaintiff's son who said that "the steps all the way up and down from the first floor to the top were bad"; that he had caught his toe on one of them; that he had made complaint to defendant's agent about their condition; that some of the nosings were loose and curled up, and that this condition was perfectly observable as he went up and down the stairs.

[3, 4] From the foregoing it is apparent that plaintiff was fully aware of the dangerous condition of the stairway, and is within the frequently enunciated rule expressed in Mautino v. Sutter Hospital Ass'n, 211 Cal. 556, 561, 296 P. 76, 78, that "There is no liability for injuries from dangers that are obvious, or as well known to the person injured as to the owner or occupant." Also see Funari v. Gravem-Inglis Baking Co., 40 Cal.App.2d 25, 29, 104 P.2d 44; Griggs v. Cook, 106 Cal.App. 551, 555, 289 P. 693; Nelson v. Myers, 94 Cal.App. 66, 74, 270 P. 719. The facts in the case of Toms v. Mercantile Arcade Realty Corp., supra, are comparable to those shown in the case before us. There plaintiff started to descend a stairway in defendant's building leading to the basement. A portion of the stairway was dark and plaintiff could discern the steps but dimly. Nevertheless he proceeded and in so doing placed his foot upon a piece of lumber which caused him to fall. The court said that the conclusion that plain-

tiff's conduct was or was not consonant with the acts of a reasonably prudent person might reasonably be drawn from the facts; but that the trial court's finding that plaintiff was negligent found support in the evidence and would not be disturbed on appeal.

[5] Appellant cites cases dealing with the burden of proof as to contributory negligence; but the duty of this court is not to weigh the evidence but to determine whether there is in the record before the trial court evidence sufficient to sustain its finding.

[6] Appellant further complains of the findings contending that she was entitled to a specific finding of the acts which constituted contributory negligence on her part, citing Huntington v. Vavra, 36 Cal.App. 352, 172 P. 166, and other cases. But in those cases there were no findings whatever. Here the court found: "that plaintiff, at the time referred to in plaintiff's complaint and for a long time prior thereto, was aware and had knowledge of the said defective condition of said stairway and that the same was out of repair"; "the court further finds that at the time plaintiff so tripped and fell on said stairway she was not using ordinary or reasonable care for her own safety and that plaintiff was herself negligent in the manner in which she descended said stairway and that such negligence on plaintiff's own part proximately contributed to cause the fall sustained by her on said stairway and the injuries resulting to plaintiff therefrom." It also found that all of the allegations contained in the affirmative defense set forth in the answer of defendant to the effect that plaintiff was guilty of contributory negligence were true. The allegations of defendant's said affirmative defense were "that plaintiff was herself careless and negligent in and about the matters therein alleged and that such carelessness and negligence on plaintiff's own part proximately contributed to the happening of the accident and the injuries or damage complained of by plaintiff, if any there were." Such findings are sufficient.

[7, 8] It is the purpose of findings to answer the questions raised by the pleadings, and if the allegations of the affirmative defense of respondent herein were sufficient (and it is not contended that they were not) findings couched in the language employed in stating such defense are proper, and no duty was imposed upon the trial court to make findings as to evidentiary details. Kenfield v. Weir, 16 Cal.App.2d 501, 503, 60 P.2d 885; Carlson v. Stanbitz, 7 Cal.App.2d 455, 457, 45 P.2d 820; Williams v. McDowell, 32 Cal.App.2d 49, 52, 89 P.2d 155. Also a more detailed finding regarding appellant's contributory negligence would not have required a different judgment. Strauch v. Bieloh, 16 Cal. App.2d 278, 282, 60 P.2d 582.

[9] Finally appellant argues that the court found as matter of law that appellant was guilty of contributory negligence and that the evidence does not justify such a conclusion. But obviously the court's finding was one of fact; and since it finds substantial support in the evidence, the judgment is affirmed.

THOMPSON and PEEK, JJ., concur.

CAMPAGNA v. MARKET STREET RY. CO.

Civ. 12340.

District Court of Appeal, First District, Division 1, California.

Nov. 19, 1943.

Rehearing Denied Dec. 18, 1943.

Hearing Granted Jan. 17, 1944.

1. Negligence 🔑119(1)

Where a defendant relies on imputed negligence as a defense, he must specifically plead facts constituting the defense, and the burden rests on him to affirmatively establish it.

2. Trial 🔑252(1)

Instructions must be applicable to the evidence.

3. Appeal and error 🔑1066
Trial 🔑252(1)

Even though an instruction is couched in proper language, it is improper if it finds no support in evidence, and the giving of it constitutes prejudicial error if it is calculated to mislead the jury.

4. Negligence ⚷119(6)

Plea that plaintiff was contributively negligent was not sufficient to raise the defense of imputed negligence.

5. Negligence ⚷113(6)

Allegations that plaintiff controlled or had right to control motortruck driven by another are essential to raise affirmative defense of imputed negligence based on joint enterprise.

6. Pleading ⚷240

Mere leave to amend pleading does not of itself operate as an amendment, and if a formal amendment is not filed, the issue involved is not properly pleaded.

7. Pleading ⚷420(3)

Where motion to amend pleading is made during trial and thereafter the case is tried as if amendment had been made, the parties cannot later complain that no formal amendment was in fact made.

8. Pleading ⚷236(5)

Trial courts have wide discretionary power to grant amendments to pleading to conform to proof.

9. Pleading ⚷420(3)

Where case is tried on theory that a certain issue is before court, and at conclusion of trial permission is granted to amend pleading to conform to proof, parties are estopped from objecting to failure to file formal amendment.

10. Negligence ⚷138(4)

Where son, mentally and physically deficient, was assisting father who was selling fruit and vegetables from truck from door to door, and son was injured in collision between street car and truck driven by father, in personal injury action against street railway company evidence was insufficient to present issue of imputed negligence, and giving instruction thereon was improper.

11. Negligence ⚷93(1)

Generally, the negligence of a driver of automobile is not imputed to the person riding with him, but where driver and passenger are engaged in a joint enterprise the negligence of the driver may be imputed to the passenger.

12. Negligence ⚷93(1)

To invoke doctrine of imputed negligence against occupant of motor vehicle, it must be shown that driver and occupant were engaged in common enterprise under such circumstances that each had equal authority and right over control and management of vehicle, and that each assumed legal responsibility for the other's conduct in the operation of the vehicle.

13. Trial ⚷252(9)

In action against street railway company for injuries which motor vehicle occupant sustained in collision with street car, the giving of instruction on contributory negligence was error, where there was no evidence tending to show occupant was guilty of contributory negligence.

14. Street railroads ⚷113(6)

In action against street railway company for injuries which motor vehicle occupant sustained in collision with street car, applicable rule of company regulating speed of street cars was admissible on issue whether motorman was negligent, even though rule imposed greater duty of care than that required by statute or ordinance.

WARD, J., dissenting in part.

Appeal from Superior Court, San Francisco County; Hon. Frank T. Deasy, Judge.

Action by Salvadore Campagna, Jr., by Angelina Sartini, his guardian ad litem, against Market Street Railway Company for personal injuries. Judgment for defendant, and plaintiff appeals.

Reversed.

Fitz-Gerald Ames, of San Francisco, for appellant.

Cyril Appel, Linforth, Cannon & Miller, and Jesse H. Miller, all of San Francisco, for respondent.

PETERS, Presiding Justice.

This action was brought by Salvadore Campagna, Jr., through his guardian ad litem, to recover for personal injuries received by him in an accident involving the collision of his father's vegetable truck, in which plaintiff was riding, and a streetcar of the Market Street Railway Company. From a judgment based upon a jury verdict in favor of defendant, plaintiff appeals.

The accident occurred at about 5:30 in the morning of August 13, 1940. Appellant's father was engaged in the business of selling fruit and vegetables from his truck from door to door. The appellant, who was twenty-five years of age at the date of the accident, rode with his father on the truck and assisted him to the extent of his ability. At the time of the collision appellant's father was driving his truck northerly across the intersection of Fremont and Market Streets in San Francisco. Respondent's streetcar was proceeding westerly on Market Street. The accident occurred under such circumstances that the jury could have found that it was proximately caused by the negligence of the father of appellant, by the negligence of respondent's motorman, or by their concurrent negligence. The main contention of appellant is that, either as a question of law or fact, the negligence of his father could not be imputed to him, and that prejudicial error was committed by the trial court in instructing the jury on this doctrine.

[1-3] It is admitted that, where a defendant relies on imputed negligence as a defense, he must specifically plead the facts constituting this defense, and that the burden rests on the defendant to affirmatively establish it. Huber v. Scott, 122 Cal.App. 334, 10 P.2d 150. It is also the law that instructions must be applicable to the evidence. Even though an instruction is couched in proper language, it is improper if it finds no support in the evidence, and the giving of it constitutes prejudicial error if it is calculated to mislead the jury. See cases collected 24 Cal. Jur. p. 830, § 95.

In the present case the court instructed at length on the doctrine of imputed negligence. The appellant concedes that the instructions given, so far as they went, correctly stated the law, but he contends that such instructions were not justified under the evidence, and that the issue was not properly presented by the pleadings.

[4-9] First, as to whether defense of imputed negligence was properly pleaded. The answer, as filed, did not specifically plead the defense. It did plead the defense, in general terms, that appellant was contributively negligent, but such a plea is not sufficient to raise the defense of imputed negligence. There is no allegation in the answer that appellant controlled, or had the right to control, the truck of his father. Such allegations are essential to raise the affirmative defense of imputed negligence based on a joint enterprise. Bennett v. Chanslor & Lyon Co., 204 Cal. 101, 266 P. 803; Dover v. Archambeault, 57 Cal.App. 659, 208 P. 178. After the respondent had closed its case on the evidence, a motion was made by its counsel asking permission to amend the answer "by adding the specific defense of imputable negligence, upon the ground that at the time of the happening of the accident the plaintiff and his father were engaged in a joint enterprise * * * and that the negligence of the father, the driver of the automobile, is therefore legally imputed to the boy." Counsel for appellant vigorously objected to such amendment of the answer at such late date. The trial court granted the request on the ground that "because of the fact you have a defense of contributory negligence in your answer, you may amend by setting up the facts constituting it." No amendment was in fact ever filed. It is a general rule that mere leave to amend does not of itself operate as an amendment, and if a formal amendment is not filed, the issue involved is not properly pleaded. Central Cal. Creditors' Assn. v. Seeley, 91 Cal.App. 327, 267 P. 138; see cases collected 49 C.J. pp. 548–549, §§ 748–750. Of course, where the motion is made during the trial, and thereafter the case is tried as if the amendment had been made, the parties, by their actions, are estopped, and cannot later complain that no formal amendment was in fact made. Greenwood v. Greenwood, 112 Cal.App. 691, 297 P. 589; Yule v. Miller, 80 Cal.App. 609, 252 P. 733; Morris v. Standard Oil Co., 188 Cal. 468, 205 P. 1073; Parmenter v. McDougall, 172 Cal. 306, 156 P. 460. In the present case the motion to amend was not made until respondent had closed its evidence. It undoubtedly would have been better trial practice for the respondent to have offered a formal amendment. We are not inclined to hold, however, that its failure to do so constituted prejudicial error. This is so because trial courts have wide discretionary powers to grant amendments to conform to proof. If parties are estopped from objecting to the failure to file a formal amendment where the motion to amend is granted early in trial and the case is tried on the theory that the amendment has been made, they should also be estopped where the case is tried on the theory that a certain issue is before the court, and at the conclusion of the trial permission is granted to amend to conform to the proof. In neither situation is the

appellant prejudicially affected by the failure to file a formal amendment. The real question on the present appeal is whether the case was tried on the theory that the doctrine of imputed negligence was involved. Stated another way, the real issue is whether there is any evidence, or any reasonable inference from the evidence, that appellant and his father were engaged in a joint enterprise so as to raise the issue of imputed negligence. If there is no such evidence, it was prejudicial error to instruct on the doctrine, whether or not the issue was properly pleaded.

A reading of the entire record demonstrates to a certainty that there is no evidence at all, and no reasonable inference from the evidence, to sustain the implied finding of the jury that appellant and his father were engaged in a joint enterprise. Appellant was admittedly mentally and physically deficient prior to the accident. Admittedly, he had a crippled arm and leg. So far as his mentality is concerned, appellant's counsel, in his opening statement, admitted that "the boy, both before the time of the accident, and at the present time, has been mentally deficient. Doctors disagree as to the exact state of his degree of mentality, whether he has that of an imbecile, or higher, or lower degree; but he was definitely, before the accident, and at birth, mentally deficient." Counsel then pointed out that prior to the accident appellant was an epileptic subject to fits and convulsions. He also stated that he was going to endeavor to prove that appellant's father was not negligent, but stated that even if he were, "it is our contention that that negligence is not imputable to the son." In his opening statement, made immediately after that of appellant, counsel for respondent did not mention the doctrine of imputed negligence. He stated, however: "Unfortunately this young man was born an imbecile, and has remained an imbecile all his life * * *." Thus, as a result of the opening statements, it was in effect agreed that the appellant, prior to the accident, was mentally deficient.

During the trial appellant's mental deficiency was at all times conceded. The only issue in relation to his mental condition that was presented was whether the serious personal injuries he suffered, including a brain concussion, had aggravated the pre-existing condition. The father and mother of the appellant testified that appellant had had but a few months' schooling; that he had been taken out of school because of his condition; that prior to the accident he could dress and care for himself, except that, because of his withered arm, he could not shave or comb his hair very well; that he helped his mother about the house in setting the table, bringing in wood, going to the store, etc. Doctor Charmak, an orthopedic surgeon, was called in to care for the boy after the accident. He testified that he had a history of the case showing that appellant had been suffering from epileptic fits from the time he was born. During the direct examination of this witness a discussion arose between counsel as to the cause of appellant quitting school. Counsel for respondent stated: "Well, I understood it was his mental deficiency, and the fact that he had epileptic fits, which prevented him from getting any schooling." The court stated: "I think so." Counsel for respondent, on cross-examination, asked this doctor: "Q. And his general mental condition, he is an imbecile, is he not?" To which the doctor replied: "A. I believe he could be rated as such." The record continues:

"Q. What would you say his mental equation is, in years? A. Oh, I would say between six and eight years of age * * *

"Q. Didn't you have a history that he was mentally deficient, from birth? A. Yes."

Dr. F. A. Di Grazia saw the appellant in July of 1940, a month before the accident. At the first meeting, at the request of appellant's mother, he made a casual examination, and a few days later made a more complete examination. He testified, on direct examination, that after the examination "I told the mother I didn't think there was much we could do with that condition." The record continues:

"Q. At that time he was an imbecile, was he? A. Yes, he was.

"Q. That is before the accident? A. Yes; definitely so."

When asked: "What age of mentality would you classify Mr. Campagna?" He answered, "He seemed to me an imbecile about nine or ten years of age—nine, I guess."

Again he was asked: "You would classify him as what, an imbecile?" He replied, "Yes, an imbecile."

The mother of the boy testified that the appellant began to get convulsions at about three months of age; that thereafter, and up to the time of the accident, he would get periodic attacks; that once he went a whole year, and once two years, without an attack; that he was subject to such attacks up to the time of the accident; that such attacks increased in number and intensity after the accident; that prior to the accident the appellant would help with simple tasks around the house; that "he has always been mentally deficient."

This is a complete summary of all of the evidence relating to the mental condition of this appellant prior to the accident. Respondent refers to two excerpts from the record which it apparently contends supports the conclusion that appellant, prior to the accident, was not mentally deficient. The father of the appellant, who is a foreigner and obviously had difficulty in explaining his exact meaning, was attempting to describe the difference in the appellant before and after the accident. When asked if the boy was born mentally deficient he testified, "No," and again, "Well, I don't know anything about that; the boy was all right." He then explained that as a baby the appellant seemed all right, but began to get fits and convulsions as a small boy. He also testified that up to the time he was five or six "He was okay, that boy." This testimony cannot be distorted into evidence that prior to the accident the boy had a normal mentality. The record discloses that the witness was trying to compare appellant's present condition with that existing prior to the accident, and was talking about apparent mental condition at birth, not the mental condition that existed after the boy was five or six years old.

The mother of appellant was also asked to describe appellant's condition before and after the accident. After testifying that prior thereto the appellant could dress and undress himself and could bathe himself, but, because of his withered arm, could not shave himself, she was asked: "What was his disposition before the accident?" She replied: "Before the accident I could talk to him, I could reason to him,—sit there and be calm and everything, and it was just like anybody else, he would he all right. You could talk. And he would do anything I say." Obviously, this evidence in no way contradicts the fact, admitted by both counsel, that appellant was mentally deficient before the accident. Both doctors, without contradiction, testified that prior to the accident appellant was an imbecile with an age rating of not to exceed ten years. From the evidence above set forth it is clear, beyond doubt, that this case was tried with that fact admitted. Respondent is in no legal position to challenge that admitted fact on this appeal.

Reference must also be made to the evidence, other than that of mentality, describing the manner in which appellant assisted his father. The father testified that he was a fruit peddler selling his fruit and vegetables from door to door; that at the time of the accident he was on his way to the commission market to get his day's supply of fruit and vegetables; that appellant was riding on the front seat with him; that he, the father, was driving; that appellant never worked for anyone except for his father; that he first went to work for his father about ten years before the accident; that an elder brother used to help the father on the truck, but when he got married appellant started to help him; that appellant went out with him every day; that "he help me lots. In going to the market he help to load the truck, and after, on the route, he deliver the stuff, fruit, vegetables, and anything for my customers"; that appellant would wait on one customer while he would wait on another; that appellant would carry the baskets of fruit and vegetables, and sometimes collect for them after the father told him how much to collect. On cross-examination the father was asked if he paid appellant for working on the truck. He replied: "Once in a while I give him a few dollars, when I could spare it." The record continues:

"Q. Whatever the two of you earned, you both went out in the morning to work together? A. Yes.

"Q. Whatever you earned together went into the family pool, didn't it? A. Yes.

"Q. And was used to support the whole family? A. Yes.

"Q. What the boy earned and what you earned? A. Well, the boy is work more voluntary.

"Q. But he was working on the truck and helping you make money in your business? A. Yes.

"Q. And he had no salary? A. No.

"Q. Whatever the two of you earned together was used by both of you together to run the family? A. Yes."

[10] This is a résumé of all the evidence on this issue. It is the contention of respondent that on this evidence the court was justified in instructing on the doctrine of imputed negligence, and that this evidence supports the implied finding of the jury that the father and appellant were engaged in a joint enterprise. Keeping in mind that such a defense is an affirmative defense and that the burden of proof on all elements of the defense was on respondent, we are of the opinion that on this evidence the trial court was not justified in instructing on the doctrine.

[11, 12] The general rule is that the negligence of the driver of a vehicle is not imputed to the person riding with him. See annotation 90 A.L.R. 631; Restatement of the Law of Torts, Vol. 2, p. 1272, § 490. To this rule there are certain exceptions. One such exception is that where the driver and passenger are engaged in a "joint enterprise" the negligence of the driver may be imputed to the passenger. There are many cases discussing what must be proved by the defendant in order to raise the doctrine. See many cases collected and commented on in annotations in 62 A.L.R. 440; 80 A.L.R. 312; 48 A.L.R. 1055; 63 A.L.R. 909; 95 A.L.R. 857. All of the authorities are agreed that in order to raise this doctrine the defendant must do more than merely show that the driver and occupant had a common purpose. In order to raise the doctrine it must be shown that the driver and occupant are engaged in a common enterprise under such circumstances that each has equal authority and rights over the control and management of the vehicle, and that each assumes a legal responsibility for the other's conduct in the operation of the vehicle. Unless the occupant would be liable for the driver's negligence, the doctrine cannot arise. The evidence must show a mutual agency flowing from what is in legal effect a limited partnership. There must exist not only a joint interest in the objects of the journey, but also an equal right to direct and control the movements of the vehicle. The doctrine is fundamentally predicated upon the right of the passenger to direct and control the movement of the vehicle. If he possesses such right then there is the duty on the part of the occupant to see to it that the vehicle is operated so as not to injure others. If the right to control the operation of the vehicle does not exist, the doctrine cannot arise. Restatement of the Law of Torts, Vol. 2, p. 1273, § 491; Prosser on Torts, p. 416, § 55; Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76; Rogers v. Goodrich, 131 Cal.App. 245, 21 P.2d 122; Evans v. Mitchell, 2 Cal.App.2d 702, 38 P.2d 437; Strandt v. Cannon, 29 Cal.App.2d 509, 85 P.2d 160; Moore v. Franchetti, 22 Cal.App.2d 75, 70 P.2d 492; Clark v. Janss, 39 Cal.App.2d 523, 103 P.2d 175; Cope v. Goble, 39 Cal.App.2d 448, 103 P.2d 598; Collins v. Graves, 17 Cal.App.2d 288, 61 P.2d 1198.

When these rules are applied to the present case it is at once apparent that no evidence at all was introduced by respondent to show that appellant ever exercised, or had the right to exercise, any control over the vehicle. The evidence shows that appellant was admittedly mentally deficient. The uncontradicted evidence shows that his mental age did not exceed that of a ten-year-old boy. It need not be held in this case that the capacity to contract is an indispensable element of proof in order to raise the doctrine of joint enterprise, although it has been so held in some jurisdictions (see cases collected 127 A.L.R. 1441 at p. 1454; 38 Am. Jur. p. 938, § 247, n. 11), but obviously the mental age of the occupant of the vehicle is a matter of some considerable importance in determining whether he and the driver were engaged in a joint enterprise. The controlling fact in the instant case is that the evidence not only fails to show that appellant exercised any control over his father, but affirmatively demonstrates that such control, or the right to control, did not exist. The evidence shows that a crippled, mentally deficient son accompanied his father on a truck and assisted him to the best of his ability. The facts that he was not paid a regular salary, or that all the money earned by the father, with the assistance of the appellant, was used to support the family, do not tend to show that the appellant had an equal right with his father to control the manner of operation of the vehicle. There is not one word of testimony that the appellant ever purported to tell his father how to operate either the business, as a whole, or the truck. It cannot possibly be inferred that he had the legal right to control the operation of the truck. There was no evidence of a legal right to share in the profits; there was no evidence of a common right to manage the truck; there was no evidence of a common liability. Under such circumstances, particularly in view of the uncontradicted evidence as to the lack of mental capacity of the appellant, it must be held, as a matter of law, that there was no evidence, or no reasonable inference from the evidence, that would support a finding that appellant and his father were engaged in a joint enterprise. Under the authorities already cited, it was error of a most serious and prejudicial nature to have instructed on the doctrine.

[13] In addition to the instructions on imputed negligence, the trial court instructed on contributory negligence. There was not one word of testimony that tended to show that appellant was guilty of contributory negligence, independently of the doctrine of joint enterprise. The giving of such instructions was clearly error.

[14] During the course of the trial appellant offered in evidence an operating rule of the respondent numbered 113. This rule reads as follows:

"Restrictions of Speed.

"113. Cars must approach the end of double track, junctions, curves, switches, terminals and street railroad crossings at a speed that will enable them to stop at the required distance from such places regardless of any emergency that might arise.

"(a) The speed of all cars will ordinarily be that prescribed in the schedule, but in cases of delay requiring greater speed in order to maintain the schedule, the speed at places not specifically restricted, may be so moderately increased as in the judgment of the trainmen in charge of the car may be safe and prudent, due consideration always being given to the location and condition of track, curves, traffic and all other circumstances.

"(b) Speed must not exceed three miles per hour when passing another car discharging passengers, a loose tongue or electric track switch, or short radius curve, and must not exceed eight miles per hour crossing another railroad track, a switch, crossover or junction. Cars must approach all crossovers and switches and intersections with care, and the motorman must be prepared to stop should other cars pull in ahead of them. * * *"

It was stipulated that this was a rule adopted by respondent, and that the motorman knew of its existence. The trial court, on objection of respondent that such rule was inadmissible because it imposed a greater duty of care than that required by statute or ordinance, refused to permit its introduction into evidence. Such rule, if material to the issue before the court, was admissible. Gett v. Pacific G. & E. Co., 192 Cal. 621, 221 P. 376; Nelson v. Southern Pacific Co., 8 Cal.2d 648, 67 P.2d 682; Smellie v. Southern Pac. Co., 128 Cal.App. 567 at page 583, 18 P.2d 97, 19 P.2d 982. Respondent concedes that the above cases establish the rule that operating rules of a street railroad, in a proper case, are admissible and may be considered by the jury in determining whether or not the motorman was negligent, but contends that this particular rule was not material. It will be noted that the rule provides that the speed of streetcars "must not exceed eight miles per hour crossing another railroad track, a switch, crossover or junction." The evidence shows that Market Street has four tracks, two for cars traveling east, and two for cars traveling west. Fremont Street is a one-way street for northerly traffic. It has double tracks, which curve and cut into the two westerly tracks on Market Street. Obviously, the situation falls within the exact situation described in the rule above quoted. Respondent argues, however, that the rule was not intended to regulate the speed of the streetcar in relation to vehicular traffic but only in relation to other streetcars. The rule placed a limitation of eight miles per hour on the motorman in crossing another "track, a switch, crossover or junction." While violation of the rule would not constitute negligence per se, the appellant was entitled to have the rule admitted on the issue of negligence. There is nothing in the rule which limits its application to other streetcars. It was obviously a rule intended to limit speeds at the designated spots not only for the benefit of other streetcars, but for the benefit of all vehicles or persons at such places. The prejudicial effect of its exclusion is at once evident when it is pointed out that some of respondent's own witnesses testified the streetcar was proceeding at a speed in excess of that provided in the rule, but not in excess of that set forth by city ordinance (fifteen miles per hour).

The judgment appealed from is reversed.

KNIGHT, J., concurs.

WARD, Justice (dissenting in part).

I dissent. I agree that when a case is tried upon a definite theory, and permission to amend a pleading to conform to the proof is given, the neglect to file the proposed amendment, though bad practice, is not necessarily prejudicial error.

Relative to the mental condition of plaintiff there is conflicting evidence from which several conclusions could be drawn. I prefer to adopt that evidently reached by the jury. The evidence shows that the adult plaintiff for a long period of time had acted as a peddler of fruits and vegetables. His father, engaged in the same enterprise, testified that his son was "okay." The proceeds of the business were placed in the family pool. There is no direct evidence in the record, and the majority opinion does not hold, that plaintiff, though mentally deficient, was incompetent to enter into a joint venture with his father in the conduct of a fruit and vegetable peddling business though lack of mental capacity is emphasized in the majority opinion. As an incident to their business it was necessary for them to go to the wholesalers at frequent intervals to purchase produce which they loaded on their truck. They were on such a mission when the accident occurred.

The evidence shows a mutual agency consisting of a limited partnership, from which a reasonable inference may be drawn that both the father and son had a right to direct and control the movements of the vehicle. The majority opinion, as I read it, is based upon the fact that there is no evidence that the son ever directed the father as to the operation of the truck. The fact, if it be a fact, that no such direction was given, is not proof of the lack of the son's authority in that regard. The fact that a driver and another are in possession of a vehicle used in a joint enterprise is sufficient to impute the contributory negligence of one to the other. Archer v. Chicago N. St. P. & P. R. Co., 215 Wis. 509, 255 N.W. 67, 95 A.L.R. 851 et seq.

In joint enterprise cases the burden of proof is on the party so alleging; but it is frequently necessary to resort to circumstantial evidence to prove the equal rights of the joint adventurers. Had the father been asked the direct question—could your son direct your movements in driving the truck?—and the answer been in the negative, such answer would not be binding on the jury. It could disbelieve the witness and conclude, from all the facts and circumstances of the conduct of the business, that the son held equal rights in the operation of the vehicle. In Blank v. Coffin, 20 Cal.2d 457, 460, 461, 126 P. 2d 868, 870, the court said: "An inference is a conclusion as to the existence of a material fact that a jury may properly draw from the existence of certain primary facts. Cal.Code Civ.Proc. §§ 1958, 1960, 1832; see cases cited in 10 Cal.Jur. 736–738, § 59. It is not always possible for a party to a lawsuit to introduce evidence directly bearing upon the existence of a fact that he is attempting to prove. The evidence available to him may serve only to establish the existence of certain primary facts that are logically connected with the material fact. If a jury can reasonably infer from these primary facts that the material fact exists, the party has introduced sufficient evidence to entitle him to have the jury decide the issue." In the present case, unless the jury determined that the father was solely responsible for the accident it must have determined from facts logically connected with the ten-year business association of the parties that there was an implied partnership, or at least a joint enterprise.

In determining the claim of a joint enterprise, each case must stand upon its own facts and circumstances. A distinction may arise in automobile accident cases between association for social purposes or pleasure and those of a business character. It may in a given case be essential to establish that an injured party on a pleasure trip had control over the driver of the vehicle. In a business enterprise, particularly when such relations have been in existence for a reasonable period, past conduct in the operation of the business may justify a reasonable inference of joint and equal control in the operation of a vehicle incident to their business.

In the case of Kelley v. Hodge Transportation System, 197 Cal. 598, 242 P. 76, cited in the majority opinion, a young lady and her escort were taking a ride for pleasure. There the "community of interest" did not indicate that the young lady passenger was entitled to be heard relative to the management of the vehicle, and she was held to be a guest of the driver. An award by the trial court was affirmed. In Rogers v. Goodrich, 131 Cal.App. 245, 21 P.2d 122, plaintiff prepared and served alcoholic drinks to her escort with whom she subsequently rode as a guest. The contention that all parties to the "joy ride" were engaged in a joint enterprise was not upheld by the jury or by the reviewing court. Evans v. Mitchell, 2 Cal.App.2d 702, 38 P.2d 437, is clearly a "guest" case, and as in the previous cases the verdict was upheld. In Strandt v. Cannon, 29 Cal. App.2d 509, 514, 85 P.2d 160, 162, it was held that "the negligence of the driver * * cannot be imputed to the guest." In the present case there is no claim by appellant that he was a guest of his father. In Moore v. Franchetti, 22 Cal.App.2d 75, 78, 70 P.2d 492, 494, express permission had been granted a daughter to drive her father's car. Upon her invitation, her sister, subsequently injured, accompanied her but did none of the driving. "The common enterprise consisted solely of the fact that they were riding together." In Clark v. Janss, 39 Cal.App.2d 523, 103 P. 2d 175, 177, a mother gave her daughters permission to drive to a nearby city for dinner. One did the driving; the other was injured in an accident sustained. There was "an entire absence of evidence showing the necessary right of control" on the part of the injured sister, and accordingly the judgment was affirmed. In Cope v. Goble, 39 Cal.App.2d 448, at page 455, 103 P.2d 598, at page 602, appellant's claim was: "* * * that the state of the evidence did not justify submission to the jury of an issue of principal and agent, master and servant, or employer and employee." No claim of imputed negligence based upon partnership or joint enterprise was presented. Once more the judgment was affirmed. In Collins v. Graves, 17 Cal.App.2d 288, 61 P.2d 1198, plaintiff (appellant), a deputy sheriff, was at the time of the accident riding with an undersheriff in a county owned car from Fresno to Sacramento. They were on a similar though not identical mission, the undersheriff doing the driving. Appellant claimed to be riding as a guest. It was held that as a matter of law a joint enterprise had not been shown and that (17 Cal.App.2d at page 297, 61 P.2d at page 1202): "Having tried the case on the theory that the testimony relating to the question of joint enterprise was such as to present a question of fact to the jury, it does not lie within the mouth of the appellant to now argue that the court erred in so doing." There are numerous other cases than those cited in the majority opinion wherein social activity, pleasure or accommodation played a part, and the jury and reviewing court held that a joint enterprise had not been proven. It is well established that joint adventure may not be declared solely upon evidence that a social relationship existed.

The discussion may be taken a bit further. There is authority holding that when parties are engaged in a common enterprise, even business, one owning the car and doing the driving and the other contributing toward the expenses of a trip, the right of the "guest" to control the operation of the car does not exist. Walker v. Adamson, 9 Cal.2d 287, 70 P.2d 914; Rogers v. Goodrich, supra. It is the claim in such cases that has caused the emphatic language, upon which the majority opinion is based, to be used. In McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909, it was held that compensation may be as variable as are the facts in different cases (Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53; Whitechat v. Guyette, 19 Cal.2d 428, 122 P.2d 47), but in the present case the question of guest or compensation for the ride is not involved.

It is conceded that the instruction as given was a correct statement of the law. That the father was solely or at least responsible in common appears from the evidence. Under the latter theory the instruction was proper. The refusal to give instructions upon one of the defenses supported by substantial evidence would have been error. If there was no evidence of a joint enterprise this court would be justified in declaring as a matter of law that the instruction was improper, but under all the circumstances as they appear in the record it is necessary, in order to reach the conclusion adopted in the majority opinion, to weigh the evidence and substitute the view of the reviewing court for that of the jury.

A joint adventure is a limited partnership or association of persons in a common enterprise for profit. A partnership or a joint adventure may relate to one or more transactions. 14 Cal.Jur., p. 760, sec. 2. A partner has equal rights with his associates in the management of the business. Civil Code, sec. 2412. Where several persons, assuming a community of interest, are associated to promote profit, the rules are the same. Butler v. Union Trust Co., 178 Cal. 195, 172 P. 601; Arnold v. Humphreys, 138 Cal.App. 637, 33 P.2d 67.

Appellant was a business associate of his father in business for profit. In Heitman v. Pacific Electric Ry. Co., 10 Cal. App. 397, 102 P. 15, a deceased was associated with one Caseboom in the transfer business. Caseboom drove a wagon drawn by mules upon the tracks of defendant railway. Held that the negligence of Caseboom was imputed to the deceased. In that case the only question seemed to be, was Caseboom guilty of negligence.

In Schron v. Staten Island Electric R. Co., 16 App.Div. 111, 45 N.Y.S. 124, at page 125, where a father and son were engaged in moving goods by means of a horse and wagon, the court held: "* * * They were therefore engaged in a joint occupation and venture, and each became liable for the negligence of the other." Cass v. Third Ave. R. Co., 20 App.Div. 591, 47 N.Y.Supp. 356; Van Horn v. Simpson, 35 S.D. 640, 153 N.W. 883. The court properly held that the question of negligence and contributory negligence were questions for the jury.

In the present case there was evidence that the father and son were engaged in a business which was jointly personal to the father and son. "When the journey on which the plaintiff and the driver of the vehicle are participating is itself a part of a business enterprise in which the parties are mutually interested, the two are engaged in a joint enterprise." 95 A.L.R., p. 858. Contributory negligence is a matter to be passed upon by a jury. It was therefore within the province of the jury following well-established principles of law to pass upon the fact as to whether plaintiff at the time of the accident had the right of joint control with the driver of the vehicle. Bryant v. Pacific Electric Ry. Co., 174 Cal. 737, 164 P. 385.

The facts of this case warrant a verdict for the defendant upon the evidence that the father was solely responsible for the accident. On the morning of its occurrence the visability was good. The driver of the truck crossed a street on which there were four sets of street car tracks, two carrying westbound traffic; and two, eastbound. He knew that it was quite possible for him to meet from one to four street cars at the intersection, and this should have constituted a practical warning. He approached the intersection from the south, intending to cross it, and struck the street car moving along the third set of rails, and at the time well into the intersection, on its side about ten feet back from the front thereof. The motorman testified that he slowed down as he entered the intersection and made an observation for vehicles; that there were none, but that a street car going east partially obscured his vision just before the accident. Assuming that the negligence of the father was not the sole proximate cause of the accident, and that there was evidence that the defendant was negligent, there is an overwhelming amount of evidence that the father was guilty of contributory negligence in running into the side of the street car.

Certain rules of the defendant company were admitted in evidence. Appellant claims reversible error in an instruction quoted in the majority opinion. The admission of operating rules is subject to the limitation that they are material to an issue in the case. An analysis of the rule herein indicates that it is for the protection and to save wear and tear of the car and the tracks; but even assuming it to be susceptible to the construction given in the majority opinion, the verdict of the jury must have been based upon the sole negligence of the driver of the truck, in which event the refusal of the instruction is immaterial. If the contributory negligence of the driver of the truck be considered, it must first be determined that the defendant was negligent. Assuming the negligence of the defendant to have been established, it is immaterial whether defendant motorman operated his car at a speed of fifteen miles an hour under the provisions of the law, or not to exceed eight miles an hour under the rules of the company. In either event the refusal of the instruction should not be held to be and is not prejudicial. The speed of the street car was a question of fact. Any limitation by rules of the company upon its employees more strict than the prevailing law would and could not change the rule of ordinary care applicable to the facts of this case. It must be assumed, if there is any basis for the majority opinion, that the driver of the truck was negligent. If the jury so found, appellant was not harmed by a refusal to admit the rule in evidence.

In conclusion it may be said, whether a given inference may be drawn is a question of fact. If the jury from the evidence draws an inference upon which it bases a verdict unfavorable to a litigant, a reviewing court may not substitute its opinion for the conclusion reached by a fair, impartial jury. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 45 P.2d 183; Pacific Lumber Co. v. Industrial Acc. Comm., 22 Cal.2d 410, 139 P.2d 892.

In my opinion the judgment should be affirmed.

Rehearing denied; WARD, J., dissenting.

61 Cal.App.2d 344

LUCAS v. ASSOCIACAO PROTECTORA UNIAO MADEIRENSE DO ESTADO DA CALIFORNIA et al.

Civ. 12470.

District Court of Appeal, First District, Division 1, California.

Nov. 16, 1943.

Rehearing Denied Dec. 16, 1943.

Hearing Denied Jan. 13, 1944.

1. Trusts 🔑103(1)

When two members of same fraternal order deal with each other and one accepts as true the other's representations, into which but for fraternal relation he would have made inquiry, law will protect him in his trust.

2. Trusts 🔑100

If fraternal lodge was in a confidential and fiduciary relationship to a lodge member, lodge's failure to carry out agreement regarding obtaining of member's property by friendly foreclosure suit so as to enable member to obtain a loan from lodge constituted a fraud on the member.

3. Trusts 🔑110

Evidence that lodge member was advised by lodge's attorney that to obtain a loan from lodge member had to have a clear title to her realty, and that only way of obtaining clear title was by lodge's friendly foreclosure suit, justified finding that lodge in securing assignment of trust deed and in holding foreclosure was acting as "trustee" for the member.

See Words and Phrases, Permanent Edition, for all other definitions of "Trustee".

4. Trusts 🔑357(2)

Where fraternal lodge held member's property subject to trust, a purchaser of the property with knowledge of trust took title subject to the trust, whether or not there was a confidential relationship between purchaser and the member.

5. Trusts 🔑357(2)

Where transferee of property held in trust by transferor has knowledge of trust, it is immaterial that transferee acted in good faith or without intention of perpetrating a wrong, and transferee holds the property in trust for equitable owner.

6. Trusts 🔑357(2)

Although transferee may have had no knowledge of fact that property or money was held by transferor as trustee, equitable owner's claim is superior to that of transferee if attending circumstances justify or require conclusion that transferee ought to have known of existence of the trust.

7. Trusts 🔑372(3)

Evidence that fraternal lodge member, who sustained a confidential relationship to lodge, was informed by lodge's attorney that to enable lodge to make loan to member lodge would have to acquire member's property by friendly foreclosure suit, that member was not informed that a creditor was to bid at foreclosure sale, and that purchaser at sale had knowledge of circumstances, justified holding that purchaser held property in trust for the member, notwithstanding purchaser had no intent to defraud such member.

8. Trusts 🔑371(2)

A complaint against fraternal lodge, its directors, and purchaser of property upon foreclosure of trust deed acquired by the lodge sufficiently pleaded confidential relationship to warrant judgment that purchaser held the property in trust for plaintiff.

9. Trusts 🔑371(2)

The alleged insufficiency of allegation to properly charge a conspiracy was imma terial where there were sufficient allegations independent of conspiracy charge to allege a trust based on theory of breach of confidential relationship.

10. Judgment ⚷250

Plaintiff is entitled to relief on any theory supported by facts alleged.

11. Trusts ⚷100

A fraternal lodge member, who was advised by lodge's attorney that only way to obtain a clear title so as to enable member to obtain a loan was through a friendly foreclosure suit by the lodge, did not fail to show fraud on theory that advice given was only an expression of opinion on question of law, where there was a confidential relation between member and lodge and member justifiably relied on the representation.

12. Trusts ⚷375(1)

A judgment, holding that defendant held property in trust for plaintiff subject to repayment to defendant of moneys which he expended in acquiring, improving, and maintaining the property, less moneys received as rents and benefits, should prescribe a time limit within which plaintiff should pay the defendant, and should provide for method for ascertaining such charges.

◆

Appeal from Superior Court, Alameda County; Benjamin Jones, Judge.

Action by Julia Lucas against Associacao Protectora Uniao Madeirense Do Estado Da California and others for a decree that certain real property held by John J. Montero was held in trust for the plaintiff. From a judgment for the plaintiff, John J. Montero appeals.

Affirmed with instructions.

E. H. Christian and John Jewett Earle, both of Oakland, for appellant.

J. Elwood Andresen and Thomas J. Michaels, both of Oakland, for respondent.

PETERS, Presiding Justice.

This action was brought by Julia Lucas against the Associacao Protectora Uniao Madeirense Do Estado Da California, a Portuguese social, beneficial and benevolent fraternal organization of which she is a member, and against its directors and several of its members, including John J. Montero. The judgment decreed that John J. Montero holds certain real property in trust for plaintiff. From this judgment John J. Montero alone appeals.

The evidence most favorable to respondent is as follows: Respondent and appellant, in the year 1940, were members of the defendant lodge, although of different councils. The lodge was authorized, among other things, to lend money on real property secured by first liens. Prior to January, 1940, respondent had secured an interlocutory decree of divorce from her husband, and had been awarded a life estate in the real property in question, which was a large city lot improved with a residence and outbuildings. She occupied the house with her two children and her mother. Her husband had declared a homestead on the property, and there were certain liens against the remainder interest of the husband which arose subsequent to the homestead. There was also a loan against the property, secured by a deed of trust prior to the homestead, which was held by the Pacific States Savings & Loan Company on which there was a sum less than $500 due. There was also the possibility that a former wife of the husband of respondent had some claim to the property. Taxes were delinquent. Under these circumstances, respondent arranged to buy out her divorced husband's remainder interest for $200. She desired to secure a loan from the lodge for this purpose. In January, 1940, she was introduced to Joe Montero, brother of appellant, and a member of the loan committee of the lodge. Joe Montero appraised the property at $2,050, and recommended that the lodge could safely lend up to $800 on the property. After the Board of Directors had approved Montero's recommendation, Montero took respondent to E. H. Christian, attorney for the lodge. The attorney secured a title search and discovered the possible claims against the property, and came to the conclusion that it would be impossible for respondent to give the lodge a first deed of trust as security for the proposed loan. The attorney then suggested, and advised, that there was one way, and one way only, that the title could be cleared and the loan made. He suggested that the lodge would purchase, or obtain an assignment of the existing note and deed of trust from the Pacific States Savings & Loan Company; that then the lodge could foreclose or sell under the deed of trust; that the lodge would purchase at the sale and thus obtain a title clear of all defects; that after the lodge had thus secured a clear title it would reconvey to respondent or to her nominee upon her executing a promissory note secured by a first deed of trust for the amount of the money advanced and expenses incurred by the lodge. This would, of course, give respondent or her nominee a clear title. Neither the attorney nor any member of the loan committee made any attempt to get in touch with those who had possible claims against the property to see if they would quit claim to respondent, nor did they suggest the possibility of a quiet title action to test the validity of such claims. The attorney informed respondent that the procedure outlined above was the only way to proceed. He also informed respondent that the sale of the property would have to be by a public sale, that the lodge would bid only in the amount of its advances, and that a private bidder might bid higher and take the property. He told respondent that she ought to keep the whole thing quiet.

The respondent, in the belief that the procedure outlined was the only method by which she could get the property, and without full realization that she would thus be jeopardizing her life estate therein, and upon the assurance of the lawyer that "We will see the property is protected and taken care of," agreed to the plan.

Pursuant to this plan the lodge thereafter purchased, from the Pacific States Savings & Loan Company, the existing deed of trust, and had two of its members, one of whom was Joe Montero, substituted as trustees under the deed of trust. The trustees published and posted the usual notices of sale, the sale to be held at 10 a. m., August 23, 1940. Approximately ten days before the sale the attorney was informed by a creditor of the remainderman that his client would probably bid at the sale. Although the attorney knew respondent's address, he did not inform her of this fact until the morning of the sale, did not inform any of the lodge members of this fact until the night before the sale, and did not take any steps permitted by law to postpone the sale so that respondent could attempt to protect her interests.

The night before the sale the attorney told Joe Montero that the creditor of respondent might bid at the sale. Joe thereupon telephoned to his brother, the appellant, and informed him generally of the situation. Until John received this telephone call he knew nothing about the transaction and did not know respondent. Joe told his brother that the property was of such a value that he could safely bid $1,400 or $1,500, but that, if he did bid, he was not to compete with the lodge but was to bid only if some third person bid higher than the lodge.

The next morning, and prior to the sale, Joe Montero met with his brother. At that time he told appellant "about Mrs. Lucas and about the lodge trying to help her out." When asked if he explained the whole transaction to his brother, he replied "I explained the best I knew how." From this evidence, and from the record as a whole, it is a reasonable inference that prior to the sale appellant knew all about the relationship between the lodge and respondent.

The sale was held at 10 a.m., August 23, 1940. Ten minutes before the sale was to occur, respondent was informed by the attorney of the fact that the creditor of her husband was a prospective bidder. Respondent asked the attorney why she had not been informed sooner. According to respondent's testimony, which is not disputed (the attorney not being called as a witness by appellant), the attorney told her that he was busy and did not have her telephone number and that he did not think the creditor would bid. Respondent pointed out to him that he could have written to her about the matter and stated: "If I knew that, I could have somebody bid for me." In spite of this objection, neither the attorney nor the trustees took any steps to postpone the sale as they could legally have done. Promptly at 10 a.m. the sale was had, the attorney for the lodge acting as auctioneer. A lodge member bid $796.48. This witness testified that the attorney told him not to bid any more. The creditor of the husband bid $1,100, whereupon appellant bid $1,125, and, there being no further bids, the property was sold to him.

Immediately after the sale, and prior thereto, respondent protested to several of the lodge members, including some of the directors. She was assured that she should not worry—that everything was going to be all right. One of the then directors of the lodge—Frank S. Jardin—told respondent: "Why, that is your own brother. He is going to buy for the lodge and everything looks all right."

Shortly after the sale the respondent asked appellant to reconvey the property to her, she offering to pay the purchase price, plus an appreciable sum for his trouble.

Appellant refused not only her request, but the request of a committee of the lodge later appointed to induce him to convey to respondent in order to maintain fraternal harmony and to carry out the arrangement made with respondent, unless respondent would pay him $3,000 for the property. He took the position then, and contends now, that he bought the property as his own without any understanding or arrangements with anyone.

For two months after the sale respondent continued to live on the property, making two payments of $15 to appellant. She then refused to make any further payments and appellant had her evicted by court order. This action was thereafter instituted.

On this evidence the court concluded that appellant holds the title to the property in trust for the respondent, subject to the repayment to him of all moneys expended by him in acquiring and caring for the property, less the rentals received by him.

The findings are not as clear as might be desired in that the proper distinction between the defendant lodge, the defendant lodge members, and the appellant was not clearly made. In spite of this defect, however, the findings are full, fair, and complete, and clearly disclose the theory of the trial court and amply support the judgment. The court found that the attorney for the lodge told respondent that the only way the transaction could be legally consummated was by the friendly foreclosure; that this plan was agreed to by the respondent and the lodge; that at all times there was a confidential and fiduciary relationship between the "defendants" and respondent; that respondent relied on the promises and representations made by the "defendants"; that in reliance on the agreement respondent abandoned all other attempts to refinance the indebtedness; that prior to the sale the "defendants" knew that a creditor of the husband of the respondent intended to bid at the sale; that this knowledge was withheld from respondent until just before the sale; that a director of the lodge, immediately after the sale, told respondent that appellant had bought the property for the lodge; that appellant obtained all of his knowledge of the transaction from his brother, who was a lodge member and one of the members of the loan committee and one of the substituted trustees; that a demand was made by respondent for a reconveyance, which was refused; that by reason of the failure of "defendants" to perform their agreement the respondent was defrauded and deceived and ousted from possession; that the friendly foreclosure suit was not the only way to clear respondent's title for the purpose of subsequent hypothecation; that the payments made by respondent to appellant were not made as rent but were to be applied pursuant to the agreement.

On this appeal many technical objections are raised by appellant. Fundamentally but one basic question is presented, namely, whether appellant's knowledge of the situation was such that the trial court was justified under the law in holding that appellant took the property in trust for respondent. On this question we have no hesitancy in holding that the determination of the trial court is supported by the facts and by the law.

[1] The court found that there was a relationship of trust and confidence between the lodge and respondent. This finding is clearly supported by the evidence. In Paladine v. Imperial Valley F. L. Ass'n, 65 Cal.App. 727, at page 745, 225 P. 291, at page 299, it is stated: "For reasons equally cogent it must be held that, when two men deal with each other as members of the same fraternal order, and one accepts as true the representations of the other, into which but for the fraternal relation he would have made inquiry, the law will protect him in his trust." Appellant claims the above quoted portion of the opinion is dictum and is not sound in any event. With these contentions we cannot agree. The quoted rule is particularly applicable to the facts of the present case because the record demonstrates that respondent as a fact placed confidence in the lodge and its attorney, and that without such trust and confidence the agreement here involved would not have been made.

[2] Once it is established that the lodge was in a confidential and fiduciary relationship to respondent, the failure of the lodge to carry out the agreement as contemplated constituted a fraud on respondent. See cases collected 25 Cal.Jur. p. 164, § 34. In addition, as found by the trial court, the attorney for the lodge falsely represented that the only way to cure the title was by the friendly foreclosure suit. While it is true that respondent was told that the public might bid at the sale, she was not told until immediately before the sale that the lodge had knowledge that a

particular third person intended to bid. No steps were taken to postpone the sale to permit her to refinance from other sources.

[3-5] When the evidence is considered as a whole, it is apparent that the trial court was justified in finding that the lodge in securing the assignment of the trust deed, and in holding the foreclosure, was acting as trustee for respondent. Sandfoss v. Jones, 35 Cal. 481; Webb v. Vercoe, 201 Cal. 754, 258 P. 1099, 54 A.L.R. 1200; see cases collected in annotations 42 A.L.R. 10, 78; 54 A.L.R. 1195, 1198; 135 A.L.R. 232, 250. Once it is established that the lodge held the property subject to the trust above defined, it follows, as a matter of law, that if appellant knew of the trust when he purchased, he took title subject to the trust whether or not there was, in fact, a confidential relationship between him and respondent. The rule, supported by many cases, is thus stated in 25 Cal.Jur. p. 222, § 90: "On the other hand, a person who acquires property from another with knowledge that the transferor has merely the legal title, equitable ownership being in a third person, is deemed to hold the land, goods or securities charged with a trust in favor of the equitable owner; and the latter may maintain a suit to establish ownership and compel a transfer of the property." In Thompson v. Bank of California, 4 Cal.App. 660, 667, 88 P. 987, 989, the court stated: "And a court of equity will enforce a trust against all persons who, with notice of the trust, come into possession of the trust property, in the same manner and to the same effect as against the original trustee." This rule was established in this state as early as the case of Price v. Reeves, 38 Cal. 457, where it was held that a party who purchases trust property, with knowledge of the trust, occupies the same position with the original trustee. In this case one of the defendants promised to bid in certain property at a foreclosure sale and hold the same for an obligation owed defendant by plaintiff. This defendant purchased the property at the foreclosure sale, but then sold to another defendant who had knowledge of plaintiff's rights. The court held that the first defendant took the property in trust for plaintiff, and that the second defendant, who took with knowledge, was also chargeable as trustee, and was liable for the value of the property after he had conveyed to a bona fide purchaser. See, also, Scrivner v. Dietz, 84 Cal. 295, 24 P. 171; Bell v. Staacke, 141 Cal. 186, 74 P. 774; Moultrie v. Wright, 154 Cal. 520, 98 P. 257; Middlecoff v. Durnal, 130 Cal.App. 119, 19 P.2d 810. Where the transferee has knowledge of the trust, it is of no importance that he acted in good faith or without intention of perpetrating a wrong. Scott v. Symons, 191 Cal. 441, 216 P. 604; Scott v. Umbarger, 41 Cal. 410; Municipal Bond Co. v. Riverside, 138 Cal.App. 267, 32 P.2d 661. These principles, in our opinion, are applicable to the facts of the instant case.

[6] There can be no doubt that appellant knew, prior to the purchase, the essential elements and circumstances of the transaction between respondent and the lodge. The court's finding in this respect is amply supported by the testimony of Joe Montero. The only material fact of which appellant did not have actual knowledge was that the lodge, or its attorney, had not told respondent that they knew a creditor intended to bid at the sale in time for her to protect her interests. However, the trial court was justified in believing that, under all the circumstances, the appellant was put on notice sufficient to require him to make inquiry. The applicable rule, supported by many authorities, is thus stated in 25 Cal.Jur. p. 223, § 91: "Although the transferee may have had no actual knowledge of the fact that the property or money was held by the transferor as trustee, the claim of the equitable owner will be held to be superior to that of the transferee where the circumstances attending the transaction justify or require a conclusion that the transferee ought to have discovered or acquired knowledge of the existence of the trust. The rule is that knowledge may be imputed to the defendant where the facts were such that a 'prudent' man would have made inquiry as to the state of the title, and the investigation would have disclosed the existence of the trust."

[7] Under these rules it matters not that appellant did not personally know respondent, or that, in fact, no relationship of trust and confidence existed between him and the respondent. The lodge was acting as a trustee. This, the appellant knew. The trial court has found, and the finding is supported, that the lodge violated that trust. This, the defendant should have known. Under such circumstances, innocent as appellant may have been of

any intent to defraud respondent, equity will not permit him to retain the fruits of the transaction.

[8-10] Appellant makes many technical objections to the judgment, none of which is ground for reversal. He urges that a confidential relationship was not properly pleaded. The following cases, in which demurrers were overruled, demonstrate the point is without merit: Sandfoss v. Jones, 35 Cal. 481; Webb v. Vercoe, 201 Cal. 754, 258 P. 1099, 54 A.L.R. 1200; Penziner v. West American Finance Co., 133 Cal.App. 578, 24 P.2d 501. Appellant also points out that the amended complaint upon which the cause proceeded to trial purported to charge a fraudulent conspiracy among all the defendants, and contends that the conspiracy is not properly alleged. The pleadings (sixth and seventh amended complaints) are certainly not models. The allegations are properly insufficient to properly charge a conspiracy. But there are sufficient allegations, independent of the conspiracy charge, to allege a trust based on the theory above fully discussed. For this reason the allegations of conspiracy may be disregarded. This conclusion is also an answer to the contention that the findings are not responsive to the issues framed by the pleadings. Facts sufficient to support the theory of a trust were sufficiently pleaded. The mere fact that the pleader may have intended to plead a conspiracy is immaterial as long as the facts to support a proper theory were also pleaded. The plaintiff is entitled to relief on any theory supported by the facts alleged.

[11] The appellant also urges that the advice given as to how to clear the title was only an expression of opinion on a question of law, and, for that reason, the finding of fraud based thereon is not supported. The rule of the cases cited by appellant—Choate v. Hyde, 129 Cal. 580, 62 P. 118, and Perlick v. Pac. Discount Corp., 53 Cal.App.2d 136, 127 P.2d 647—is not here applicable. As shown by the Perlick case, that rule has no application where there is either a confidential relation or where there is justifiable reliance on the representation. Both exceptions here apply.

[12] Appellant does make one meritorious contention, which relates, however, only to the form of the judgment. The judgment decrees that appellant holds the title to the property "in trust for the plaintiff Julia Lucas, subject however to the repayment to him of all moneys which the said defendant expended in acquiring, improving and maintaining said property, less however all moneys received as rents and benefits collected from said property by said defendant." It will be noted that the judgment fails to prescribe a time limit within which respondent must pay appellant, and fails to provide for a method for ascertaining those charges. Obviously, respondent should not have an unlimited period within which to pay appellant. This defect, however, in no way affects the soundness of the judgment. The judgment is affirmed. The trial court is instructed to ascertain the amounts due to appellant, and to thereupon fix a reasonable period within which respondent must pay appellant the amount so ascertained. Respondent to recover her costs on this appeal.

KNIGHT and WARD, JJ., concur.

OCCIDENTAL INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14141.

District Court of Appeal, Second District, Division 3, California.

Nov. 16, 1943.

Hearing Granted Jan. 13, 1944.

1. Admiralty 🔑20

In case injuries to seaman fisherman are sustained under conditions bringing his claim clearly within admiralty jurisdiction, that jurisdiction is exclusive. Merchant Marine Act 1920, § 33, 46 U.S.C.A. § 688; Judiciary Act of 1789, 1 Stat. 76, 77, § 9; Jud. Code §§ 24, 256, 28 U.S.C.A. §§ 41, 371; Const. art. 1, § 8, cl. 17; art. 3, § 2.

2. Workmen's compensation 🔑1939

Finding of the Industrial Accident Commission that seaman fisherman was injured in the course of employment having substantial support in the evidence is conclusive.

3. Admiralty 🔑20

Action of seaman fisherman for damages based upon alleged negligence of employers in respect of injury sustained in employers' warehouse when getting nets to be used on boat on which he was employed was clearly within jurisdiction of federal court, and award in his favor by Industrial Accident Commission was void as constituting an unconstitutional application of state workmen's compensation law. St. 1937, p. 265 et seq., § 3201 et seq.; Merchant Marine Act 1920, § 33, 46 U.S.C.A. § 688; Judiciary Act of 1789, 1 Stat. 76, 77, § 9; Jud.Code §§ 24, 256, 28 U.S.C.A. §§ 41, 371; U.S.C.A. Const. art. 1, § 8, cl. 17; art. 3, § 2.

◆

Proceeding under the Workmen's Compensation Act by Steve Ruljanovich, claimant, to recover for injuries, opposed by the Occidental Indemnity Company, insurer. Award of compensation by the Industrial Accident Commission, and the insurer petitions for review.

Award annulled.

Henry E. Kappler, of Los Angeles, for petitioner.

Everett A. Corten and Fred Goldsworthy, both of San Francisco, for respondents.

SHINN, Acting Presiding Justice.

Proceeding in review seeking annulment of award by Industrial Accident Commission to Steve Ruljanovich against petitioner herein, insurer of his employers, for injuries sustained in his employment as a seaman fisherman. Ruljanovich, until 7 or 8 years before his injury, was a fisherman, later an employee in a fish cannery, where he had been working until about two months before his injury. He was employed as a seaman fisherman by the owners of the fishing boat "Betsy Ross," a tuna boat working out of San Pedro. As compensation he was to receive a percentage of the catch. On the day following the agreement of employment Ruljanovich went on the boat with others and did some work putting it into shape. They then went across the bay, took a truck and went to a warehouse to get the boat's tuna nets. While in the warehouse Ruljanovich was hit on the head by a falling timber and sustained injuries, for which compensation was awarded.

On the day he filed his application with the Industrial Accident Commission he filed in the United States District Court an action in rem and personam against the vessel and her owners, seeking a decree for the payment of wages, maintenance and cure. The fact that this action had been instituted was first brought to the attention of the Industrial Accident Commission upon petition of Occidental Indemnity Company for a rehearing. A rehearing was denied and on the same day Ruljanovich filed an amended libel alleging his employment, the occurrence of his injuries, and charging that the accident resulted from the combined negligence of the warehouse company and Frank Muljat, one of the owners and a member of the crew of the "Betsy Ross." He sought a decree for the payment of wages, maintenance and cure and damages in the sum of $15,000.

The controlling question involved in the instant proceeding is whether the Industrial Accident Commission of California had jurisdiction of the proceeding before it, for the reason that Ruljanovich must seek redress through the admiralty jurisdiction of the United States District Court, because he is entitled to recover for his injuries under the Jones Act. Sec. 33, Merchant Marine Act of June 5, 1920, 41 Stat. 1007, c. 250, 46 U.S.C.A. § 688. That act provides: "Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; * * *." By this act the right was given to employees to recover for injuries resulting from negligence of their employers. Federal Employers' Liability Act, 45 U.S.C.A. §§ 51–60.

It is the contention of respondents that although Ruljanovich's injury arose out of and occurred in the course of his employment as a seaman fisherman, and although he was employed to fish upon the high seas, his right to recover from his employers is governed by the Workmen's Compensation Law as administered by the Industrial Accident Commission, because he was injured while on shore.

[1] By the Jones Act the admiralty jurisdiction was broadened so as to add actions by seamen for the recovery of damages for personal injuries, due to negligence of the owner of a vessel, to the existing rights to receive maintenance and cure, and to recover damages for injuries sustained through the unseaworthiness of the vessel. If re-

spondent's injuries were sustained under conditions bringing his claim for damages clearly within the admiralty jurisdiction, that jurisdiction is exclusive, under Article III, sec. 2, of the Constitution, which extends the judicial power of the Untied States "to all Cases of admiralty and maritime Jurisdiction," Article I, sec. 8, which confers upon Congress power "To make all Laws which may be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof," and under sec. 9, Judiciary Act of 1789, 1 Stat. 76, 77; Judicial Code, secs. 24 and 256, 28 U.S.C.A. §§ 41, 371, under which the District Courts of the United States were given "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, * * * saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Southern Pacific Co. v. Jensen, 1917, 244 U.S. 205, 37 S.Ct. 524, 61 L.Ed. 1086, L.R.A.1918C, 451, Ann.Cas. 1917E, 900; Knickerbocker Ice Co. v. Stewart, 1920, 253 U.S. 149, 40 S.Ct. 438, 64 L. Ed. 834, 11 A.L.R. 1145; State of Washington v. Dawson & Co., 1924, 264 U.S. 219, 44 S.Ct. 302, 68 L.Ed. 646; Nogueira v. New York, N. H. & H. R. Co., 1930, 281 U. S. 128, 137, 50 S.Ct. 303, 74 L.Ed. 754, 760. Admittedly the injuries were sustained under conditions which would bring the case within the literal scope of the Workmen's Compensation Law.

The question of jurisdiction must be determined from a consideration of the nature of the services for which respondent was engaged, the nature of those in which he was injured, and the circumstances thereof. He was to serve as a seaman and a fisherman upon navigable waters, without any specific duties to be performed on shore, but presumably with such shore duties as were incidental to the preparation of the vessel for voyages and to the business of taking and discharging cargoes of fish. As a member of the crew he was assisting in taking aboard the vessel's nets which were essential to carrying on the business of fishing. This was a part of his duties as a seaman and well within the scope of his employment. He had been aboard the vessel for a brief time helping to fit her for a voyage, and the bringing of the nets aboard was no less a part of the outfitting of the vessel than would have been the storage of the nets after they had been brought aboard. The case on its facts is within the rules announced by the Supreme Court in O'Donnell v. Great Lakes Dredge & Dock Co., 1943, 318 U.S. 36, 63 S.Ct. 488, 87 L.Ed. 596. There a seaman employed on a sand ship had gone from the vessel to the dock in order to repair a gasket in a pipeline which was being used to unload the ship. While on the deck he received injuries through the negligence of a fellow employee. A judgment of the district court dismissing his action for damages against the employer was reversed. The court said in part (at page 489 of 63 S.Ct.): "The question for decision is whether a seaman injured on shore while in the service of his vessel is entitled to recover for his injuries in a suit brought against his employer under the Jones Act. * * * [492 of 63 S. Ct.] The right of recovery in the Jones Act is given to the seaman as such, and, as in the case of maintenance and cure, the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters. See Waring v. Clarke, 5 How. 441, 12 L.Ed. 226, and New England Mut. M. Ins. Co. v. Dunham, 11 Wall. 1, 20 L.Ed. 90, supra. * * * [and at page 490 of 63 S.Ct.] The term 'seamen' has been interpreted to embrace those employed on a vessel in rendering the services customarily performed by seamen, including stevedores while temporarily engaged in stowing cargo on the vessel. International Stevedoring Co. v. Haverty, 272 U.S. 50, 47 S.Ct. 19, 71 L.Ed. 157; Buzynski v. Luckenbach S. S. Co., 277 U.S. 226, 48 S.Ct. 440, 72 L.Ed. 860. There is nothing in the legislative history of the Jones Act to indicate that its words 'in the course of his employment' do not mean what they say or that they were intended to be restricted to injuries occurring on navigable waters."

Respondents contend that Ruljanovich was not engaged in the service of his vessel at the time of his injury because he was on shore, and they rely upon findings of the commission that "1. Steve Ruljanovich, applicant, while employed as a seaman fisherman, * * * sustained injury arising out of and occurring in the course of said employment when he was struck on the head by a timber. * * * 2. Said employee at the time of the injury was not engaged in work in connection with his occupation as seaman and said injury did not occur on a vessel or on navigable waters outside of the State of California but within the boundaries of the State of California, and therefore this Commission has jurisdiction in this proceeding." Respondents contend, and properly, that the findings, read together, mean that Ruljanovich was injured in the course of his employment as a seaman fisherman but that the injury was not sustained while he was on the vessel or on navigable waters. Apparently it was the contention of respondents at the time of the hearing before the commission, which was before the decision in the O'Donnell case, that the fact that Ruljanovich was on shore established the jurisdiction of the state commission as against that of the Federal court. But even if such had been assumed to be the law after the passage of the Jones Act, as it unquestionably was before that time, it is no longer the law, since the maritime jurisdiction has been broadened and it has been decided that it is the nature of the service and its relationship to the operation of the vessel, and not the place where the injury is inflicted, that determines the question of jurisdiction.

[2] The finding of the commission that Ruljanovich was injured in the course of his employment, having substantial support in the evidence, is conclusive. But respondents argue, as we understand it, that this finding should be construed, if possible, so as to support the decision of the commission that it had jurisdiction of the case. They urge that there is a strong presumption that the commission has not made an application of the Workmen's Compensation Act, Labor Code, § 3201 et seq., St. 1937, p. 265 et seq., which invades the constitutional jurisdiction of the federal courts and that we should allow that presumption to control our decision of the case. They rely upon Davis v. Department of Labor and Industries of Washington, 1942, 317 U.S. 249, 63 S.Ct. 225, 87 L.Ed. 246, where state jurisdiction was upheld after it had been denied by the Industrial Accident Commission and the courts of the State of Washington. The facts of that case were that Davis, a structural steel worker, while engaged in examining and cutting steel after it had been lowered to a barge anchored in a navigable river, in the process of dismantling an abandoned drawbridge, fell or was knocked into the stream and drowned. He had been helping to cut steel from the bridge before taking up his duties on the barge. The court had before it for consideration the Workmen's Compensation Law of Washington, particularly the provision thereof which granted compensation to "all employers and workmen * * * engaged in maritime occupations for whom no right or obligation exists under the maritime laws" (Rem.Rev.Stat.(Wash.) secs. 7674, 7693a) and also the Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., which provides § 903): "Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law."

The court determined that the state law, under the facts of Davis' employment and death, did not encroach upon the maritime jurisdiction of the Federal courts to a forbidden extent. This conclusion was reached by way of reaffirmance of the rule first stated in Southern Pacific Co. v. Jensen, supra, 244 U.S. 205, at page 216, 37 S.Ct. 524, at page 529, 61 L.Ed. 1086, 1098, L.R.A.1918C, 451, Ann.Cas. 1917E, 900: "Equally well established is the rule that state statutes may not contravene an applicable act of Congress or affect the general maritime law beyond certain limits. * * * And plainly, we think, no such legislation is valid if it contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations. This limitation, at the least, is essential to the effective operation of the fundamental purposes for which such law was incorporated into our national laws by the Constitution itself." Of this rule it was said in the Davis case (page 227 of 63 S.Ct.): "When a state could and when it could not grant protection under a compensation act was left as a perplexing problem, for it was held 'difficult, if not impossible' to define this boundary with exactness. * * * Harbor workers and longshoremen employed 'in whole or in part, upon the navigable waters' are clearly protected by this Federal Act; but, employees such as decedent here occupy that shadowy area within which, at some undefined and undefinable point, state laws can validly provide compensation. This Court has been unable to give any guiding, definite rule to determine the extent of state power in advance of litigation, and has held that the margins of state authority must 'be determined in view of surrounding circumstances as cases arise.' * * * [page 229 of 63 S.Ct.] The Longshoremen's Act passed with specific reference to the Jensen rule, provided a partial solution. The Washington statute represents a state effort to clarify the situation. Both of these laws show clearly that neither was intended to encroach on the field occupied by the other. But the line separating the scope of the two being undefined and undefinable with exact precision, marginal employment may, by reason of particular facts, fall on either side. * * * There is, in the light of the cases referred to [consisting of a multitude in which support for the position of each of the parties in the Davis case was to be found], clearly a twilight zone in which the employees must have their rights determined case by case, and in which particular facts and circumstances are vital elements. That zone includes persons such as the decedent who are, as a matter of actual administration, in fact protected under the state compensation act."

In sustaining the application of the Washington act, the court relied upon a presumption in favor of the constitutionality of the state statute and upon the fact that the federal authorities had taken no action in the case under the Longshoremen's Act. The court said (page 230 of 63 S.Ct.): "Under all the circumstances of this case we will rely on the presumption of constitutionality in favor of this state enactment; for any contrary decision results in our holding the Washington act unconstitutional as applied to this petitioner. A conclusion of unconstitutionality of a state statute can not be rested on so hazardous a factual foundation here any more than in the other cases cited. Giving the full weight to the presumption, and resolving all doubts in favor of the Act, we hold that the Constitution is no obstacle to the petitioner's recovery."

We consider it to be unnecessary to engage upon an analysis of the facts of those cases in which workmen were held to be and those in which they were held not to be engaged in maritime employment. There is no doubt or uncertainty as to the nature of the services which Ruljanovich was to render under his employment or of those he was rendering at the time of his injury. They were definitely and exclusively services in the operation of the "Betsy Ross" in the business of fishing for tuna. They were no less exclusively maritime in character than were the services of O'Donnell for the Great Lakes Dredge & Dock Co. If we were to sustain the award made by the state commission as within its jurisdiction, it would have to be solely upon the theory of the presumption of constitutionality, as was done in the Davis case, and upon facts essentially different. From all of the facts that appear in that case, the services of Davis were to be performed both on shore, that is to say, a drawbridge, and upon a barge. He worked first at one place and then at the other and his work on shore, consisting of cutting steel, might well have been considered the principal work that he had to do in dismantling the bridge and not merely incidental to the carrying away of the steel by barge. However, it would seem that part-time work on the barge would have brought him within the Longshoremen's and Harbor Workers' Compensation Act and the opinion is open to the construction that in certain doubtful cases a recovery may be had under either state or federal laws. Under rules which are firmly established this could not be true of a case which, under the facts, was clearly within one jurisdiction and not the other, as where the duties of the seaman were exclusively, or were not at all, in the service of the ship. The work of Ruljanovich was strictly in the service of the vessel. His bringing the nets aboard was a necessary part of that service and not merely incidental to it. To apply the state law to his case would deprive the federal courts of their exclusive jurisdiction and would set up a rule of concurrent jurisdiction in all cases where a seaman engaged in exclusively maritime service receives injury while performing duties on land. To sustain the award of the state commission would deprive Ruljanovich of his right to sue for damages for negligence under the Jones Act and would substitute for that right the remedies of the State Compensation law. The suggestion of respondents that he may recover some of his damage under the state law and the remainder through action in the federal court assumes, at least, that the jurisdictions overlap, which we have seen is not the case.

[3] Our conclusion is that the action of Ruljanovich for damages based upon the alleged negligence of his employers is clearly within the jurisdiction of the United States District Court and that therefore the award made in his favor by respondent commission constituted an unconstitutional application of the California Workmen's Compensation Law; that the award is void and should be annulled.

The award is annulled.

PARKER WOOD, J., and SHAW, Justice pro tem., concur.

PORTER v. GIBSON.

Civ. 14196.

District Court of Appeal, Second District, Division 1, California.

Nov. 17, 1943.

Hearing Granted Jan. 13, 1944.

1. Corporations 🔑121(2)

Where contract for sale of stock authorized seller, on buyer's default, to withdraw stock from escrow and retain, as liquidated damages, any stock paid for, and where seller withdrew stock from escrow, including one share paid for, but tendered all such stock to buyer, withdrawal of stock from escrow did not relieve buyer of liability for price. Civ.Code, §§ 1502, 1503, 1670, 1671.

2. Damages 🔑79(1)

A provision for liquidated damages cannot be enforced when damages are clearly ascertainable. Civ.Code, §§ 1670, 1671.

3. Sales 🔑202(1)

Where contract provides for payment for goods on delivery, tender implies that fulfillment of such concurrent condition must be complied with before title passes from seller to buyer.

4. Corporations 🔑121(1)

Where seller, on buyer's default under contract to purchase stock, withdrew stock from escrow and tendered it to buyer with demand for balance due, and, on return of stock by buyer, notified buyer that stock was being held for his account and subject to his order, title vested in buyer and buyer was liable for balance of purchase price. Civ.Code, §§ 1502, 1503.

5. Corporations 🔑121(1)

A provision of contract for sale of stock authorizing seller, on buyer's default, to dispose of stock "freed of the terms of this agreement" did not preclude seller from tendering stock to buyer and suing for purchase price. Civ.Code, §§ 1502, 1503.

6. Corporations 🔑121(2)

In seller's action for balance due on contract to purchase stock, buyer could not set up provision of contract relieving buyer of liability if he were removed from management of corporation by creditors, where buyer's removal, if any, did not occur until approximately six months after his breach of contract.

7. Corporations 🔑121(5)

In seller's action for purchase price due on contract for purchase of stock, under which buyer was relieved of liability if removed from management of corporation by creditors, evidence established that creditors' committee did not remove buyer but retained him while committee temporarily participated in operation of corporation's business.

8. Appeal and error 🔑1071(3)

In seller's action for purchase price due on contract to purchase stock, finding, contrary to evidence, that seller did not cause stock to be delivered to buyer and that stock was not returned to seller's attorney was not prejudicial.

9. Corporations 🔑121(1)

A seller's action for purchase price due on contract for purchase of stock was within Civil Code provisions for action for price where title to stock had passed to buyer on seller's proper tender with intent that title should pass. Civ.Code, § 1783, subds. 1, 2.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Lucille J. Porter against Clair J. Gibson, also known as C. J. Gibson, on a contract for the purchase of stock. From a judgment for plaintiff, defendant appeals.

Affirmed.

Welburn Maycock, of Los Angeles, for appellant.

Harry G. Sadicoff, of Los Angeles, for respondent.

WHITE, Justice.

On May 29, 1942, respondent Lucille J. Porter filed an action for money in the superior court of Los Angeles County. From a judgment in her favor, appellant prosecutes this appeal.

This litigation arises out of a contract entered into by plaintiff and defendant on July 24, 1939, whereby defendant agreed to purchase 200 shares of stock of the Gibson Oil Company, Inc., at $50 per share, payable in installments of $150 per month, commencing on the 24th day of July, 1939. At the time of filing the action 35 monthly installments of $150 each, or $5,250, had become due and payable, whereas only $1,550 had been paid. Prior to trial plaintiff supplemented her complaint to include installments accruing subsequent to the filing of the original complaint, and she further alleged delivery of the full 200 shares of stock to defendant.

The contract here in question provided that the defendant (buyer) might elect to take up the whole amount of the stock at any time upon the payment of the balance due at the rate of $50 per share; that buyer should have the right of delivery to him of the stock paid for each month, but in lots of not less than ten shares; that *"buyer shall be under no further or additional obligation to purchase stock under this agreement should Gibson Oil Company be adjudicated a bankrupt or an assignment for the benefit of creditors be made by it, or if Mr. Gibson, party of the second part, is removed from the management of the company through the action of its creditors or bankers"*. The contract also included clauses referring to voting rights of the seller, which rights were to be retained by her until the shares were transferred on the corporation's books. Also "In the event that buyer shall fail to purchase the full number of shares, to-wit, 200, then no rights are waived hereby by seller". In order to facilitate the operation of the agreement, it was agreed in the contract that an escrow be opened wherein plaintiff deposited the 200 shares of stock with instructions to the escrow holder to collect the agreed amount monthly and make delivery of the stock in ten-share lots. The defendant agreed to pay the escrow charges and taxes, so that plaintiff would receive $50 per share without any deductions whatsoever. The contract also contained the provision that "Time shall be the essence of this agreement and in particular of the payments herein provided to be made". The agreement further contained the following: "It shall be a condition of said escrow and of this agreement that should buyer fail to make any payment for said shares at the times and in the amounts and manner herein provided, or in the event that buyer shall fail to pay any escrow charges, taxes and other sums herein provided to be paid by buyer, then in either of such events seller may withdraw from said escrow, without any notice to or demand upon buyer, all shares of said stock not paid for and withdrawn and seller may retain any of said shares as to which payment may have been made, *as liquidated damages for any such breach* of this agreement; and it shall be a further condition of this agreement and of said escrow that in the event of any such default in payment, said escrow holder shall redeliver to seller promptly and without question upon demand, notwithstanding any notice, demand or contention upon the part of buyer, all of said shares not then withdrawn from said escrow, and that said escrow holder shall not be liable to buyer by reason of any such redelivery, *and seller may otherwise dispose of said shares freed of the terms of this agreement.*"

The escrow provided for in the agreement was opened on August 4, 1939, and defendant continued to make payments on the contract until March 16, 1940, when payments stopped. Up to the latter date defendant had paid in $1,550 and had received 30 shares of stock, and there remained $50 in the possession of plaintiff for one share of stock not delivered.

In the meantime, however, and during August, 1940, the Gibson Oil Company experienced financial difficulties and a majority of its creditors agreed to form a creditors' committee, which committee entered into an agreement with the company on November 20, 1940, providing, among other things, that all checks issued by the company be countersigned by a member of the committee; that C. J. Gibson, appellant herein, be retained to manage the affairs of the company, subject to the terms of the agreement and subject to the control of the committee, at a salary of $250 per month or 10% of the company's net production, whichever was less; that the committee have power to recommend the discharge, retention, or employment of all employees or agents of the company, and the company agreed to comply with all recommendations of the committee in these respects. In other words, the record reveals that the creditors' committee took over the affairs of the company temporarily in an advisory and supervisory manner with the view of securing the payment of the company's indebtedness to them on an equal and proportionate basis.

On May 27, 1942, after default of the defendant buyer, plaintiff withdrew from the escrow the remaining 170 shares of stock and on the same day tendered them to defendant, properly endorsed, coupled with a demand for the payment of $3,700, the accrued installments then due, and on May 29, 1942, filed the action here involved. On June 16, 1942, defendant returned the tendered shares of stock to plaintiff's attorney, refusing acceptance of same and denying any liability under the contract, stating in his letter to plaintiff's attorney: "Mrs. Porter's tender was not made in accordance with the terms of the contract of July 24, 1939, and I am not under any obligation to purchase the balance of the stock. The Gibson Oil Co., Inc., has been under the management of a Creditors' Committee since November, 1940, and in accordance with the terms of the contract, I am no longer obligated to purchase the balance of the stock". Plaintiff's attorney, on June 23, 1942, advised defendant by letter that "The certificates are held by me for your account and you can have them at any time you desire, as they are your property".

On April 22, 1942, at a meeting of the Board of Directors of the Gibson Oil Company, Inc., the directors of said corporation passed a resolution to amend the articles of incorporation of the corporation to provide for the assessment of its capital stock, such authorization not having been previously given to the directors. The necessary consent of the holders of two-thirds of the outstanding shares of stock, which did not include those held by plaintiff, having been obtained, the proposed amendment was added to the articles of incorporation. Pursuant thereto an assessment of $6 per share was levied on all stock and on May 5, 1942, Mrs. Porter received a notice of such assessment to be paid on or before June 6, 1942; to become delinquent on June 8, 1942, and if unpaid the stock would be sold on June 25, 1942, to pay the assessment plus a penalty of 5%. Mrs. Porter failed to pay the assessment and on June 25, 1942, the 170 shares were sold to one D. E. Spriggs for $1,071.

Appellant first contends that the contract being executory, upon default of the buyer and the attempted tender by the seller, an allegation in the pleadings that the goods "cannot readily be resold for a reasonable price" is necessary to maintain an action for the price. Conceding this to be true, nevertheless, the third paragraph of the complaint specifically alleged that plaintiff had delivered 200 shares of the stock of said company and had made demand upon defendant for payment of the sum of $3,700 then due and unpaid, but that defendant had failed, neglected and refused to pay said sum or any part thereof. By his answer defendant admitted delivery of the stock to him, as charged in the complaint, but alleged that he returned such shares of stock to plaintiff through her attorney and that she or her agent was in possession thereof. At the trial such delivery of the stock was established by both oral and documentary evidence.

[1, 2] Appellant, however, asserts that the evidence, instead of proving performance of her contract by respondent, established the fact that she had cancelled the contract pursuant to the terms thereof when she withdrew the stock from escrow and retained the $50 received in escrow in excess of the amount theretofore paid for stock which was delivered in lots of ten shares to appellant and for which he had paid the purchase price. It is true the contract herein provided that should defendant buyer default in any of the covenants made by him in the contract, plaintiff seller was entitled to withdraw from escrow all stock unpaid for, and might "retain any of said shares as to which payment may have been made, as liquidated damages for any such breach of this agreement", but plaintiff did not retain the $50 in question as damages, but on the contrary sent to defendant all of the stock unpaid for as well as the one share paid for by him with the aforesaid $50. Furthermore, the rule is firmly established

that a provision for liquidated damages cannot be enforced when the damages are clearly ascertainable. In the instant case it cannot be said from the nature thereof that it would be either impracticable or extremely difficult to fix the actual damage (sections 1670 and 1671, Civil Code). Furthermore, it cannot be said that by withdrawing the unpaid for stock from escrow, after default upon the part of defendant, that plaintiff breached the contract, because the essence and gravamen of the contract in question was the mutual agreement to buy and sell the stock. The establishment of an escrow was merely incidental to the main purpose of the contract and solely for the convenience of the parties in carrying out the principal purpose of the agreement. It must, therefore, be held that in withdrawing the escrowed stock plaintiff did not contravene a condition of the contract which vitiated the agreement and relieved defendant from liability thereunder.

[3, 4] We are convinced that the agreement of July 24, 1939, with which we are here concerned was an executory contract for sale and purchase of personal property and that plaintiff did all that she was required to do to vest title to the stock sold in defendant vendee. In the full performance of her obligations under the contract she delivered the stock, properly endorsed, to the buyer and, after the latter thereafter returned the stock to her, plaintiff notified him that such stock was being held for his account and subject to his order (sections 1502 and 1503, Civil Code). Defendant entered into a binding contract to purchase the stock, and if title to the same vested in him then plaintiff was justified in suing upon her contract of purchase and sale to recover the amount due according to the purchase price rather than for damages for breach of contract. Manifestly, every tender does not transfer title, and where a contract provides for payment on delivery, the tender implies that the fulfillment of this concurrent condition must be complied with before title will pass from the seller to the buyer, but under an executory agreement such as we are confronted with herein, if delivery of the stock was made to the buyer with intent to transfer title, then such title passed. The governing principle being that of intention, the question in the main is one of fact. When, in the instant case, resort is had to the terms of the contract, the conduct of the parties, and the circumstances attending the delivery of the stock, we think the conclusion is justified that such transfer was made with the full intent and purpose upon the part of plaintiff to unreservedly vest title to the stock in defendant. Gopcevic v. California Packing Corp., 64 Cal.App. 132, 220 P. 1078, hearing in Supreme Court denied.

[5] Appellant calls our attention to the provision contained in the contract which reads: "and the seller may otherwise dispose of said shares freed of the terms of this agreement", but this does not preclude seller from pursuing remedies provided by law on account of the breach of the contract. Appellant's argument that if the doctrine of mutuality is still effective, the clause which permits seller to relieve herself of all obligations under the contract and permits her to sell the stock elsewhere also relieves the buyer from his obligation to make further purchases, is specious under the circumstances here present as default had been made by the purchaser and none had occurred on the part of the seller.

[6] Appellant next contends that he had been removed from the management and control of Gibson Oil Company by action of its creditors, and therefore, by reason of a heretofore quoted provision in the contract in that regard, he was not obligated to make further payments upon his contract to purchase plaintiff's stock. We think a complete answer to this contention is that defendant's default under the contract occurred in March, 1940, while it was not until the following September that the agreement with creditors of the corporation was entered into. Be that as it may, however, we do not regard the arrangement made between the corporation and its creditors as one by which defendant was "removed from the management of the company through the action of its creditors or bankers".

[7] The trial court found that appellant was not so removed through the action of the creditors, and the finding in that regard is amply supported by the evidence. Appellant by his own testimony and also by oral and documentary evidence offered in his behalf admitted that the creditors' committee participated in the operation of the business temporarily with a view to securing proportional payments on the indebtedness of the company to them and to check payments being made by ap-

pellant to the various creditors. There was introduced in evidence a letter, dated May 22, 1942, from Fred J. Carpenter, chairman of the creditors' committee, to Mr. Gibson, in which Mr. Carpenter protested a payment to his own company which he felt was too small in comparison to a payment to another creditor. Mr. Carpenter testified that although he protested this payment, nevertheless the same was made in the manner and form determined upon by appellant and not as recommended by one of the creditors' committee. If the creditors' committee, of which Mr. Carpenter was chairman, had full control of the business and Mr. Gibson was "removed" as claimed by him, certainly no payments of funds contrary to the wishes of the creditors' committee could have been made by Mr. Gibson. Instead of being "removed" from the management of the affairs of Gibson Oil Company, the defendant was specifically retained, according to the agreement, "to manage the affairs of the company" subject only to the right of the creditors' committee to countersign checks and dictate the hiring and discharging of company employees. Indeed, the so-called "removal" agreement provided that "In the event of a dispute as to the validity, priority or amount of any claim or claims the committee, *with the consent of the company* (and appellant concededly owned the company) but not otherwise, shall have the authority and power to compromise, settle or adjust such dispute" (emphasis added).

[8] The finding of the court that plaintiff did not cause 170 shares of stock to be delivered to the defendant and that such shares were not returned by defendant to plaintiff's attorney, is next made the basis of an attack upon the judgment herein. It is conceded by all parties to this appeal that plaintiff's complaint and defendant's answer both alleged that the stock, contrary to the finding made, was delivered and returned as above set forth. It is also stipulated that the evidence abundantly and conclusively establishes such delivery and return of the stock in question. The challenged finding is not, therefore, supported by the evidence, being in fact contrary thereto, and, obviously, was inadvertently made by the court. In view of the fact that the delivery and return of the shares of stock is conceded by all parties, no prejudice arises from the patent error, and a reversal is, therefore, neither justified or necessary. Cornblith v. Valentine, 211 Cal. 243, 294 P. 1065; Thayer v. Tyler, 169 Cal. 671, 147 P. 979.

[9] Appellant's contention that the contract herein was not of the character contemplated by subdivisions 1 and 2 of section 1783 of the Civil Code is answered by what we have heretofore said in holding that under the circumstances here present it was intended that title to the stock should and did pass to the buyer. Therefore, the instant action was maintainable by plaintiff seller pursuant to the provisions of subdivision 1, section 1783 of the Civil Code.

For the reasons herein stated, judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

ROESCH et al. v. DE MOTA et al.

VICTOR LAND & MINERAL CO. v. SAME.
Civ. 12427.

District Court of Appeal, First District,
Division 2, California.

Nov. 16, 1943.

Rehearing Denied Dec. 16, 1943.

Hearing Granted Jan. 13, 1944.

1. Appeal and error ⇨1012(1)

A finding which is contrary to uncontradicted evidence of witness cannot stand, unless there are other facts in case casting doubt upon its accuracy.

2. Bills and notes ⇨499

Parties claiming that payment had been made on notes had burden of proof.

3. Bills and notes ⇨527(1)

Evidence sustained finding that no payment had been made on a note.

4. Evidence ⇨591

Where parties, having burden of proof, elicited testimony regarding payments on note from witness who testified solely from what appeared on a statement, adversary introducing entire statement in evidence without qualification was not bound by the statement.

5. Appeal and error 🔑1010(1)

Where a negative finding is made against party upon whom rests burden of proving issue, the appellate court will treat it in the same light as if it were a direct finding that the party had failed to prove the issue, and will not disturb the finding unless evidence compels conclusion that issuable fact has been satisfactorily proved.

6. Usury 🔑126

Where original borrower had transferred encumbered property and it was not shown that any interest remained in original borrower which it had to protect and deficiency judgment was not sought, original borrower did not have right to assert defense of usury.

7. Usury 🔑130

Where original borrower was given approximately 15 per cent of capital stock in new corporation organized to purchase borrower's property and corporation promised to pay the mortgage debt, the new corporation and parties claiming an interest through it could not assert defense of usury.

8. Usury 🔑130

A purchaser who takes property subject to a mortgage, without more, may not assert defense of usury.

9. Usury 🔑130

A borrower may sell his mortgaged property with defense of usury attached.

10. Usury 🔑130

Contract whereby original borrower gave purchaser of mortgaged property right to negotiate with creditor to settle, discharge, compromise or in any other manner adjust creditor's claim, did not grant to purchaser right to assert defense of usury, in view of fact that subject of usury had not entered into the negotiations, and purchaser expressly assumed obligation to pay principal and interest.

11. Contracts 🔑143

An agreement should be interpreted as a whole and the meaning gathered from the entire context and not from particular words, phrases or clauses.

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Suit by Helen Roesch and others against Clara P. De Mota, Antonio Mota, E. O. Erickson, individually and as trustee, and the Victor Land & Mineral Company and others for an accounting and to enjoin a scheduled sale by the trustee under two trust deeds, wherein the Victor Land & Mineral Company filed a cross-complaint against Clara P. De Mota, Antonio Mota, and E. O. Erickson, individually and as trustee. From the judgment, all parties appeal.

Judgment affirmed in part and reversed in part and remanded with directions.

Cornish & Cornish, of Berkeley, and Maurice H. Roach, of Oakland, for appellants Roesch and others.

Philip C. Boardman, of San Francisco, for appellant Victor Land & Mineral Co.

Virgil M. Airola, of San Andreas, and Jesse H. Steinhart and John J. Goldberg, both of San Francisco, for appellants De Mota and others.

NOURSE, Presiding Justice.

Plaintiffs brought this suit for an accounting and to enjoin a scheduled sale by the trustee under two deeds of trust covering certain gold mining property. Plaintiffs held beneficial interests in the mining property which were subsequent in right to the two deeds of trust. The two deeds of trust secured two promissory notes which admittedly exacted usurious interest. Joined as defendants with the trustee were Victor Land & Mineral Company, the original borrower and owner of the mining property, the Calaveras Central Mining Corporation, the transferee of Victor Land & Mineral Company, and the Calaveras Central Gold Mining Co., Ltd., the present lessee. For the purposes of this opinion there is no distinction between the latter two corporations and they will be referred to as Calaveras Central. The Victor Land & Mineral Company, hereinafter called the Victor Land Co., by way of cross-complaint, and Calaveras Central, by way of answer, admitted the allegations of the complaint and asked for the same relief as the plaintiffs against their co-defendants. Clara P. De Mota and Antonio Mota, the alleged owners of the notes, were not served nor did they appear. The trustee contested the amount which was alleged to have been paid under the notes, and for a separate defense alleged that none of the plaintiffs or his codefendants could assert the defense of usury. The trial court found that no payments had been made on the notes and as a conclusion of law held that the defense of usury was available to the "plaintiffs." The trial court enjoined the defendant trustee from selling the land under the deeds of trust for amounts in excess of the face value of the notes plus charges and fees which were stipulated to upon the trial.

All the parties have appealed from the judgment in toto. The plaintiffs and the corporation defendants urge that the court erred in its finding that no payments had been made on the notes. The defendant and cross-complainant, Victor Land Co., urges that it was error not to conclude that the defense of usury was available to it as the original borrower who is still interested in property which secured the loan. The defendant trustee urges that the court erred in determining that the defense of usury was available to any of the plaintiffs. He also contends that the defense of usury was not available to either Victor Land Co., as cross-complainant, or to Calaveras Central. The questions presented by the contentions concerning the trial court's finding that no payments had been made and those concerning the defense of usury are governed by different sets of facts and will be treated separately. The parties stipulated that the three appeals would be heard on one set of briefs and one transcript.

(1) Concerning the finding of the trial court that no payments had been made upon the usurious notes:

One M. H. Manuel, the president of the Manuel Estate Company, which was the original payee of the notes secured by the deeds of trust testified on the trial from a statement prepared by him at about the date he sold the notes that certain payments had been made between 1923 and 1928 on the note for $15,000 on account of interest and principal. This statement was prepared on or about September 15, 1928. It credited payments of interest and principal at various dates and debited the unpaid interest at 1% per month plus charges for insurance, taxes, attorney's fees, etc. At the time of the trial, April, 1941, Mr. Manuel had no independent recollection of the amounts credited and debited to the account of Victor Land Co. in the statement. He believed it was a correct statement of the amounts in his books, but he did not know whether his books were any longer available. This statement was admitted in evidence and no evidence was offered to contradict it other than the circumstances of its execution and the unsatisfactory recollection of Manuel concerning its veracity. With this evidence before it, the trial court found "That there is considerable doubt as to what if any payments were made on account of the aforesaid promissory notes or either of them and the Court therefore finds that nothing has been paid on account of the aforesaid notes or either of them."

The plaintiffs and defendant corporations contend that the court cannot arbitrarily disregard this uncontradicted evidence. They assert that it is uncontradicted by any testimony and was introduced by the trustee himself. Therefore they contend that the court erred in finding that no payments had been made on the $15,000 note. They urge that full credit must be given to Mr. Manuel's statement, with the result that, assuming the defense of usury is available to them, all payments must be credited against the principal of the note and that the judgment should be corrected accordingly.

[1-3] "It may be conceded to be the law of this state that a finding which is contrary to the uncontradicted evidence of a witness cannot stand, unless there are other facts or circumstances in the case casting doubt upon its accuracy. But the qualification is as important as the rule, and, given any facts or circumstances reasonably calculated to cast doubt on the testimony, the jury's action in disbelieving it cannot be interfered with on appeal." Jewell v. Bell, 120 Cal.App. 682, 684, 8 P.2d 223, 224. We must examine Mr. Manuel's testimony and his statement in the light of these principles before we can say as a matter of law that the court could not disregard them in its findings. Mr. Manuel had no present recollection of the figures in the statement, hence his testimony on the stand was of no probative force on the issue of whether in fact the payments were made. Although no objection to its introduction was interposed, the statement was but secondary evidence which is not of the same quality as the primary evidence of those who received and paid the alleged amounts. Lacrabere v. Wise, 141 Cal. 554, 556, 75 P. 185. The officers of the appellant corporations who would have made the supposed payments did not testify nor was an explanation of their absence offered, nor of their failure to produce the books of account showing what payments were made. The court heard Mr. Manuel's testimony and was in a better position to determine the weight

to be accorded his statement, written more than twelve years before. The appellants on the issue of whether payments had been made or not had the burden of proof. The lower court may not have believed that plaintiffs and defendant corporations had carried that burden from the evidence produced. Although such evidence might support a finding in accord with its contents, we can not say as a matter of law that the court was bound to find in accord with its contents. Nor can we say as a matter of law that standing alone the statement prepared by Mr. Manuel was sufficient to carry the burden of proof where the other circumstances of the case are considered. Those cases cited by plaintiffs and defendant corporations are not in point as they involve the sufficiency of secondary evidence to support a finding, and not whether uncontradicted secondary evidence in view of all the circumstances may be disregarded by the court in making its findings.

[4, 5] Finally, the plaintiffs and defendant corporations contend that the trial court and the trustee are bound by the uncontradicted statement in Manuel's handwriting that certain payments were made upon the notes because the trustee introduced the statement in evidence without qualification. They make this assertion on the theory that by the introduction of the statement the trustee vouched for its accuracy and veracity in all respects and in the absence of contradictory testimony, the trial court was bound to find in accord with it. The appellants overlook that the record discloses that Mr. Manuel was first made the appellants' witness and upon examination each alleged payment was elicited in the following manner:

"Q. Now, Mr. Manuel, consulting that statement again, could you tell me whether or not any payment was made on or about the first of March, 1926? A. Well, according to the statement here, it is $300. * * *

"Q. Now, referring to that statement, Mr. Manuel, can you tell whether or not any payment was made on or about the first of April, 1926, and if so, how much? A. $300 etc." Prior to those questions and answers it had been made clear that Mr. Manuel had no independent recollection of the transactions involved and was testifying solely from what appeared on the statement. Upon cross-examination and after Mr. Manuel had been made the trustee's own witness the trustee introduced the entire statement in evidence. It would be an extremely unjust state of affairs if the plaintiffs were allowed to introduce parts of a statement by the above method of oral reading into the record and then prohibit the opponent at his peril from putting the whole document into the record so that the court could ascertain its true weight in the light of the verification attached, giving due weight to the charges which were also part of the statement which the plaintiffs carefully did not put into the record by their method of examination. Further it should be noted that no California authority has been cited for the proposition that a party "is bound" by the documentary evidence which he produces whether the court believes it or not. Cf. Bank of British Columbia v. Frese, 116 Cal. 9, 47 P. 783; Long Beach Brick Co. v. De Dodson, 104 Cal.App. 99, 285 P. 382; 32 C.J.S., Evidence, § 1040, pp. 1113, 1114. When a negative finding of this character is made against the party upon whom rests the burden of proving the issue, the appellate court will treat it in the same light as if it were a direct finding that the party had "failed to prove" the issue. Thus, though slight evidence supported by the inferences applicable, will support an affirmative finding on the issue, we do not disturb the judicial conscience of the trier of the facts, whether it be court or jury, unless we can say that the evidence received compels the conclusion that the issuable fact has been satisfactorily proved. Having reached this conclusion, it is unnecessary to discuss the contention of these appellants regarding the propriety of certain charges for attorneys' fees appearing in the statement.

(2) Concerning the conclusion of the trial court that the defense of usury was available to plaintiffs:

The two questions presented by this portion of the appeals before us concern the propriety of the trial court's conclusion that the defense of usury was available to plaintiffs and was not available to defendant and cross-complainant Victor Land Co.

In order to determine the merits of the trustee's and cross-complainant's appeals concerning these questions it is necessary to elaborate on the manner in which Calaveras Central became the owner of the mining property and to present the facts upon which the trial court based its conclusions. Victor Land Co. executed the two notes, which exacted usurious interest, for the principal sums of $15,000 and $4,500 in

1923 and 1925 respectively. In 1926 creditors were pressing the Victor Land Co. and proceedings were under way to foreclose the deeds of trust which secured the notes, the company being in default. In these circumstances the Victor Land Co. entered into an agreement with one Harry Sears to whose rights and obligations thereunder Calaveras Central succeeded.

By this agreement the Victor Land Co. granted and gave to Sears "the exclusive option to purchase and acquire in the times (four months) and for the considerations and upon the terms and conditions" stated therein, all its mining property situated near the town of Angels Camp, Calaveras County. In the event Sears, "his heirs, successors or assigns" elected "to purchase" the property, he was to organize a new corporation with an authorized capital stock of 1,000,000 shares of the par value of one dollar per share, to which corporation it was contemplated this agreement would be assigned. In return for a conveyance of the above mining property to this corporation, Victor Land Co. was to receive 150,276 shares of the new corporation's paid up nonassessable stock, this stock to be held in escrow for one year pending the sale of treasury stock to finance the new corporation. Further considerations named in the agreement flowing to the Victor Land Co. were that Sears agreed to "pay and discharge or secure the complete release * * * of all indebtedness now owing by the (Victor Land Co.) * * * to the Manuel Estate Company * * * and being the indebtedness now due and owing upon two promissory notes * * *; that there is now accrued and unpaid upon said promissory notes not only the full amount of the said principal sums of said indebtedness but also interest thereon in accordance with the terms and conditions of said respective * * * notes together with costs, charges, expenses, insurance premiums, taxes, charges for attorneys' fees * * * and other miscellaneous expenses incurred by the said Manuel Estate Company in proceedings taken to enforce the terms of the said trust deeds * * * which proceedings for enforcement and sale are now pending and in progress." Sears further agreed to discharge or pay specific indebtedness to the Utica Mining Co. and "to pay or to secure the release and discharge of (Victor Land Co.) of and from all of the indebtedness, liabilities or obligations of whatsoever kind due or owing at the date hereof."

Paragraph four of the agreement recited that the Manuel Estate Company's proceedings to enforce the two deeds of trust were pending and that other creditors might also proceed against the property. It then provided that all such proceedings were at Sears's own risk and "that there is no duty imposed upon or to be undertaken by (Victor Land Co.) to avoid any of such actions." However, Sears was to have "the right to negotiate with any of the said creditors to settle, discharge, compromise, or in any other manner adjust the creditors' claims or any of them, so as to avoid any proceedings that may otherwise be taken by the said creditors against the (Victor Land Co.). * * *"

Sears's rights under this agreement were assigned to Calaveras Central upon its assumption of the liabilities thereunder imposed by Sears. The mining property was conveyed by Victor Land Co. to Calaveras Central. To Victor Land Co. were issued 150,276 shares of stock, and the rest of the authorized stock was issued to Sears in consideration of his assignment of his rights under the contract. In the contract between Sears and Calaveras Central whereby the assignment was made the indebtedness to the Manuel Estate Co. was specifically mentioned "together with accrued interest thereon" and Calaveras Central assumed "all the indebtedness mentioned."

[6] Victor Land Co. did not allege that it still owned the stock in Calaveras Central which was distributed to it under the 1926 agreement. There is no evidence or finding that Victor Land Co. still owns the stock. Therefore we need not decide whether Victor Land Co. could have asserted the defense of usury by reason of its contention that it was an original borrower who still retained an interest in the property as a stockholder in Calaveras Central. The defendant trustee was not attempting to get a deficiency judgment. No interest has been shown to exist in the original borrower which it had to protect. Hence the court was correct in determining that only the plaintiffs, if any, had the right to assert the defense of usury.

[7] The plaintiffs rest their right to assert the defense of usury upon the right of Calaveras Central to raise the defense which originally inured to Victor Land Co. It is their position that the right to assert the defense passed to Calaveras Central either by operation of law or by contract.

The appellant-trustee contends that because the agreements between Victor Land Co., Sears, and Calaveras Central resulted in a sale of the mining property to Calaveras Central, the defense of usury was lost to the purchaser. The plaintiffs and defendant corporations take the position that the contract between Sears and Victor Land Co. and the subsequent assignment and conveyance to Calaveras Central were but the means of consolidation and merger. They assert that Calaveras Central is in exactly the same position as Victor Land Co. was originally with respect to the assertion of the defense of usury. With this position we can not agree. The contract between Sears and Victor Land Co. denominates the transaction a purchase. The plaintiffs in their complaints alleged that Calaveras Central purchased the mining property. The trial court found that Calaveras Central was organized "to purchase, own and operate" the mining property. The terminology of the agreements were those of bargain and sale. And in the light of the provision that Victor Land Co. was to receive only a small interest in Calaveras Central, approximately 15%, we can not say that Calaveras Central is but the alter ego of Victor Land Co., and therefore in the same position, in order to bring this case within the rule laid down in Western States Acceptance Corp. v. Frank D. Tuttle, Inc., 210 Cal. 51, 290 P. 574.

The cases relied upon by plaintiffs and defendant corporations to bring this case within that rule are distinguishable on their facts. In Greengard v. Katz, 270 Ill.App. 227, 235, the court states that the basis of its decision was that "there was, in fact, no sale by the mortgagors to the defendant, the Prairie Garage, Inc. The parties who owned the 99-year lease and the garage, and who were operating it, merely changed the form of the interest which they had from a personal interest in the property to a corresponding *proportionate* interest in the same property in the corporation." (Emphasis added.) Calaveras Central was organized to operate the mining property *conveyed* to it by Victor Land Co. This property constitutes the principal property of Calaveras Central. The Victor Land Co. has not the same proportionate interest in the property when given only 15% of the capital stock in the new corporation. In the other case relied on by plaintiffs and defendant corporations, Chas. S. Riley & Co. v. W. T. Sears & Co., 154 S.C. 509, 70 S.E. 997, 1001, the court found that the case presented a situation where "with the consent of all the parties, the corporation was substituted as successor to the original parties." Here as late as 1928 the Manuel Estate Company as payee of the two notes treated Victor Land Co. as the principal obligor and there is no possible basis on which a novation can be said to have taken place prior to the effective date of the obligations under the notes as in Chas. S. Riley & Co. v. W. T. Sears & Co., supra.

[8] Further it should be noted that to allow plaintiffs to assert the defense of usury benefits creditors only so far as the record shows, and not the original borrower. The allowance of the defense would be but a mere windfall to those people. This result clearly illustrates the reason why a purchaser who takes property subject to a mortgage without more may not assert the defense of usury. Read v. Mortgage Guarantee Co., 11 Cal.App.2d 137, 142, 53 P.2d 377, and cases there cited. The theory behind the rule is well stated in Trusdell v. Dowden, 47 N.J.Eq. 396, 399, 20 A. 972, 973, where it is said: "the purchaser, by taking title subject to the mortgage, and retaining, out of the price he agreed to pay, sufficient money to pay the mortgage, places himself in a position where he cannot allege usury without attempting to keep back part of the money which he agreed to pay for the mortgaged lands. Having retained enough of the purchase money to pay the mortgage, under a promise that he would apply the money to the payment of the mortgage, it is plain that, if he were allowed to make the defense of usury, and should make it successfully, he would defraud both his grantor and the mortgagee. He would be permitted to speculate on a violation of law that had done him no harm, and to keep back money to which he has no right whatever, and to do so in direct violation of his promise."

In applying this reasoning to the contract between Sears and Victor Land Co. it appears that under the terms of the contract there are specific promises to pay the mortgage debt here in question together with accrued interest thereon according to their terms. This promise is repeated in the agreement between Sears and Calaveras Central. This assumption is stated to be part of the consideration for the transfer of the mining property. It may be inferred therefore that the price of 150,276 shares of the par value of $1 per share was paid only for the equity of redemption of Victor Land Co. in the property. The fact that these shares were to be held in escrow for 1 year as part of the contract does not weigh against this interpretation, nor is it a factor in determining whether the contract contemplated a consolidation or merger and not a purchase in the light of the language and actions of the parties throughout.

[9, 10] Finally, the plaintiffs and defendant corporations urge that, even assuming that Calaveras Central is to be considered but a purchaser of the property, the contract by its terms gives Sears the right to assert the defense of usury which right passed to Calaveras Central by the assignment. They rely on paragraph four of the contract which gives Sears "the right to negotiate with any of the said creditors to settle, discharge, compromise or in any other manner adjust the creditor's claims. * * *" It is true that in order to afford the oppressed borrower the full protection of the usury laws, he must be allowed to sell his mortgaged property with the defense of usury attached. However, we do not believe that Victor Land Co. intended to grant the right to assert the defense of usury to Sears, and the question of intention is the all important one here. We reach this conclusion partly because of the concession of all the parties in the briefs that, during all these transactions had prior to the year 1927, they did not contemplate that the obligations were usurious and that that subject did not enter into their negotiations. In fact it was not until our supreme court in that year rendered the opinion in Haines v. Commercial Mortg. Co., 200 Cal. 609, 254 P. 956, 255 P. 805, 53 A.L.R. 725, that promissory notes calling for interest at one per cent a month *compounded* were recognized as illegal within the Usury Law.

[11] Standing alone, the broad language of the sentence of the contract could be interpreted in the way contended for. But if such interpretation is made it is inconsistent with the express assumption of the obligation with interest in the prior paragraphs. To resolve the inconsistency it is necessary to resort to fundamental concepts underlying the interpretation of contracts. "An agreement should be interpreted as a whole and the meaning gathered from the entire context, and not from particular words, phrases, or clauses. * * * All provisions should, if possible, be so interpreted as to harmonize with each other. * * * No word should be rejected as mere surplusage if the court can discover any reasonable purpose thereof which can be gathered from the whole instrument. An interpretation which gives reasonable meaning to all its provisions will be preferred to one which leaves a portion of the writing useless or inexplicable." 12 Am. Jur. 772. Applying these principles to the contract before us, it appears that the assumption of the obligations and the recitals of in what they consisted, including interest, expenses, etc., are mere surplusage under the respondents' view of the contract. With this result we can not agree. Paragraph four taken as a whole was intended to give Sears the right to forestall the creditors' proceedings which were pending and might be pending. The language was apt to grant such rights. It contemplated negotiation and settlement rather than litigation. Apter words would have been used had the parties intended to assign personal defenses which did not follow the land per se. Reading the contract as a whole, we also find that personal duties of Victor Land Co. were expressly denied. The purpose of the grant is shown in the recital of the pending proceedings and expressly, "so as to avoid any proceedings that may otherwise be taken." Consequently, in order to give effect to the express assumption of the obligations, it is necessary to construe the clause granting Sears the right to compromise and adjust the creditors' claims not to include the right to the assertion of the defense of usury. This view is further fortified by the whole contract's terms concerning the bargained for consideration of Victor Land Co. Victor Land Co. would not bargain for the specific assumption of a debt and on the other hand grant the right to defeat that debt. In reaching this result, no provision of the contract is mere surplusage, and all the provisions, when read in their entirety, harmonize. From the record before us it appears that all the plaintiffs' rights in and to the property itself accrued subsequent to this agreement and conveyance of title to the mining property thereunder to Calaveras Central in 1927. Plaintiffs' right to assert the defense of usury depends on Calaveras Central's right to assert the defense in the first instance. Having concluded that Calaveras Central never had the right, it follows that the trial court erroneously concluded that plaintiffs, whose rights would be derivative, could assert the defense of usury.

By reason of these conclusions it becomes unnecessary to discuss the contentions of the parties with respect to a release of all claims and demands subsequently executed by Calaveras Central to defendant trustee and the owners of the notes. That part of the judgment enjoining the sale of the property for a sum in excess of the face value of the notes, plus the stipulated attorneys' and trustee's fees, is reversed and the cause is remanded for further proceeding in accordance with the views expressed herein. In all other respects the judgment is affirmed. The appellant-trustee to have his costs.

SPENCE, J., and DOOLING, Justice pro tem., concur.

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61 Cal.App.2d 326

SHENBERG v. DE GARMO et al.

Civ. 14151.

District Court of Appeal, Second District, Division 2, California.

Nov. 12, 1943.

Hearing Denied Jan. 11, 1944.

1. Corporations 🔑319, 320(4, 5)

A corporation must itself sue for losses occasioned by wrongdoing of its officers or directors, or upon corporation's failure to do so a stockholder may sue derivatively on behalf of the corporation, but a stockholder cannot sue directors in his own right for destruction of or diminution in value of stock.

2. Corporations 🔑320(4)

An action by stockholder individually against directors for injury to corporation by which corporation's assets were depleted was not maintainable, notwithstanding allegations charging conspiracy.

3. Corporations 🔑320(4)

Directors' alleged malicious appointment of a receiver, conversion and dissipation of corporate assets and payment of excessive salaries to managing directors are wrongs to the corporation itself, and stockholders cannot sue to recover except in a derivative action on behalf of corporation.

4. Corporations 🔑320(8)

In a derivative action, a stockholder must allege a demand and refusal on part of corporate management to commence the action for wrongdoing, or allege an appropriate excuse for not making such demand, and the corporation is a necessary party defendant.

5. Corporations 🔑320(1)

A stockholder's cause of action against directors charged with wrongfully causing corporation to breach its contract for stockholder's employment is not "derivative."

See Words and Phrases, Permanent Edition, for all other definitions of "Derivative Action".

6. Pleadings 🔑248(1)

A plaintiff may not introduce in amended complaint a wholly different cause of action from the one stated in original complaint.

7. Pleading 🔑254

Where stockholder's original complaint sued for injuries to corporation causing destruction or diminution in value of corporation's stock, amended complaint seeking damages from directors for inducing breach of contract of employment made with the stockholder was demurrable as introducing a wholly different cause of action.

8. Action 🔑50(9)

An action for injury to plaintiff individually may not be joined with derivative action for injuries done to corporation, notwithstanding plaintiff claims his action is not derivative and formulates his allegations on theory that his action may be maintained as an individual.

9. Corporations 🔑320(7)

The allegations of stockholder's amended complaint did not bring his cause of action within exception to rule that derivative actions must be commenced on behalf of the corporation, where allegations of misconduct of directors were directed to acts resulting in injuries to corporation, except allegations concerning breach of contract of stockholder's employment which were improperly added to the amended complaint.

10. Pleading 🔑254

In determining whether trial court properly sustained demurrer to third amended complaint without leave to file a fourth amended complaint by a stockholder who sued individually for wrongs done to the corporation, a change in the allegation placing a greater value upon plaintiff's stock and asking $15,000 less than amount asked in third amended complaint was inconsequential.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swan, Judge.

Action by N. E. Shenberg against G. C. DeGarmo and another, as directors of a corporation, to recover damages for alleged wrongdoing, wherein defendants filed demurrers. From a judgment for defendants after sustaining their demurrers without leave to amend, plaintiff appeals.

Affirmed.

Frank N. Gunter, of Los Angeles, for appellant.

Glen Bahymer, of Los Angeles, for respondents.

W. J. WOOD, Justice.

Plaintiff appeals from a judgment in favor of defendants after demurrers to the third amended complaint had been sustained without leave to amend and after a motion to reconsider and to grant leave to file a fourth amended and supplemental complaint had been denied. This is the third occasion on which the various troubles of Golden State Glass Corporation and its stockholders have come before the reviewing courts of California. See Golden State Glass Corp. v. Superior Court, 13 Cal.2d 384, 90 P.2d 75; DeGarmo v. Goldman, 19 Cal.2d 755, 123 P.2d 1.

In the original complaint, which was filed on April 25, 1940, the plaintiffs named were N. E. Shenberg and Hortense Shenberg, husband and wife. They alleged therein that they were owners in joint tenancy of stock in Golden State Glass Corporation and sought damages against G. C. DeGarmo, John E. Biby and several fictitious defendants in a sum equal to the value of the stock owned by them. It was alleged in the complaint that defendants had committed several acts of wrongdoing specifically set forth, including the malicious appointment of a receiver for the corporation and the dissipation of the corporation's assets and conversion of portions thereof to their own use, causing the value of plaintiffs' stock to be wholly destroyed. Summons was issued on February 17, 1941. A dismissal was filed as against defendant Biby on March 12, 1942. An amended and supplemental complaint was filed and an alias summons issued on April 7, 1942, defendant Golden being substituted for one of the fictitious defendants. In each of the amended complaints Hortense Shenberg was dropped as party plaintiff and the remaining plaintiff, N. E. Shenberg, added certain paragraphs, without arranging them as a separate cause of action, in which he alleged that he had a contract with the corporation for his personal services and that defendants had unjustifiably induced a breach of this contract. For this reason he sought additional damages in the sum of $4,915.

In the third amended complaint plaintiff alleges that he and his wife hold as community property one-third of the capital stock of Golden State Glass Company; that defendant DeGarmo owns one-third and that defendant Goldman owns one-third of the stock of the corporation; that until a receiver was wrongfully appointed through the machinations of the original defendants G. C. DeGarmo and John Biby, the corporation was highly solvent; that plaintiff was, until May 31, 1938, when the receiver was appointed, employed by the corporation as a co-manager under written contract; that the reasonable market value of the stock held by plaintiff at the time of the appointment of the receiver was $42,225; that defendant DeGarmo was indebted to the corporation at the time of the appointment of the receiver for $22,033.17, monies wrongfully paid him through excessive salaries and without consideration; that DeGarmo wrongfully contended that he was entitled to receive such salary for an indefinite period in the future at the rate of $500 per month; that DeGarmo bore ill will toward plaintiff during the entire period mentioned in the pleadings and that Goldman bore ill will toward plaintiff during the latter period of time referred to in plaintiff's complaint; that as a result of a conspiracy between defendants DeGarmo, Biby and unnamed parties DeGarmo wrongfully caused a receiver to be appointed in an action in the Superior Court, various details concerning the manner in which the receiver was procured being set forth; that the receiver took possession of the corporation's business and property and held it from May 31, 1938, to March 3, 1939, when the receivership was terminated; that since December, 1940, the corporation has been in the hands of a board of directors controlled by defendant DeGarmo and defendant Goldman; that a stockholders' meeting was held in March, 1942, at which time Frank M. Gunter, counsel and pledgee of certain stock held by plaintiff, was elected a director, together with defendants DeGarmo and Goldman; that DeGarmo and Goldman dominate the board, do not hold meetings as required by the by-laws, are dissipating the assets of the corporation, paying monies to defendant DeGarmo belonging to the corporation without consideration and converting assets of the corporation to their own use; that defendant DeGarmo caused certain persons to be named as directors of the corporation and by threats of physical violence barred plaintiff from entering upon the property of the corporation; that by reason of this course of wrongdoing, the stock owned by plaintiff has become valueless to any person other than defendants and that the market value of the stock has become wholly destroyed to plaintiff's damage in the sum of $42,225.

In the proposed fourth amended and supplemental complaint it is alleged that after the filing of the original complaint herein plaintiff commenced an action for the dissolution of the corporation in which he alleged that the corporation was possessed of liquid assets sufficient to discharge the claims of all creditors and to pay to plaintiff as his share of the net assets a sum not in excess of $15,000. He alleges that he has "suffered damage in the diminution of the value of his said stock in the sum of $27,225." He therefore asks judgment for $27,225 on this account instead of the sum of $42,225 originally asked. He also asks for judgment for $50,000 as punitive damages and $4,915 for loss of salary.

[1] It is a general rule that a corporation which suffers damages through wrongdoing by its officers and directors must itself bring the action to recover the losses thereby occasioned, or if the corporation fails to bring the action, suit may be filed by a stockholder acting derivatively on behalf of the corporation. An individual stockholder may not maintain an action, in his own right against the directors for destruction of or diminution in the value of the stock. This rule was expressly followed by the Supreme Court of California in Anderson v. Derrick, 220 Cal. 770, 32 P.2d 1078, where the plaintiffs instituted an action as individuals to recover damages alleged to have been suffered by them as the result of the fraudulent acts of the defendants who, as directors of a corporation, were asserted to have conspired to cause and did cause the transfer of the entire corporate assets to one of their number, thereby depriving the corporation and plaintiff stockholders of everything of value. The court concluded that the injury was to the corporation itself and that plaintiffs should have commenced a derivative action. This rule is justifiable, for the rights of creditors of the corporation, which are superior to those of the shareholders, would not be protected if individual shareholders were permitted to sue in their own right.

[2] The situation is not changed by the allegations charging conspiracy on the part of defendants, for the action was instituted to recover a judgment for the injury done to the corporation itself by which the corporation's assets were depleted. Allen v. Curtis, 26 Conn. 456; Smith v. Bramwell, 146 Or. 611, 31 P.2d 647; Lukach v. Blair, 108 Misc. 20, 178 N.Y.S. 8; Brock v. Poor, 216 N.Y. 387, 111 N.E. 229; Niles v. New York Central & H. R. R. Co., 176 N.Y. 119, 68 N.E. 142; Anderson v. Derrick, supra. Nor is the situation changed by allegations that defendants acted through malice. The ill will of a director toward a stockholder and his motive in wrongdoing do not change his liability for injuries, which remain injuries to the corporation rather than to the individual shareholder. Green v. Victor Talking Machine Co., 2 Cir., 24 F.2d 378, 59 A.L.R. 1091.

[3, 4] In the original complaint the acts complained of are, essentially, the wrongful and malicious appointment of a receiver, the conversion and dissipation of the assets of the corporation and the payment of excessive salaries to the managing directors. Clearly, these are wrongs to the corporation itself and plaintiff cannot sue to recover except in a derivative action on behalf of the corporation. In a derivative action a shareholder must allege a demand and refusal on the part of the corporation management to commence the action, or allege an appropriate excuse for not making such a demand, and the corporation is a necessary party defendant. Plaintiff does not contend that this is a derivative action and he does not seek to amend his complaint for the purpose of making it a derivative action.

[5-8] In his amended complaints, in which Mrs. Shenberg ceased to be a party plaintiff and Mr. Biby ceased to be a party defendant, plaintiff includes allegations in which defendants are charged with wrongfully causing the corporation to breach its contract for his employment. Plaintiff properly contends that such a cause of action is not derivative in its nature. If it be assumed that the directors of a corporation are personally liable for their acts in inducing the breach of a contract of employment made with a solvent corporation, an assumption which is vigorously opposed by defendants, the action of the lower court must nevertheless be upheld, for a plaintiff may not introduce in an amended complaint a wholly different cause of action from the one stated in his original complaint. The cause of action set forth in the original complaint was for injuries done to the corporation causing the destruction, or diminution in the value, of the corporation stock, whereas the redress sought in the matter of inducing the breach of contract is an individual action which is of interest to plaintiff individually and not as a stockholder. An action of a personal nature resulting in injury to the plaintiff individually may not be joined with a derivative action for injuries done to the corporation. James v. Steifer Mining Co., 35 Cal.App. 778, 788, 171 P. 117. The rule is to be followed notwithstanding plaintiff claims that his action is not derivative in nature and formulates his allegations on the theory that his action may be maintained as an individual. Brock v. Poor, supra.

[9] Plaintiff contends that the allegations of his third amended complaint bring his cause of action within the exception to the rule that derivative actions must be commenced on behalf of the corporation. The exception is stated in 13 Fletcher, Cyc. Corp. Ch. 58, p. 275, sec. 5913: "It is only where the injury sustained to one's stock is peculiar to himself alone, and does not fall alike upon other stockholders, that he can recover as an individual". It is stated in Green v. Victor Talking Machine Co., supra [24 F.2d 381, 59 A.L.R. 1091]: "For a shareholder to obtain a *personal* right of action there must be *relations* between him and the tort-feasor *independent* of those which the shareholder derives through his interest in the corporate assets and business." Plaintiff's allegations of misconduct on the part of defendants are directed to acts which resulted in injuries to the corporation, except the allegations concerning the breach of the contract of employment, which, as we have seen, were improperly added in the amended complaints.

The facts in the present case do not correspond to the facts in any of the cases relied upon by plaintiff. In General Rubber Co. v. Benedict, 215 N.Y. 18, 109 N.E. 96, L.R.A.1915F, 617, the action was not commenced by an individual shareholder but the plaintiff was a corporation suing its own director for damages suffered by the corporation through the misfeasance of the defendant. In Ritchie v. McMullen, 6 Cir., 79 F. 522, the plaintiff had pledged shares of stock with the defendants, who were directors of the corporation. They wrongfully conspired together and reduced the value of the pledged shares with the intention of defaulting the plaintiff, forcing the shares to a public sale, depriving the plaintiff of the means of redeeming them or buying them in, and of buying them in at less than their value, thus increasing their own holdings and causing the plaintiff to cease to be a stockholder. The basis of the decision was that the pledgees used their position as managing directors to depreciate the value of the stock of their pledgor. In these circumstances the injury to the plaintiff was personal and was not an injury which fell upon all shareholders alike. A similar condition, that of pledgor-pledgee of corporation stock, existed in Kono v. Roeth et al., 237 App.Div. 252, 260 N.Y.S. 662. In Adams v. Clark, 239 N.Y. 403, 146 N.E. 642, the plaintiff, a former stockholder in the corporation, was induced by false and fraudulent representations to consent to the adoption of a resolution consenting to the voluntary bankruptcy of a corporation. The corporation was put through bankruptcy proceedings, all of its assets disposed of, and it ceased to do business. False representations had been made to the plaintiff that the corporation would be reorganized in the bankruptcy proceedings and capital would be furnished by the conspirators for the reorganizations, whereas their intention was not to furnish any funds whatever, but to bid in the assets at the bankruptcy sale and eliminate the plaintiff, who was the holder of a majority of the stock. The corporation was no longer in existence and a derivative action could not be maintained. The gravamen of the cause of action was the false and fraudulent representations made directly to the plaintiff. In Hammer v. Werner, 239 App.Div. 38, 265 N.Y.S. 172, the plaintiff was no longer a stockholder and there was no present stockholder of the corporation who was in position to maintain a derivative action. The defendants in violation of their fiduciary relationship improperly acquired stock in the corporation without affording the plaintiff an opportunity to participate ratably in the purchase of the stock. The court referred to the right of a stockholder to have redress where the act complained of effects a separate and distinct wrong to him individually. All of the cases cited by plaintiff recognize the rule that a corporate action is necessary to redress wrongs done to the corporation and that an individual right of action can arise only in cases where shareholders have suffered individual wrongs independently of the wrongs to the corporation or, as in the case of Hammer v. Werner, supra, there is no present stockholder in position to commence a derivative action.

A recent California case is cited by plaintiff, Elsbach v. Mulligan, 58 Cal.App.2d 354, 136 P.2d 651, 654, where the plaintiff and the defendant were stockholders of a corporation and it was claimed the wrongs were done to the corporation. In that case the parties entered into a business venture and "it was agreed between plaintiff and defendant Walter J. Mulligan that any profits or losses resulting from said joint enterprise, undertaking or adventure would be shared equally between plaintiff and defendant". Thereafter a corporation was formed and the two parties owned the corporate stock. The decision recognized the general rule that corporate wrongs must be redressed by the corporation, but further held that "If a corporation or a formal partnership is a mere agency for the purpose of convenience in carrying out a joint venture agreement, and independent and innocent third parties, such as creditors or stockholders, are not injured thereby * *, justice would seem to demand that in determining the rights of the parties they be placed in the position each occupied under the original agreement". The court referred to a conflict in the evidence as to whether the obligations of the parties constituted genuine corporate functions or whether the corporate form was employed merely as a convenient method of carrying out the agreement of the parties, and stated that the trial court's resolution of such conflicts in favor of the plaintiff found support in the record. There are no allegations in plaintiff's various amended complaints which bring the action within the rule of Elsbach v. Mulligan, supra.

[10] No charges appear in the allegations of the proposed fourth amended and supplemental complaint which make inapplicable the general rule that corporate wrongs must be redressed by a corporate action. In all substantial particulars the proposed fourth amended complaint conforms to the third amended complaint. An important change appears to be in the allegation placing a greater value upon plaintiff's stock and asking for judgment in an amount lower by $15,000 than the amount asked in the third amended complaint. This, however, is inconsequential in determining whether the action of the lower court was correct.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

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61 Cal.App.2d 355

PEAK v. NICHOLSON et al.

Civ. 12432.

District Court of Appeal, First District,
Division 2, California.
Nov. 16, 1943.

1. Courts 🔑85(3)

Where record on appeal was completed with filing of transcript before effective date of new rules on appeal, question of sufficiency of transcript was required to be determined by prior rules. Rules on Appeal, rule 53(b).

2. Appeal and error 🔑631

Where a notice of appeal was duly given and a typewritten clerk's transcript was duly filed, it was sufficient record on appeal, under old rules, for review of rulings appearing thereon, as in case of appeal based on judgment roll alone. Code Civ.Proc. §§ 950, 953a.

3. Courts 🔑85(3)

Where record on appeal was on file when new rules on appeal took effect, all subsequent steps in reviewing court had to be taken under the new procedure and question whether delay in filing opening brief was fatal was to be determined under new rules. Rules on Appeal, rule 53 (b).

4. Appeal and error ⚷773(3)

Where appellant's opening brief was not filed within time specified by rules on appeal nor any extension thereof, but appellant was permitted to file brief a little over two weeks after expiration of last extension and brief was filed before notice of motion to dismiss, appeal would not be dismissed because of delay in filing opening brief. Rules on Appeal, rules 16(a), 17(a), 53(b).

5. Appeal and error ⚷801(1)

A dismissal of appeal on technical grounds is not favored where it does not appear that the delay caused material detriment to respondent, and it is policy of courts to encourage hearings of appeals on their merits.

6. Appeal and error ⚷773(3)

Motion to dismiss appeal for delay in filing brief may be granted or denied, in discretion of court, but if brief is already on file at time notice of motion is given, the motion must be denied. Rules on Appeal, rules 16(a), 17(a), 53(b).

◆

Appeal from Superior Court, Sonoma County; Hilliard Comstock, Judge.

Action for damages by George Peak against W. V. Nicholson and others. From a judgment dismissing the action as to some of the defendants, plaintiff appeals. On motion to dismiss appeal.

Motion denied.

Wm. H. Penaat, of San Francisco, for appellant.

A. E. Bagshaw, of San Rafael, for respondents.

NOURSE, Presiding Justice.

The respondents have moved to dismiss the appeal upon two grounds—the failure to serve upon them a copy of the transcript, and the delay in filing the opening brief.

The action is one for damages against a number of defendants. The demurrer of those defendants who are the moving parties here was sustained and a judgment of dismissal was entered as to them on February 9, 1942. No notice of entry of judgment appears in the record. On March 12, 1942, appellant gave notice of appeal from this judgment. A typewritten transcript was prepared and certified by the county clerk and filed with the clerk of the District Court of Appeal of the Third District on June 9, 1942. No service of this transcript was made upon respondents. Extensions of time were given by that court for filing appellant's opening brief; the case was transferred to this court for hearing and decision; and further extensions were given here until July 19, 1943, when further extension was denied. On August 4, 1943, the opening brief was filed, and on August 12th these respondents filed their notice to dismiss the appeal upon the two grounds stated.

[1] The first question must be determined from an examination of the rules of court existing prior to July 1, 1943, since the Rules on Appeal effective on that date are made applicable to pending appeals "after the filing of the record in the reviewing court." Rule 53(b). In the Draftsman's Notes attached to the new rules (Annotated Rules on Appeal, Published by California State Printing Office, 1943.) it is correctly stated that this provision means that they shall apply to and govern the "subsequent proceedings" such as briefs, oral argument, dismissals and hearings.

Here the record on appeal was completed with the filing of the transcript on June 9, 1942. At that time neither the statute nor the rules required that the transcript be printed. The appellant has followed the same steps as those outlined in Miller v. Price, 203 Cal. 772, 265 P. 931. The notice of appeal was not tied into section 953a of the Code of Civil Procedure, but a clerk's transcript, consisting of the judgment roll, and duly certified, was filed as the "record" on appeal. The Supreme Court held that this was sufficient for the review of all rulings which appear thereon, and that the record will be deemed a sufficient compliance with the section 950 of the same code. In Charles v. Crescent City, 12 Cal.2d 241, 242, 83 P.2d 34, the Supreme Court followed the rule of Miller v. Price, supra, and went a step further in holding that the clerk's transcript was not required to be printed when the appellant failed to procure a reporter's transcript under section 953a, citing Ramsay v. Rodgers, 189 Cal. 100, 207 P. 516, and McKinnell v. Hansen, 34 Cal.App. 76-81, 167 P. 887, 888. The citation of the latter case relates to the opinion of the Supreme Court on denial of a petition for transfer. At that time Rule VII required that transcripts of record must be printed except in criminal cases and "civil cases coming under the provisions of section 953a." In reference to it the Supreme Court said: "It is the settled construction of that rule that in any civil case in which a record on appeal is authorized to be prepared under those sections the case is a civil case 'coming under the provisions of section 953a' within the meaning of the rule, and that under the express terms of the rule (subs. 1 and 2) the whole record on appeal, including the judgment roll, may be typewritten. Such has been the invariable practice. Prior to the amendment of section 953a in 1915 it was held that when the appeal was on the judgment roll alone no record on appeal could be prepared thereunder, but it is settled by decisions made since the amendment that the effect thereof is to authorize a record thereunder even when the appeal is on the judgment roll alone, with the consequent right to a typewritten record thereof."

These cases, and others to the same purport, are reviewed and approved in Benson v. Gardner, 14 Cal.2d 526, 95 P. 2d 136.

[2] The rules upon which the moving parties here rely are sections 1 and 2 of Rule I, section 1 of Rule VII and Rule XII. They require generally that all transcripts of record, except in criminal cases "and civil cases coming under the provisions of section 953a of the Code of Civil Procedure, shall be printed" and that the "printed transcript" shall be served before filing. The Supreme Court in the McKinnell case has clearly interpreted the meaning of "civil cases coming under the provisions of 953a" as relating to any civil case in which a transcript is "authorized" to be prepared under that code section, and hence we have no difficulty in holding that, where a notice of appeal was duly given and a typewritten clerk's transcript was duly filed, it was a sufficient record on appeal, under the old rules, for the review of the rulings appearing thereon, as in the case of an appeal based upon the judgment-roll alone.

[3] The second ground of the motion calls for the application of the new Rules on Appeal, which "apply to pending appeals, after the filing of the record in the reviewing court." Rule 53(b). On July 1, 1943, when the rules took effect, the record was on file, and consequently all subsequent steps in the reviewing court had to be taken under the new procedure.

[4, 5] The new rules, like the old, provide fixed periods within which briefs must be filed, and likewise provide for extensions of time and relief from default. Appellant's brief was not filed within the time specified nor any extension thereof and he was clearly in default under the express and mandatory terms of Rule 16 (a). However, he was permitted to file the brief a little over two weeks after the expiration of the last extension, and in granting such permission this court was exercising the powers expressly recognized by Rule 53(b) in the following language: "The reviewing court for good cause may relieve a party from a default occasioned by any failure to comply with the new rules, except the failure to give timely notice of appeal." The excuse offered by appellant was that he was without funds to pay the printer, and that he had expected that the orders extending his time would continue because the trial of the case on the merits as to other defendants was then pending in the superior court. To this it may be added that the change from the old to the new rules took place during the period consumed by these extensions, and under the former rules the filing of his brief before the notice of motion to dismiss would have been a sufficient answer to the motion. It is the accepted policy of the courts to encourage hearings of appeals on their merits and a dismissal on technical grounds is not favored where it does not appear that the delay caused material detriment to the respondent.

[6] We do not wish to be understood as suggesting, by anything said in this opinion, that under the new rules an appellant has an additional 30 days to file his brief, by virtue of the provisions of Rule 17(a), and therefore that respondent's motion to dismiss was premature. Rule 17(a) merely provides a speedy procedure of enforcement of the terms of Rule 16(a) and the notification and grace period of 30 days operates in much the same manner as the former order to show cause why the ap-

peal should not be dismissed for failure to file the brief. Rule 17(a) expressly states that if the clerk does not mail the notification, the respondent may move to dismiss, and there is nothing in the section which prevents him from making that motion within a reasonable time after the brief is due. The motion may be granted or denied, in the discretion of the court. But if the brief is already on file at the time the notice of motion is given, the motion must necessarily be denied, for as pointed out above the filing of the brief after the time therefor has elapsed is possible only by permission of the reviewing court, and this amounts to relief from the default.

The motion is denied.

SPENCE J., and DOOLING, Justice pro tem., concur.

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61 Cal.App.2d 517

BETSCHART v. STEEL et al.

Civ. 3247.

District Court of Appeal, Fourth District, California.

Nov. 30, 1943.

1. Automobiles ⇨208

Where two highways did not intersect or join at perfect right angles but joined at approximately right angles and formed an intersection within meaning of statute, trial court properly determined that the intersection was what is commonly known as a "T intersection," as respects duty towards approaching truck of motorist making left turn at intersection. Vehicle Code, § 86, St.1935, p. 99.

See Words and Phrases, Permanent Edition, for all other definitions of "T Intersection".

2. Automobiles ⇨208, 226(2)

A motorist approaching intersection intending to turn to the left on intersecting highway, who saw truck approaching from the left but continued on into intersection believing the truck would turn to the right although no signal was given indicating such a turn, was guilty of negligence which was the proximate cause of resulting collision. Vehicle Code, § 551, St.1935, p. 186.

3. Automobiles ⇨245(13, 79)

Question of negligence and contributory negligence is generally one of fact where the driver looks but does not see approaching automobile, or, seeing one, erroneously misjudges its speed, distance, or course, or for some other reason assumes he could avoid injury to himself.

4. Automobiles ⇨245(91)

Where a motorist approaching a T intersection saw defendant's truck approaching from the left and erroneously assumed that truck would turn to the right, although no signal so indicating was given, and drove into the path of the truck knowing that if truck did not turn motorist would be struck, whether truck driver was negligent in failing to turn to the right to avoid collision was a question of fact. Vehicle Code, § 551, St.1935, p. 186.

5. Appeal and error ⇨1010(1)

In automobile collision case where finding of negligence on part of plaintiff was supported by the evidence, question of defendant's negligence was immaterial on appeal.

6. Appeal and error ⇨1010(1)

Trial court's decision on issues of fact is conclusive on appeal where there is substantial evidence tending fairly to support the decision and finding.

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Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Leonard Betschart against Henry Steel and E. W. Hoke for damages resulting from an automobile collision. From a judgment for defendants, plaintiff appeals.

Affirmed.

C. E. Crowley, of Ontario, for appellant.

Stephen Tighe and C. W. Bowers, both of Los Angeles, for respondents.

GRIFFIN, Justice.

Plaintiff and appellant, driver of a Ford coupe, brought this action against defendants and respondents Steel, the driver, and Hoke, the owner, of a Ford dump truck, for damages growing out of a collision in which the two vehicles were involved. Defendants deny negligence and set up a further defense of contributory negligence of plaintiff.

The collision occurred at the intersection of two public highways known as Pine Avenue and Chino-Corona Road, in San Bernardino County. Pine Avenue runs east and west. Chino-Corona Road runs approximately north and south. Chino-Corona Road joins Pine Avenue, not exactly at right angles, but more from a southeasterly direction, at what might be rightfully described as approximately right angles. The trial court, in its findings, described it as a "T" intersection. The Chino-Corona Road is a state highway with a 30-foot pavement. As it approaches from the southeast it does not cross Pine Avenue but joins it at a slight angle, creating a rounding curve to the west of approximately 270 feet. From this intersection the state highway continues westerly on Pine Avenue, at which point the pavement on Pine Avenue is 30 feet wide. Leading from the east to the place where Pine Avenue joins the Chino-Corona Road, the paved highway is only 18 feet wide. The intersection, as thus formed is entirely paved. Plaintiff was traveling north on Chino-Corona Road. Defendant Steel was traveling east on Pine Avenue. A collision occurred within the intersection. As they approached each other each had a clear and unobstructed view. The accident happened in the daytime and no other traffic was on the road.

Plaintiff testified that he was approaching the intersection on his right side of the highway at about 15 or 20 miles per hour; that as he was about 30 feet south of the south side of the prolongation of Pine Avenue defendant's truck approached to his left on Pine Avenue about 200 or 300 feet west of the intersection; that he continued on into the intersection in a northerly direction; that at all times he observed the approach of the truck; that he thought the truck was going to turn and go south on the Chino-Corona Road, but instead it came straight east on Pine Avenue. However, he testified that the truck driver gave no signal indicating that he was going to turn; that he (plaintiff) continued on northerly onto Pine Avenue with the intention of proceeding westerly thereon; that he realized that if the truck driver did not make the turn he, plaintiff was going to "get hit"; that he thought the truck driver would make the turn but that he did not and that he found himself directly in the pathway of the oncoming truck. He then testified that the truck ran directly into the left side of his car as he was crossing Pine Avenue, and that the truck carried his car straight east on Pine Avenue about 60 feet.

There were no white lines indicating the center line of either of the highways and no white marks within the intersection. Plaintiff further testified that the truck driver was approaching him about in the middle of Pine Avenue. As a result of the collision plaintiff was injured and his car was damaged.

Defendant truck driver testified that he was approaching the intersection in his truck loaded with 9 tons of gravel; that about 100 yards west of the intersection and "at the intersection" he was traveling "to the right hand or south side of the highway" (Pine Avenue) going east about 25 to 30 miles per hour; that just as he entered the intersection he saw plaintiff's car "coming up the road" not proceeding in a westerly direction around the curve but going "straight north"; that he watched him all the time; that plaintiff was traveling about 25 to 30 miles per hour; that "it seemed like he was slowing up"; that he thought plaintiff was "going to come to a stop for me and I went on"; that just then plaintiff, instead of stopping, went on in front of him; that the front end of the truck collided with the left side of plaintiff's car on the south half of Pine Avenue and in the intersection; that the truck pushed plaintiff's car forward for a distance of about 60 feet; that he did not have room enough to turn to the right to avoid hitting him; that he backed the truck away from plaintiff's car; that he later saw plaintiff seated in his car and asked him how badly he was hurt; that plaintiff remarked that "he didn't know what he (plaintiff) meant by going in front of me (defendant truck driver) the way he did"; that he thought the truck driver was going to turn.

Other witnesses were called who corroborated the testimony of the truck driver. One was the occupant of a car which was traveling east a short distance behind the truck. He testified that the truck driver was going about 25 to 30 miles per hour at a point 100 feet west of the intersection; that the truck driver gave no signal indicating any intention of turning to his right around the curve; that when the truck arrived in the intersection the Ford coupe was "heading in front of the truck"; that the truck was proceeding on the south side of Pine Avenue about four feet north of the south edge thereof. The witness then designated a corresponding point on a diagram of the intersection which he claimed was the point of collision.

Defendant Hoke testified that he interviewed the plaintiff at the hospital and asked him how it happened; that plaintiff said "he didn't know, he just didn't see the truck"; that "I guess it was more my fault than it was the other fellow's". Plaintiff denied such a conversation but did admit on the stand that although the truck driver did not make any signal, he thought he was going to "make the turn" and that he realized that if he didn't make the turn he (plaintiff) was going to get hit.

This is the substance of the evidence produced. From that evidence the trial court found that plaintiff's injuries and damages were not the result of any carelessness or negligence of defendants but that the sole cause of plaintiff's injuries and damages was plaintiff's own negligence. Judgment was entered accordingly.

[1] Appellant first contends that the trial court erred in finding that the intersection here involved was what is commonly known as a "T" intersection. While the two highways did not intersect or join at perfect right angles, they did join each other at approximately right angles and form an intersection within the meaning of sec. 86 of the Vehicle Code, St.1935, p. 99.

Appellant next contends that the evidence does not establish negligence, as found by the court, on the part of the plaintiff. Considering that question the evidence, though conflicting, shows that defendant truck driver was driving, and intended to drive, east through the intersection on what would be the south half of Pine Avenue if the lateral boundary lines thereof were prolonged and extended through the intersection from west to east. Plaintiff was driving northerly in the intersection on what would be the right or easterly half of Chino-Corona Road, if the lateral boundary lines thereof were prolonged and extended northerly. It was his intention to turn to his left or to the west.

[2] Viewing the evidence in its most favorable light, defendant truck driver was proceeding in a lawful manner on his proper and intended course within the intersection. Mathis v. Bzdula, 1936, 122 Conn. 202, 188 A. 264, 265; Sec. 86 Vehicle Code. Plaintiff was about to negotiate a turn to the left at the intersection. The driver of a vehicle within an intersection intending to turn to the left shall yield the right of way to any vehicle approaching from the opposite direction which is within the intersection or so close thereto as to constitute an immediate hazard. Sec. 551, Vehicle Code; Ekwall v. Los Angeles Hat Co., 105 Cal.App. 300, 287 P. 545. Plaintiff continuously observed the oncoming truck for a distance in excess of 300 feet. He erroneously believed that the truck driver was going to turn to the south even though no signal was given by him indicating such a turn. Notwithstanding these observations, plaintiff drove immediately in front of the oncoming truck and in its pathway. Plaintiff realized that if the truck driver did not make the turn plaintiff was going to "get hit". Unfortunately, plaintiff acted upon an erroneous assumption.

[3-6] The question of negligence and contributory negligence is generally one of fact where the driver looks but does not see an approaching automobile, or seeing one, erroneously misjudges its speed, distance or course, or for some other reason assumes he could avoid injury to himself. Kienlen v. Holt, 106 Cal.App. 135, 288 P. 866. The trial court was fully justified in finding that plaintiff was guilty of negligence and that such negligence was the proximate cause of the injury. Mathes v. Aggeler & Musser Seed Co., 179 Cal. 697, 178 P. 713; Berkovitz v. American River Gravel Co., 191 Cal. 195, 215 P. 675; Peel v. California Belting Co., Inc., 108 Cal. App. 93, 291 P. 219. Whether or not defendant was negligent in failing to turn his truck to the right and avoid colliding with plaintiff's car was a question of fact for the trial judge. In view of the finding of negligence on the part of plaintiff, the question of defendant's negligence becomes immaterial on this appeal. The decision of the trial court on issues of fact is con-

clusive on appeal where there is any substantial evidence tending fairly to support the decision and finding. Robinson v. Robinson, 159 Cal. 203, 113 P. 155; Tench v. McMeekan, 17 Cal.App. 14, 118 P. 476.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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61 Cal.App.2d 447

PEOPLE v. HUPP.

Cr. 557.

District Court of Appeal, Fourth District, California.

Nov. 22, 1943.

1. Arrest 🔑63(4)

A peace officer, knowing, at night, of facts which would cause ordinarily reasonable and prudent person to entertain honest and strong suspicion that another person has committed a felony, may arrest such person without a warrant. Pen.Code, § 836.

2. Arrest 🔑63(4)

Reasonable and probable cause for peace officer's belief that a person has committed a felony, so as to authorize arrest of such person without a warrant, must be measured by facts presented to officer at time he is required to act. Pen.Code, § 836

3. Arrest 🔑58

It is peace officers' duty to make arrests, not only for commission of crimes, but to prevent commission of additional crimes and protect citizens' lives.

4. Arrest 🔑63(4)
Assault and battery 🔑69

City police officers, who were ordered by their superior to investigate charges that certain person had chased his son-in-law down street, threatened him and sent for shotgun to prevent him from reporting affair to police, proceeded to offender's residence, where he threatened one officer's life with loaded shotgun, and saw offender's wife crawling under house with child in arms, were justified in suspecting that offender had committed felony, so as to authorize his arrest without a warrant, and hence were not "trespassers," whom he could resist by any means short of homicide to prevent invasion of his domicile, as alleged by him in defense of prosecution for assault on officers with deadly weapon. Pen.Code, §§ 245, 417, 836.

See Words and Phrases, Permanent Edition, for all other definitions of "Trespasser".

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Everett Hupp was convicted of assault with a deadly weapon, and he appeals.

Affirmed.

J. M. Lopes, of Visalia, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from a judgment pronounced upon defendant after he had been found guilty of assault with a deadly weapon, with one prior conviction of a felony which he admitted.

The sole question for consideration is whether or not the evidence is sufficient to support the verdict and judgment. Defendant argues that he was only guilty of the misdemeanor defined in section 417 of the Penal Code but not of the felony denounced by section 245 of that Code.

The defendant argues that the complaining witnesses attempted to enter his home to arrest him without a warrant; that they were trespassers on his property and that he had the lawful right to protect his property with such amount of force, short of homicide, as might have been necessary to prevent the unlawful invasion of his domicile. People v. Ross, 19 Cal.App. 469, 126 P. 375; People v. Hubbard, 64 Cal.App. 27, 220 P. 315; 3 Cal.Juris. 210.

A decision of this question requires a review of the evidence in the case to determine if the complaining witnesses were trespassers on defendant's property.

At all times material here, C. H. Hickman and O. M. Sasseen were police officers of the city of Visalia. On the late afternoon of May 15, 1942, officer Hickman saw defendant in a tavern in Visalia. Defendant was drunk, quarrelsome and invited the bartender to go outside and fight. Officer Hickman told defendant to go home or he would lock him up.

Later in the evening the two officers were patrolling the streets of Visalia in a police car. At about 7:40 o'clock they received a radio call ordering them to go to defendant's house to investigate a disturbance. They were informed that defendant, armed with a shotgun, had chased his son-in-law down the street and had threatened his family.

The two officers went to defendant's house. As officer Sasseen reached the top of the steps leading to the porch, defendant appeared in the front doorway with a loaded shotgun in his hands which he pointed at Sasseen, saying, after he found out there was no warrant issued for his arrest, "Don't come any further or I will kill you." Sasseen jumped down from the porch and Hickman quieted defendant and placed him under arrest. The officers had seen defendant's wife crawling under the house with a small child in her arms.

The cause of the radio call to the officers was a report at the police station by defendant's daughter and son-in-law to the effect that defendant had chased his son-in-law down the street, threatening him; that he sent for his shotgun with which he was going to prevent his son-in-law and daughter from reporting the affair to the police.

There is evidence to the effect that before the two officers reached his house defendant had armed himself with his shotgun, had loaded it, stating that he was going to shoot the "cops" and save one shell for his wife.

It seems to be the theory of defendant that as the officers had no warrant for his arrest they were trespassers on his property; that he had the right to repel their invasion by any means short of homicide.

[1, 2] An officer has the right to arrest a person at night without a warrant where there is reasonable cause to believe that he has committed a felony. Sec. 836, Penal Code.

It is a generally accepted rule that where, at night, a peace officer has possession of facts which would cause an ordinarily reasonable and prudent person to entertain an honest and strong suspicion that another had committed a felony, the officer may arrest such person without a warrant. People v. Kilvington, 104 Cal. 86, 37 P. 799, 43 Am.St.Rep. 73. The question of reasonable and probable cause for the belief must be measured by the facts presented to the officer at the time he is required to act. For a detailed discussion of facts sufficient to justify such reasonable belief, see People v. Kilvington, supra; Michel v. Smith, 188 Cal. 199, 205 P. 113; Bate v. Jolin, 206 Cal. 504, 274 P. 971; People v. Gays, 54 Cal.App. 460, 202 P. 43; Murphy v. Murray, 74 Cal.App. 726, 241 P. 938.

[3, 4] We can entertain no doubt of the sufficiency of the facts made known to the officers to justify their strong suspicion that a felony had been committed by defendant. Complaint had been made to their superiors by the daughter and son-in-law of defendant. The facts of this complaint were communicated to them in the regular course by their superior who ordered them to investigate the charges. It became their duty to do so as it is the duty of peace officers not only to make arrests for the commission of crime but to prevent the commission of additional crimes and protect the lives of citizens. Under these instructions they proceeded to defendant's residence, not necessarily to arrest him, but to investigate and act on the results of such investigation. One of the officers walked up the steps to the porch where he was met by defendant, armed with a loaded shotgun, who threatened the officer's life. One officer had seen defendant drunk, quarrelsome, and trying to engage in a fight a short time earlier. They saw defendant's wife crawling under the house with a child in her arms. They had been told by responsible authority that defendant was armed and had threatened his son-in-law. Under such circumstances the officers did nothing but their duty and showed creditable restraint in performing it. The argument that they were trespassers and that defendant could resist the trespass by any means short of homicide is entirely without merit.

The judgment is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

61 Cal.App.2d 364

PEOPLE v. NOLAND.

Cr. 2271.

District Court of Appeal, First District,
Division 2, California.

Nov. 16, 1943.

1. Poisons 🔑9

Evidence that defendant kept narcotics in a vase in hallway outside his hotel room as a secret hiding place sustained conviction of "possession" of narcotics.

See Words and Phrases, Permanent Edition, for all other definitions of "Possession".

2. Criminal law 🔑568

To establish "possession" of an unlawful article it is not necessary to show that the accused had the article on his person or to show possession at very time of arrest.

3. Property 🔑10

A person has "possession" of an unlawful article who has physical control with the intent to exercise such control, or, having had such physical control, has not abandoned it and no other person has obtained possession.

4. Criminal law 🔑742(3), 1160

That defendant's conviction was not supported by the evidence, because state's witness was biased and her testimony was motivated by revenge, was a question for the jury and the trial court on the motion for new trial, and not for the District Court of Appeal.

5. Criminal law 🔑1159(4)

It is not competent for the appellate court to pass upon the credibility of the witnesses, unless the record discloses that the testimony is inherently improbable.

6. Poisons 🔑9

In prosecution for unlawful possession of narcotics, testimony as to defendant's possession of a syringe and hypodermic needle, customarily used in the administration of the drugs, and which were found concealed with the drugs, was admissible as relative to the issue of possession of the drug.

7. Criminal law 🔑1169(3)

In prosecution for unlawful possession of narcotics, defendant's objections to the qualifications of arresting officer to testify relative to punctures in defendant's arm was overcome by defendant's own testimony that such punctures were caused by him in the injection of narcotics.

8. Poisons 🔑9

In prosecution for unlawful possession of narcotics, which were found concealed in a vase in hallway outside defendant's hotel room together with a syringe and hypodermic needle, trial court's refusal to give requested instructions relating to "exclusive possession" and "complete dominion and control" of the narcotics, and the giving of instruction relating to actual and constructive possession, was not error.

Appeal from Superior Court, City and County of San Francisco; Lile T. Jacks, Judge.

Mancel Noland (charged as James Noland) was convicted of unlawful possession of narcotics, and he appeals.

Affirmed.

A. J. Hennessy, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

NOURSE, Presiding Justice.

The defendant was tried before a jury on an information charging a felony—possession of narcotics. He has appealed from the judgment following a verdict of guilty and from the order denying his motion for a new trial.

The defendant was arrested at about 1 P.M. while asleep in his room in a hotel in San Francisco which he had occupied with a married woman, not his wife. The narcotics were found in a vase standing outside the door of defendant's room. They were in a phial wrapped in tissue paper with a rubber band around it. With them was another package containing a syringe and hypodermic needle. The defendant denied to the officers that he was an habitual user of narcotics, but admitted that he used them occasionally, and displayed sixteen punctures in his arms which were shown to have been caused by the use of a hypodermic needle. His woman companion testified that the instruments belonged to defendant; that he had kept them and the package of narcotics in his possession in his room for the period of two or three weeks while she was living with him, and had placed them in the vase in the hallway to avoid detection. The testimony of this witness was attacked, the defendant showing that she had recently commenced a civil action against him to recover a sum of money which he had taken into his possession and held on the claim that she had given it to him. There was also an attempt to show that she had threatened his arrest charging a theft of the money. This witness admitted that she had commenced the civil action, but denied the threats of criminal prosecution. She had been apprehended, for reasons not shown, and led the officers to defendant's room, and showed them where the narcotics and instruments could be found.

[1] Appellant argues that the evidence is insufficient to prove possession since the articles were found in the vase located in the hallway. But the evidence is that the vase was a secret hiding place used by him for that purpose, that he had kept them in his possession all the time his companion had lived with him, but had placed them in this vase, or in other secret hiding places outside his hotel room.

[2, 3] In People v. Belli, 127 Cal.App. 269, 271, 15 P.2d 809, 810, it was held that the statute did not require "proof of possession at the very time of arrest." In People v. Sinclair, 129 Cal.App. 320, 322, 19 P.2d 23, 24, it was held it was not necessary to prove that "the person accused has the unlawful article on his person." And see People v. Le Baron, 92 Cal.App. 550, 268 P. 651, 269 P. 476; People v. Chan Chaun, 41 Cal.App.2d 586, 107 P.2d 455; and People v. Ng King, 60 Cal.App.2d 239, 140 P.2d 426. A person has "possession" of a chattel who has physical control with the intent to exercise such control, or, having had such physical control, has not abandoned it and no other person has obtained possession. Restatement Torts, section 216.

Appellant relies on People v. Herbert, 59 Cal.App. 158, 210 P. 276, and People v. McDaniel, 59 Cal.App.2d 672, 140 P.2d 88. Neither case states any different rule of law. The first held that evidence was sufficient to show possession; the second case held that it was insufficient, but the case was reversed for other error.

[4, 5] The appellant argues that the verdict is not supported by the evidence because his woman companion was biased and her testimony was motivated by revenge. This was a question for the jury and for the trial court on the motion for a new trial. It is not competent for the appellate court to pass upon the credibility of the witnesses, unless, of course, the record discloses that the testimony is inherently improbable. 27 Cal.Jur. p. 186.

[6, 7] Appellant complains of the ruling admitting testimony of the possession of the syringe and hypodermic needle. Proof of the possession of these instruments, which are customarily used in the administration of the drug, and which were found concealed with the drug, was relative to the main issue—possession of the drug. The evidence of the needle punctures on appellant's arm showed the manner in which the drug was used, and the testimony objected to was merely a part of the entire story. The suggestion that this testimony was inadmissible because possession of the articles was not charged in the information cannot be taken seriously. Whatever objection appellant may have had to the qualifications of the arresting officers to testify relative to the punctures in appellant's arm was overcome by his own testimony that these punctures were caused by him in the injection of a narcotic.

[8] Appellant complains of the refusal of the trial court to give his proposed instruction relating to "exclusive possession" and "complete dominion and control" of the narcotics, and of the giving of the instruction relating to actual and constructive possession. We find no error here. Appellant's argument rests upon an interpretation of the ruling in People v. Herbert, 59 Cal.App. 158, 210 P. 276, and on People v. McDaniel, 59 Cal.App. 672, 140 P.2d 88, where it was held that possession of the drug was not proved. They are not applicable here, as we have heretofore shown.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concur.

61 Cal.App.2d 379

PEOPLE v. DUGGAN.

Cr. 3729.

District Court of Appeal, Second District, Division 2, California.

Nov. 16, 1943.

Homicide ⇐22(1)

Where accused, after his wife stated that she had another man and didn't care whether she left accused, got up from divan, went into kitchen, and choked wife to death with a handkerchief, the offense was "murder in the first degree", since it was perpetrated by "torture" within statute defining first-degree murder. Pen.Code, § 189.

See Words and Phrases, Permanent Edition, for all other definitions of "Murder in First Degree" and "Torture".

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Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Allen Ross Duggan was convicted of first-degree murder, and he appeals.

Affirmed.

Stanley Visel, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

Defendant entered a plea of guilty to an information charging him with murder. Thereafter the trial judge fixed the crime as murder in the first degree and sentenced defendant to life imprisonment.

From the judgment defendant appeals.

The record discloses the following facts:

On the evening of February 1, 1943, defendant declined to go to the motion picture theater with his wife, daughter and son. The two children went to the theater leaving their parents at home. According to defendant's statement, he lay on a divan in a room adjoining the kitchen where his wife was working. A dialogue ensued between them. During the course of their conversation defendant's wife complained that he never took her to a show. He replied in jest: "Well, maybe you can get some good-looking man to take you to the show." His wife remarked: "I already have one." Defendant then asked her if she wanted to leave him and she answered, she didn't care. Defendant then told her that if he "couldn't have her, nobody could." Thereafter he tied a handkerchief around her neck, pulled it tight, and choked her to death. Defendant then put her upon a bed, covered her with a spread, kissed her, took off her shoes, and wrote a note, "May God have mercy on you." The note he placed on the front room table, turned out the lights in the house, locked the door, went to the police station and surrendered.

This is the sole question necessary for us to determine:

Was there substantial evidence to sustain the trial court's finding that defendant was guilty of murder in the first degree?

This question must be answered in the affirmative. The law is established in California that murder which is perpetrated by means of *torture* is murder in the first degree. (Section 189 of the Penal Code.)

Applying the foregoing rule to the facts in the instant case, since the evidence discloses that defendant choked his wife to death with a handkerchief, it is clear that the murder was perpetrated by means of torture and therefore was murder in the first degree. (People v. Murphy, 1 Cal.2d 37, 41, 32 P.2d 635; People v. Cardoza, 57 Cal.App.2d 489, 134 P.2d 877.)

For the foregoing reasons, the judgment is affirmed.

MOORE, P. J., concurs.

W. J. WOOD, Justice (concurring).

I concur. Murder is of the first degree when it "is perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing * * *." Sec. 189, Penal Code. To establish that the killing was deliberate and premeditated it was not necessary for the prosecution to prove that there was any appreciable space of time between the intention to kill and the act of killing. "They may be as instantaneous as successive thoughts of the mind." People v. Donnelly, 190 Cal. 57, 210 P. 523. Defendant left his reclining position in the living room, went to the kitchen and there attacked his wife. The evidence is ample to support a finding that the killing was willful, deliberate, and premeditated and consequently murder of the first degree.

61 Cal.App.2d 406

PEOPLE v. BRAIKER et al.

Civ. 3726.

District Court of Appeal, Second District, Division 2, California.

Nov. 19, 1943.

Larceny ⟹65

Evidence that defendants, who were engaged in business of constructing homes, received deposits from prospective customers to be used for purchase of lot described in receipt, and that deposits were diverted by defendants for other uses, supported conviction of grand theft.

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Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Sol. Braiker and Edward M. Rose were convicted of grand theft, and they appeal.

Affirmed.

George D. Higgins, of Los Angeles, for appellant Sol Braiker.

Leonard Wilson, of Los Angeles, for appellant Edward M. Rose.

Robert W. Kenny, Atty. Gen., R. S. McLaughlin, Deputy Atty. Gen., and Jere J. Sullivan, Deputy Dist. Atty., of Los Angeles, for respondent.

W. J. WOOD, Justice.

In each of nineteen counts of an information defendants were charged with the crime of grand theft. At a trial before the court without a jury they were convicted on seven of the counts and were found not guilty on the remaining counts. They have appealed from the judgments and from the orders denying their motions for a new trial, contending that the evidence is insufficient to sustain the convictions.

Prior to October 15, 1941, defendant Braiker had been engaged in the business of constructing homes either as a contractor or as an employee of others and defendant Rose had been employed as a salesman of small homes for various concerns. On that date Braiker and Rose entered into a contract in which it was provided that Braiker should be the contractor and Rose should be the salesman in the business of building and selling small homes. It was provided in this contract: "Contractor agrees to hire and does hereby hire and employ the salesman to act as the selling agent of the contractor in the business to be conducted by the contractor under the name of S. Braiker, at 11430 West Pico Boulevard, Los Angeles, California, where the said contractor shall maintain a general sales office for the sale of the buildings to be constructed by him. Contractor agrees to pay all of the necessary costs of maintaining and operating said office, including, but not limited to, telephone, advertising, secretarial costs, stationery, postage and all expenses incidental to the operation of a building construction office." It was further provided in the contract that Rose should devote all of his time to the business to be conducted and as full compensation he should receive $50 for each house sold, whether it be sold by him or by someone else, the "commissions" to be payable to Rose upon the final consummation of the deals and the transfer and the conveyance of title to the purchasers.

Operations were commenced by defendants shortly after they entered into their contract and Braiker constructed a model house on the lot adjoining their office. Rose handled all of the preliminary work connected with the sales, the obtaining of payments, the arranging for the loans and the preparation of plans and specifications. Braiker did the actual construction work. The same general procedure was followed by defendants in all the operations. When a customer entered the premises, Rose, or one of the salesmen working under him, would show the customer through the model house and take him out to see vacant lots. The customer would, if desirous of purchasing, select a lot and make a deposit in excess of $200 to be used in the purchase of the lot in the event a Federal Housing Administration loan could be secured to build the house. The customer's check was made payable to Braiker and deposited in Braiker's bank account. The customer and the salesman signed a deposit receipt containing these provisions, the blanks being filled in according to the prices agreed upon:

"Sol Braiker
"11430 W. Pico Boulevard
"West Los Angeles, California
"Arizona 92247

"Date ——

"Gentlemen:

"We hand you herewith the sum of $—— as a deposit on a total down payment of

$——, to purchase for us (or if you own the same, to hold for us) the following described parcel of property:

"To wit:————————— ————
(Lot Block Tract City Street and No.)

which we agree to purchase for the sum of $——. We have selected your Plan —— No. ——, and agreed to have you build a similar house for us on the lot above described, to cost us $——. We agree to sign all necessary application papers for loans. If the loans are approved, we agree to pay you an additional sum of $—— and sign and execute all necessary loan papers and contracts to complete the transaction. We will assign the proceeds of said loan upon demand to Sol Braiker, or their nominee.

"The payments to be made under such loans shall be approximately as the following schedule indicates, to wit:

$—— 30 days from date
$—— 60 days from date
$—— 90 days from date
$—— 120 days from date
$—— 150 days from date
$—— 180 days from date
$—— 210 days from date
$—— 240 days from date

and shall continue monthly until the full amount of said loans are paid. Said loans shall include interest at a rate indicated on face of trust deeds or notes per annum on the unpaid balance. These monthly payments do not include taxes or fire insurance.

"In the event this transaction is not completed due to our inability to qualify for said loan, it is understood that our deposit will be returned to us in the full amount, less $10.00 expended by you for services.

"It is further agreed and understood that if this transaction is canceled by us for any reason other than our inability to qualify for said loan, then in that event our full deposit shall be retained by you for services rendered.

"We authorize you to secure for us a conditional F.H.A. Title 2 commitment and agree to sign an application and all necessary papers upon demand for an F.H.A. Title 2———, year loan. Upon acceptance by F.H.A. of such Title 2 loan, we understand that the payments will be approximately $—— per month, including taxes, insurance, principal and interest.

"We understand that there is no guarantee on the part of your Company that such loans will be forthcoming.

"This application is subject to a final contract to be executed by Sol. Braiker, and ourselves. All plans and specifications are subject to F.H.A. changes.

"Contractor does not guarantee said loan to convert to a Title II loan.

"Contract price does not include water meter."

Defendants did not own any of the lots described in the deposit receipts and none of the lots involved in the transactions covered by the counts on which defendants were convicted were purchased, nor were any houses built thereon. No final contracts were ever made by Braiker or Rose with the customers. Nor were the amounts of the deposits made by the customers ever returned to them notwithstanding proper demand was made for their return. The deposits made by the customers were used to pay the general expenses of the business, including the cost of constructing a number of homes for customers other than those mentioned in the various counts of the information. From time to time Braiker instructed Rose to pay bills of the business out of the funds collected and in such instances Rose paid the bills in cash and took receipts therefor.

Deposits were placed by Braiker in a separate bank account but later the deposits were placed in the general account. Mr. Braiker testified:

"I have taken out a thousand dollars from the checking account and put into a separate account so that money that came in from the buildings, while they were under construction, should not mix in with deposits given by depositors; and at that time, when Mr. Rose found out that, he said for me to take that money out and put it back again in the checking account. Of course, he takes care of the financial end, and it was better to have it in one account.

"Q. Then what did you do? A. I took it out and put it back as he told me.

"Q. You redeposited it in the general account? A. Yes."

There is evidence in the record from which the court could reasonably infer that part of the deposits were used for the living expenses of defendants. The bookkeeper testified:

"All those moneys that were deposited as reflected by the books to the bank account of Sol Braiker, were dispersed and used for the operation of the business? A. By Sol Braiker?

"Q. Or by anyone, whoever wrote the checks? A. No, not all checks were used for the business.

"Q. Some of it was for the living expenses of Mr. Braiker and Mr. Rose? A. Not charged to the company expenses, no.

"Q. Did you charge that to Mr. Rose and Mr. Braiker? A. Drawing account, yes.

"Q. All right. What else was the money dispersed for other than the business, drawing account of Mr. Braiker and Mr. Rose? A. That is all."

Mr. Braiker testified that after the commencement of the war it became very difficult for him to secure materials and that the great difficulties of the construction business then encountered, together with the action of the prosecuting attorneys in causing his arrest, made it impossible for him to carry on the business; that he had no fraudulent intent and that his inability to return the deposits was due to conditions beyond his control.

The attorney general contends that the sums deposited by the customers constituted a trust fund which defendants had no right to use except for the express purpose for which the deposits were made and that when defendants diverted the deposits to any other use they in fact embezzled them. An examination of the deposit receipt bears out this contention. It is therein expressly stated that the sum delivered is a deposit to be used for the purchase for the customer of the lot described in the receipt. It is true that this statement is followed by language by which the customer agreed to have built a house similar to the model house for a given sum and that the parties had agreed upon the purchase of the lot and the erection of a building thereon if a proper loan could be negotiated. But it is clear that two separate transactions were included in the general agreement, the purchase of the lot for a given sum, and the erection of a building for a given sum. It is provided that the whole transaction should fail and the deposit be returned if the F.H.A. loan should not be obtained. The only construction to be placed upon the part of the agreement referring to the purchase of the lot is that the deposit therein mentioned constituted a trust fund. The addition of the further provision that a house should be erected upon the lot for a stated sum does not change the status of the deposit from that of a trust fund and make it available for the general business uses of the contractor. Indeed, Mr. Braiker stated in the offices of the district attorney that he knew that the deposit constituted a trust fund.

The claim of Braiker that he intended to use the trust funds in the construction of the houses and that he had no intention of permanently depriving the customers of their property does not constitute a defense, for it is the immediate breach of the trust which makes the offense. The crimes were completed when defendants diverted the trust funds from the uses for which the funds had been entrusted to them. People v. Talbot, 220 Cal. 3, 28 P.2d 1057. The commencement of the war and the resulting difficulties encountered by builders did not authorize defendants to commit the criminal acts of diverting trust funds to improper uses.

In arguing that defendants had the right to use the deposit money, defendants rely upon People v. Holder, 53 Cal.App. 45, 199 P. 832, and People v. Bullock, 92 Cal.App. 785, 268 P. 1059. In the Holder case the defendant entered into a contract with the owner of a lot for the construction of a house. A part of the stipulated contract price was paid to the defendant, who failed to use it for labor and materials. The reviewing court held that Holder was not guilty of embezzlement because the money thus paid to him was his own property and was not the property of any other person. In the Bullock case the owner of a small dwelling house contracted with the defendant to remodel the house for the sum of $2,500. The reviewing court held that the property alleged to have been embezzled was paid to the defendant under and by virtue of the building contract and that the money received was not held in trust but was the property of the defendant under the contract. A very different situation appears in the present case, where the customers, not being the owners of the lots in question, paid deposits to defendants to be used in the purchase of the lots.

Defendant Rose argues that as to him in particular the evidence is insufficient since he was to receive only the sum of $50 for the sale of each house. There are many circumstances disclosed by the record which involve defendant Rose and make him criminally responsible. He conversed daily with Braiker during the progress of the operations of the concern and was well informed concerning its affairs. He made admissions in the district attorney's office that he was aware that the deposits were trust funds. The funds in the separate trust account were placed in the general account at the suggestion of Rose and were withdrawn by Rose by check. Rose also personally paid general bills of the business out of the money received as deposits.

The judgments and the orders denying new trials are affirmed.

MOORE, P. J., and McCOMB, J., concur.

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61 Cal.App.2d 522

PEOPLE v. AMES.

Cr. 621.

District Court of Appeal, Fourth District, California.

Nov. 30, 1943.

1. Perjury 🔑12

In prosecution for perjury based on falsity of testimony, in civil action involving ownership of automobile purchased by accused, that accused had borrowed a substantial sum from a building and loan association to apply on purchase price, $159.45 which accused had borrowed, which was a little less than 20 per cent. of total amount involved in purchase, and a little more than 20 per cent. of cash paid, constituted a "substantial sum" of amount paid for automobile.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Sum".

2. Criminal law 🔑741(1), 742(1)

The credibility of witnesses and weight to be given their evidence were for jury.

3. Perjury 🔑29(4)

In prosecution under information charging perjury because accused had falsely testified, in civil action involving ownership of automobile purchased by accused, that accused had borrowed money from building and loan association to apply on purchase price of the automobile, testimony that some of the money used for purchase came from the association was a material variance from and did not support the allegation that accused borrowed money to apply on the purchase price, which was a material part of the charge.

4. Criminal law 🔑935(1)

Where evidence failed to support allegation of information charging perjury because accused falsely testified in civil action involving ownership of automobile purchased by accused that accused had borrowed money to apply on purchase price from a building and loan association, motion for new trial should have been granted as to count of information charging perjury.

5. False pretenses 🔑7(5)

The false representations made by defendant, to constitute grand theft, must relate to a present or past fact. Pen. Code, § 21.

6. False pretenses 🔑7(5)

A valid present contract for future care and support for life can be made by two parties, and, if one entertains a present intention of not performing and falsely represents to other that she will give him a home and care for life and has no present intention of performing and obtains money or property from the other while he relies on truth of such false representations, then representations relate to a "present fact" and warrant conviction of grand theft. Pen.Code, § 21.

See Words and Phrases, Permanent Edition, for all other definitions of "Present Fact".

7. False pretenses 🔑7(5)

That a false statement of a present fact is coupled with a false promise of a future act does not overcome effect of the false pretense concerning the present fact. Pen.Code, § 21.

8. False pretenses 🔑51

In prosecution for grand theft by means of false pretenses, accused's guilt was for jury. Pen.Code, § 21.

9. Criminal law 🔑618

Denial of motion to grant separate trials of count charging grand theft alleged to have been committed on June 2, 1941, and of count charging perjury on November 12, 1942, was not an abuse of discretion, where offenses grew out of same transaction and much of same evidence was necessary to establish guilt or innocence under both counts. Pen.Code, §§ 21, 954.

10. False pretenses ⚷26

A count of information charging that accused on certain date feloniously by a false and fraudulent representation and pretenses defrauded named party of $800 did not fail to state facts sufficient to constitute a public offense, in view of adoption of simplified form of pleading in criminal cases. Pen.Code, §§ 21, 950–952.

11. Criminal law ⚷822(1)

Instructions must be considered in their entirety and their effect on jury must be weighed after they have been read as a whole.

12. Criminal law ⚷822(16), 823(15)

A long instruction, first part of which merely stated a legal platitude, and portion of which incorrectly stated the law applicable to reasonable doubt, was not prejudicial where closing portions correctly stated the law of presumption of innocence and of doctrine of reasonable doubt including statutory definition, especially where accused's instructions on the subject were also given. Pen.Code, § 1096; Code Civ.Proc. § 2061, subd. 2.

◆

Appeal from Superior Court, Orange County; Kenneth E. Morrison, Judge.

Pearl Ames was convicted of perjury and grand theft, and, from an order denying her motion for new trial, she appeals.

Affirmed in part and reversed in part.

Blodget & Tobias, of Santa Ana, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

MARKS, Justice.

This is an appeal from an order denying a motion for new trial, made after defendant had been granted probation, following her conviction of perjury and grand theft.

Defendant was a resident of the city of Huntington Beach. In April, 1941, she became acquainted with W. M. Turk, an aged resident of the same city. He was then about 86 years old. He went to live at defendant's house and paid her $30 a month for board and lodging. He, defendant, and a third party named Anthony F. Roth, discussed the purchase of a used automobile. Turk drew $800 in currency from his bank account by check dated June 2, 1941. He testified he gave defendant the $800 sometime in June, 1941. She purchased a car on June 6, 1941, trading in an old car and paying the balance of the purchase price in cash, taking title in her own name.

In December, 1941, she and Turk had a disagreement and he left her house. On September 4, 1942, Turk filed suit against her which came on for trial in the Superior Court of Orange County in November, 1942. It involved the ownership of the car. Defendant testified in her own behalf and her evidence given there furnished the basis of a charge of perjury which was subsequently filed against her. She was also accused of grand theft of the $800 Turk had given her. She was convicted on both counts, was granted probation, and has appealed from the order denying her motion for new trial.

The specific perjury charged against her is thus set forth in the information:

"That the said Pearl Ames * * * took the witness stand and gave in evidence, among other things, in substance as follows:

"That she had borrowed a substantial sum of money from the Santa Ana Building and Loan Association to apply on the purchase price of an automobile, whereas, in truth and in fact, said statement was false and she, the said Pearl Ames, knew that said statement was false. That said false statement was material to the issue of the cause then and there on trial in the aforesaid Superior Court."

The evidence discloses that several years prior to the transactions here involved, defendant had borrowed $750 from the Santa Ana Building and Loan Association; that after certain bills were paid there remained $159.45 which the Association paid to defendant in December, 1935. She testified that she kept this money intact and applied it on the purchase price of the automobile which she bought in June, 1941. This evidence stands undisputed in the record except in so far as it is contradicted by circumstantial evidence.

The car she purchased, including the sales tax and license transfer fee, cost $819.55. She received a credit of $85 for the old car and paid the balance of $734.55 in cash, mostly in currency.

Mr. Turk testified that he gave defendant eight one hundred dollar bills. The agent making the sale testified that the money paid him was not in one hundred dollar bills, though there might have been two or three in the "roll of money she handed me". This evidence is not contradicted except by the evidence of defendant who testified there were no one hundred dollar bills in the money she paid for the car.

It is therefore established in this case that the Santa Ana Building and Loan Association, in December, 1935, paid defendant $159.45.

If the allegation in the information to the effect that defendant falsely testified that she borrowed money from the Santa Ana Building and Loan Association to apply on the purchase price of the automobile was intended to allege that she testified the loan was made at about the time of the purchase of the car for the purpose of getting money with which to make the purchase, it is supported by the evidence. While no reporter's transcript of the evidence given in the civil action was introduced in evidence (we are informed there was no reporter at the trial), the trial judge and the attorney for plaintiff in the civil action both gave a summary of defendant's evidence in that case. The attorney summarized the testimony of defendant on this question as follows:

"Q. Then when you asked her whether or not any of the money came from any other place did she say that some of it may have come from the Santa Ana Building and Loan Association? A. She said some of it did come * * *

"Q. And did she say she couldn't recall when it was that she borrowed the money? A. Yes.

"Q. And she said she couldn't recall exactly how much she had borrowed at the time? A. She said she couldn't recall how much it was. * * *

"Q. Did she tell you she couldn't remember how much cash she got out of the Building and Loan? A. She said she couldn't remember how much she had borrowed.

"Q. And did she tell you it had been some time since that had occurred? A. She told me she couldn't remember. She said she didn't remember how long it had been."

The testimony of the trial judge is to the same general effect.

Thus it appears that Mrs. Ames did not testify in the civil action that the loan was made to apply on the purchase price of the car.

As the information alleges the falsity of the testimony that defendant had borrowed a substantial sum from the Building and Loan Association to apply on the purchase price of the car, assuming she so testified, we must first consider whether or not $159.45 constituted such a substantial sum when and if used as a part of the purchase price.

In the case of Tax Commission of Ohio v. American Humane Education Society, 42 Ohio App. 4, 181 N.E. 557, 558, the court construed a statute under which a public charity was exempted from paying an inheritance tax if it carried on a "substantial part" of its activities within the State. The court said:

"Counsel for plaintiff in error adopt the definition of 'substantial' as found in Funk & Wagnalls Standard Dictionary as follows: 'Of real worth and importance; of considerable value; valuable.'

"We are disposed to accept this as a correct definition of what constitutes a substantial part of the society's expenditures.

"Bouvier defines 'substantial damages' as 'Damages assessed by the verdict of a jury, which are worth having as opposed to nominal damages.' "

The evidence disclosed that 1/48 of the activities of the society were conducted in Ohio. It was held that this was a substantial part of its activities so that a bequest to it in Ohio was not subject to inheritance tax.

[1] In determining what may be classed as a substantial sum of money, which was a part of a sum paid, the size of the transaction should be one important element. In this case the transaction was small. $159.45 was a little less than 20% of the total amount involved, and a little more than 20% of the cash paid. Under the circumstances here we cannot say that $159.45 was not a substantial part of the amount paid

for the automobile. Thomas Haverty Co. v. Jones, 185 Cal. 285, 197 P. 105.

[2] Thus, if the testimony of defendant be believed, she did apply on the purchase price of the car a substantial part of its purchase price which she had borrowed from the Santa Ana Building and Loan Association more than six years before. There is much circumstantial evidence in the record casting serious doubt on the truth of her evidence to the effect that she had kept the $159.45 and had applied it on the purchase price of the car. She was thoroughly impeached in other respects. The jury, being the judge of the credibility of the witnesses and the weight to be given their evidence, was justified in disbelieving her evidence to the effect that she had kept the money intact over that long period of time and had used it in the purchase of the car.

[3] There is a further question which we must consider. It is alleged in the information that she falsely testified in the civil action that she borrowed money from the Santa Ana Building and Loan Association to apply on the purchase price of the car. We have searched the record and can find no evidence supporting this allegation and counsel has directed our attention to none. She merely testified that some of the money used for the purchase of the car came from the Santa Ana Building and Loan Association which is a material variance from the allegation that she borrowed the money to apply on the purchase price of the car and does not support the allegation.

In People v. Mizer, 37 Cal.App.2d 148, 99 P.2d 333, 336, it was said:

"To invalidate a verdict on account of variance between the allegations of the information and evidence of the crime, it must appear that some necessary and material element of the charge lacks proof. The absence of evidence on an immaterial portion of a recitation of facts will not vitiate the verdict. In 31 Corpus Juris, page 840, section 451, it is said in that regard:

" 'Variance is defined to be a disagreement between the averments of the indictment and the proof in some matter which is legally essential to the charge. * * * A variance as to a matter which is not material is not fatal.'

"With respect to the crime of perjury it is likewise said in 48 Corpus Juris, page 886, section 138:

" 'Strictness of proof is required in all matters which constitute the essence of the crime, and a substantial variance in this regard is fatal; but strict proof is not required as to immaterial averments, or it has been stated, as to those which are not descriptive of the offense, and a variance in respect of such matters is not fatal.' "

[4] We regard the allegation that defendant testified in the civil action that she borrowed the money to apply on the purchase price of the car as a material part of the charge against her as it was descriptive of the perjury which she was alleged to have committed. As the evidence fails to support that portion of the allegation, the motion for new trial should have been granted as to count one of the information. This makes it unnecessary for us to consider the many purported errors urged by defendant in connection with that charge.

In count two of the information defendant was accused of the crime of grand theft alleged to have been committed as follows: "That the said PEARL AMES, on or about the 2nd day of June, 1941, at and in the County of Orange, State of California, and before the filing of this information, did wilfully, unlawfully and feloniously, by false and fraudulent representations and pretenses, obtain and defraud W. M. Turk of the sum of $800.00, lawful money of the United States."

It is now urged that the evidence is insufficient to support her conviction under this count. We may briefly summarize the evidence tending to support the verdict, disregarding conflicts.

Turk and defendant became acquainted in April, 1941. He desired to secure an old age pension. Probably in May, defendant discovered that Turk had $1,000 on deposit in his bank account. She told him he could not get the pension while he had that amount of money to his credit in the bank. She took him for several rides in an automobile owned by herself and Anthony F. Roth, who was boarding and lodging at her house. Roth accompanied them on some of these rides. The purchase of an automobile to replace the one in which they were riding, which was old, was discussed and defendant told Turk that she could take him riding frequently if she had a better car. Turk wanted to board and lodge at defendant's house and she agreed to take him for $30 per month. On June 2, 1941, Roth, at Turk's request (he could neither read nor write), and in the presence of defendant, wrote a check for $800 which Turk signed with his mark. Turk cashed this check and hid the money in his home. Defendant learned of this and told him that this was too much money to keep in such a place and advised him to give it to her for safe keeping, which he did. The date he gave her the money is not made clear though a study of his testimony leaves the impression that it was before she purchased the car on June 6, 1941. The discussion about the purchase of the car was continued by the three persons after it was started in May and Turk finally said he was willing to contribute five or six hundred dollars to that fund but did not want to furnish more. He moved into defendant's house about June 15, 1941, and continued to live there until some time in December, 1941, for which he paid defendant the agreed price.

Turk's testimony concerning the occasion of his leaving defendant's home is to the following effect: That after an absence from home of about two days, defendant returned, and without cause picked a quarrel with him; that she cursed him and ordered him to leave; that she armed herself with a butcher knife and threatened his life; that he left in about two days; that he had not ridden in the automobile since that time. He testified that he had asked defendant for some writing showing his interest in the car, but that she told him it was not necessary.

Turk described the agreement under which he made his contribution to the purchase price of the car as follows:

"Q. Just tell the jury what that conversation was. A. The car was put in her name and I was supposed to have a home there my lifetime, and I was to have the car to go back and forth in. The car was to be hers and I was to go and she was to take me any place I wanted to go.

"Q. You say 'supposed to'. Is that what she told you? A. Yes, she told me time and again she would take me."

Title to the automobile stood in the name of defendant and she took Turk for rides in it until he left her house in December. It is argued that she faithfully performed the terms of the contract as detailed by Turk until he left her home; that the only representations made by her as to present or past facts were carried out by her so there was no fraud or misrepresentation on her part when she obtained the money from Turk; that the only representations he claimed were not carried out pertained to events to occur in the future, amounting to predictions; that such expressions or predictions as to future events cannot support a conviction of grant theft committed by means of false and fraudulent representations and pretenses. People v. White, 85 Cal.App. 241, 259 P. 76; People v. Jackson, 24 Cal.App.2d 182, 74 P.2d 1085.

[5] It is the settled law that the false representations made by a defendant must relate to a present or past fact. People v. Wasservogle, 77 Cal. 173, 19 P. 270; People v. Walker, 76 Cal.App. 192, 244 P. 94; People v. Moore, 82 Cal.App. 739, 256 P. 266; People v. Robinson, 107 Cal.App. 211, 290 P. 470; People v. Reese, 136 Cal.App. 657, 29 P.2d 450.

The representations made by defendant, as described by Turk, covered other matters than the purchase of the car and placing the title to it in the name of defendant. According to his testimony she agreed to give him a home for life as part of the consideration for the delivery to her of the $800 and of $30 per month besides taking him places he wanted to go.

[6] That two people can make a valid present contract for future care and support for life of one of them is too well settled to need citation of authorities. If one of the parties entertains a present intention of not performing her part of such a contract when it is made, and falsely represents to the other that she will give him a home and care for life and has no present intention of performing, and obtains money or property from the other while he relies on the truth of such false representations, then they relate to a present fact and are not merely predictions of the occurrence of future events of the expressions of an opinion concerning them.

The present intent not to perform the obligations of a contract under which money or property is obtained from another can rarely be shown by direct evidence. Generally it is necessary to resort to circumstantial evidence to prove such an intent not to perform.

[7] Because a false statement of a present fact is coupled with a false prom-

ise of a future act, it does not overcome the effect of the false pretense concerning the present fact. People v. Bowman, 24 Cal.App. 781, 142 P. 495.

Section 21 of the Penal Code provides: "The intent or intention is manifested by the circumstances connected with the offense * * *." In People v. Alba, 46 Cal.App.2d 859, 117 P.2d 63, 66, it was said: "Grand theft is accomplished by fraudulently procuring a sum of money in excess of two hundred dollars from the owner by means of artifice, trickery or misrepresentations even though it is obtained as a pretended loan if it appears to be the intention of the accused person at the time of the transaction not to repay the money. People v. Weibert, 18 Cal.App.2d 457, 464, 64 P.2d 169; In re Clark, 34 Cal.App. 440, 167 P. 1143; 15 Cal.Jur. 905, secs. 11 and 12; 32 Am.Jur. 922, sec. 32. The question of the intent with which money is procured is a matter for the determination of the jury."

[8] Defendant's attention to Turk and her solicitation for his welfare after she first met him, her approach which resulted in obtaining possession of his $800, her unauthorized use in the purchase of the automobile of more than the sum Turk had authorized and her appropriation of the balance were all matters for consideration by the jury on the question of present intent to defraud. This and other evidence of her conduct, when coupled with that showing the violent, unprovoked and unjustifiable assault on Turk when she drove him from her home, seems to be sufficient to support the inference of the jury that her promises and representations were false and fraudulent and were made with a present intention to defraud. That Turk believed her and parted with his money in reliance upon her good faith and the truth of her promises seems evident. Under the decisions already cited this furnished sufficient evidence of a present intention to defraud, when such inference is drawn by the jury, to support its verdict of guilty of grand theft.

[9] Defendant argues that it was prejudicial error to deny her motion to have the two counts of the information tried separately. She argues that the grand theft was alleged to have been committed on June 2, 1941, and the perjury on November 12, 1942, with no sufficient connection between the offenses to justify their trial together.

Section 954 of the Penal Code permits two or more offenses connected together in their commission to be charged in separate counts of an information and to be tried together. Here the two offenses, while separate crimes, alleged to have been committed at different times, grew out of the same transaction and much of the same evidence was necessary to establish her guilt or innocence under both counts. We can see no abuse of discretion in the denial of the motion to grant separate trials. People v. Feigelman, 65 Cal.App. 319, 223 P. 579; People v. West, 34 Cal.App.2d 55, 93 P.2d 153; People v. Duane, 21 Cal.2d 71, 130 P.2d 123.

Defendant relies on People v. Frank, 130 Cal.App. 212, 19 P.2d 850, 851, where it was held error to try together charges against defendant of robbery, burglary and assault with a deadly weapon with intent to commit murder. The principal ground for reversal was that the three offenses charged did not belong to the same "class". In stating one of the reasons for its conclusion, the court, quoting from McElroy v. United States, 164 U.S. 76, 17 S.Ct. 31, 41 L.Ed. 355, said: "We do not think the statute authorizes the joinder of distinct felonies, not provable by the same evidence, and in no sense resulting from the same series of acts." This declaration is sufficient to distinguish the instant case from the Frank case. Here both crimes grew out of the same transaction and evidence to prove the commission of one was necessarily admissible to prove the other.

[10] Defendant urges that the allegations of the second count of the information fails to state facts sufficient to constitute a public offense. Since the adoption of the simplified form of pleading in criminal cases, Secs. 950, 951, 952, Penal Code, this argument lacks convincing force. It is sufficiently answered in the cases of People v. Robinson, 107 Cal.App. 211, 290 P. 470; People v. Tullos, 57 Cal.App.2d 233, 134 P.2d 280; People v. Kirsch, 204 Cal. 599, 269 P. 447, and People v. Myers, 206 Cal. 480, 275 P. 219.

Defendant complains of numerous instructions given by the trial judge. A majority of them relate to the charge of perjury. As we have already indicated our conclusion that the evidence is insufficient to sustain the verdict of guilty of perjury we need give no further attention to those instructions.

Defendant complains of portions of People's instruction Number Two, from which we quote the following:

> "You are not bound to decide in conformity with the declarations of any number of witnesses, who do not produce conviction in your minds, against a lesser number or against a presumption of law or evidence which satisfies your minds; in other words, it is not the greater number of witnesses which should control you where their evidence is not satisfactory to your minds, as against a lesser number whose testimony does satisfy your minds.
>
> * * *
>
> "The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even though a number of witnesses on the other side might testify to an opposite state of facts, if, from the whole case, the jury believes that the greater weight of the evidence considering its reliability and the credibility of the witness is on the one witness as against the greater number of witnesses."

This instruction is long, covering over seven typewritten pages in the reporter's transcript. Taken by themselves, the quoted portions, especially the second paragraph, do not correctly state the law applicable in criminal cases—that of reasonable doubt. The closing two and one half pages of the instruction are devoted to a correct statement of the law of the presumption of innocence and of the doctrine of reasonable doubt, including the definition of reasonable doubt as contained in section 1096 of the Penal Code. Several instructions on the presumption of innocence and reasonable doubt proposed by defendant were also given.

[11, 12] It is firmly established that instructions must be considered in their entirety, and their effect on the jury must be weighed after they have been read together as a whole and not from some isolated paragraphs in them. After studying all of the instructions given we deem it a remote possibility that the jury could have been mislead by the portions of the instructions we have quoted.

The first quoted paragraph of the portion of the instruction of which defendant complains is a summary of subdivision two of section 2061 of the Code of Civil Procedure which requires that juries be instructed in accordance with its terms. The giving of such an instruction was before the court in People v. Hahn, 58 Cal.App. 704, 209 P. 268. The court was of the opinion that it merely stated a legal platitude the giving of which could have done no harm.

Defendant complains of other instructions given by the jury. We have examined all of them and do not consider them sufficiently erroneous to require detailed consideration here.

The portion of the order denying the motion for new trial under count one of the information charging the defendant with perjury is reversed.

The portion of the order denying the motion for new trial under count two of the information charging the defendant with grand theft is affirmed.

BARNARD, P. J., and GRIFFIN, J., concur.

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61 Cal.App.2d 367

MORTGAGE GUARANTEE CO. et al. v. LEE et al.

Civ. 14234.

District Court of Appeal, Second District, Division 1, California.

Nov. 16, 1943.

Rehearing Denied Dec. 7, 1943.

1. Appeal and error 🔑102, 452

Order sustaining demurrer to cross-complaint was not an appealable order, and therefore such attempted appeal did not divest trial court of jurisdiction to proceed with trial on the merits pending appeal.

2. Mortgages 🔑295(3)

Where beneficiary in deed of trust on assignment of note and deed of trust to trustee as depositary and trustee reserved right to take over and manage property in event of default, a sale of property to trustee as depositary and trustee of beneficiary was not effective as a "merger", since beneficiary even after sale still retained some interest in equitable title.

See Words and Phrases, Permanent Edition, for all other definitions of "Merger".

3. Mortgages ⚷295(4)

Equitable lien upon rentals of property covered by deed of trust in accordance with provisions thereof was in effect an intervening right or intermediate interest which would prevent a merger of the legal and equitable title in one person.

4. Mortgages ⚷274

Rights of purchasers of property covered by deed of trust as grantees of the trustor are measured by the deed of trust and its terms are binding upon them, including provisions for possession and collection of rents in case of default.

5. Mortgages ⚷199(2)

An assignment of rentals pursuant to terms of trust deed constitutes additional primary security for indebtedness, and became absolute and enforceable upon default.

6. Mortgages ⚷295(4)

Under trust deed authorizing beneficiary to take possession and collect rents and apply them to indebtedness in case of a default, beneficiary had a lien upon rents until payment of indebtedness, which lien was independent of right to sell real property upon default so that sale of property to trustee did not effect a "merger" of equitable lien for rentals with fee title acquired by trustee's deed.

7. Mortgages ⚷199(2)

Rent of property covered by trust deed may be assigned as security, and as such is an independent, primary security for indebtedness, so long as debt remains unpaid.

8. Mortgages 427(2)

Under deed of trust providing for possession by beneficiary upon default and for exhaustion of securities by either beneficiary or trustee at option of both, or either, beneficiary was entitled to prosecute action to enforce terms of trust deed without making trustee a party.

9. Mortgages ⚷275

Purchasers of property covered by deed of trust having accepted conveyance subject to lien of trust deed were estopped to deny validity thereof.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by the Mortgage Guarantee Company and another against Lazo Lee, Annie Lee, and others for specific performance to obtain possession of real estate pursuant to the terms of a trust deed, wherein defendants named filed a cross-complaint. Demurrer to cross-complaint was sustained, and from a judgment for plaintiffs and an order denying motion for new trial, defendants named appeal.

Purported appeal from order denying new trial dismissed. Judgment affirmed.

John J. McMahon, of Los Angeles, for appellants.

Fleming & Robbins and C. S. Tinsman, both of Los Angeles, for respondents.

YORK, Presiding Justice.

Respondents on February 17, 1939, instituted the instant action for specific performance to obtain possession of real property situate in the City of Los Angeles, improved with two hotel buildings, known as the Eusten Hotel and the Rutland Hotel, pursuant to the terms of a trust deed executed by Junior Capital Company, Ltd., on February 6, 1937, in favor of respondent Mortgage Guarantee Company, as beneficiary, and in which Title Guarantee and Trust Company was named trustee, to secure the payment of a promissory note for the sum of $187,000, being the balance of the purchase price of said property.

Said deed of trust provided (paragraph B–6) that the indebtedness secured thereby might be further secured and the beneficiary or trustee might exhaust any of said securities without affecting the status of, or waiving the right to exhaust, all or any other security; (paragraph B–10) that in event of default by trustor, the beneficiary should be entitled at its option by itself or by a receiver to be appointed by the court, without regard to the adequacy of any security for the indebtedness, enter and take possession of the property, exclude the trustor, collect the rents and apply them to the indebtedness, said rents "being hereby assigned to the beneficiary as further security for the payment of all indebtedness secured" by said deed of trust; and (paragraph B–12) that the bringing of any action for the enforcement of any right under the deed of trust, including the right to rents, should not be construed to be a waiver of any other right thereunder, and could be enforced independently or concurrently with other rights secured by said deed of trust.

Said instrument was recorded March 18, 1937, and on March 27, 1937, Mortgage Guarantee Company assigned the note and deed of trust to Title Insurance and Trust Company, as depositary and trustee under Trust No. 7298, Series 111. On or about February 20, 1938, appellants Lee purchased the property described therein, subject to the said deed of trust (but not assuming or agreeing to pay the same), entered into possession and collected the rents from the buildings.

Default occurred in payments due under the note and trust deed on January 1, 1939 and dates subsequent thereto, and between February 8 and 10, 1939, respondents served upon appellants Lee and the tenants of the buildings, written demand for possession and the rentals, which demand was refused by appellants Lee, who on February 14, 1939, served upon respondents a notice of rescission of the transaction by which they had acquired title to said property.

Respondents on February 17, 1939, as beneficiaries under said deed of trust, filed the instant action to obtain possession of the property and the rentals accruing therefrom; and moved for appointment of a receiver pending trial. At the hearing on the motion, by leave of the court, respondents filed an amendment to their complaint adding paragraph XVII thereto, alleging that the Mortgage Guarantee Company had sold the property in question to the Junior Capital Company, Ltd., for $200,000, payable $10,000 in cash, and $187,000 by a promissory note secured by the deed of trust referred to, and $3,000 by a promissory note secured by a second deed of trust; that the consideration for said notes and deeds of trust was adequate; that the value of the property was not less than the purchase price and that the promissory notes and trust deeds were just, fair and equitable; that concurrently with the execution thereof the property was conveyed to the Junior Capital Company, Ltd., which entered into possession and that defendant Lazo Lee claimed the right to possession as a grantee of Junior Capital Company with full knowledge of the rights of the Mortgage Guarantee Company under the deed of trust.

On March 13, 1939, a receiver was appointed who took possession and proceeded to collect the rentals accruing therefrom.

Appellants by their answer denied the execution of the note by Junior Capital Company was for a consideration; denied that the promise to pay the note was based on an adequate, just or reasonable consideration as to the appellants Lee; denied any sums were due thereunder on January 1, 1939, or subsequently thereto; admitted execution of the trust deed by Junior Capital Company but denied the consideration therefor was adequate, just or reasonable as to appellants Lee; admitted the trust deed was recorded but denied it contained the provision of paragraph B–10, assigning rents to the beneficiary and giving it right to possession upon default, and alleged that only the owner of the property could collect the rents; that the Title Guarantee and Trust Company, as trustee, was the legal owner; admitted the assignment of the note to the Title Insurance and Trust Company, and the interest of Mortgage Guarantee Company, but denied the ownership of respondents, denied their assumption of the obligation was on consideration adequate, just or equitable as to them; admitted default under the note and trust deed and that respondents had elected to take possession and collect the rents, but denied that they were the proper parties to enforce the provisions of the deed of trust; admitted that they (appellants) were in possession of the property and were operating the hotel buildings, but alleged that respondents had wrongfully served notice on their tenants and the tenants were afraid to pay rents to anyone; also denied that respondents were entitled to possession or to bring the action.

Respondents' motion to strike portions of the answer was granted, which stricken matter included appellants' notice of rescission dated February 14, 1939, and their second affirmative defense.

Appellants filed a cross-complaint and an amended cross-complaint, alleging that the notice to tenants not to pay rent to appellants was void, because the trustee under the deed of trust did not join therein nor in the motion to appoint a receiver, therefore the collection of rents by the latter was unlawful resulting in damage to appellants in the sum of $25,000.

Respondents' demurrer to appellants' amended cross-complaint was sustained without leave to amend on May 15, 1939, whereupon appellants filed their notice of appeal from the order and sought to stay proceedings on the issues joined by the complaint and answer. However, the matter proceeded to trial on October 9, 1939. Meanwhile, on June 12, 1939, respondent Title Insurance and Trust Company, as depositary and trustee, purchased the property covered by the trust deed at the trustee's sale, and on June 22, 1939, possession was delivered to respondents by the receiver pursuant to order of the Superior Court. The account and report of receiver was continued to date of trial, to-wit, October 9, 1939.

During the trial appellants filed an amendment to their answer, alleging that the promissory note bore the endorsement of a sale credit and deficiency claim against Junior Capital Company; that defendants Lee never assumed or agreed to pay any part of the indebtedness represented by the note and deed of trust, and that by reason of the sale, "all equitable liens merged in the legal title and that as a result of the giving and delivery of said trust deed by the trustee, all of the provisions and terms in said deed of trust became null and void and of no effect."

Appellants were not present at the trial, but it was stipulated by their counsel that the facts alleged in respondents' complaint were true, except the allegation that respondents were entitled to possession of the property and the rents. No defense was interposed by appellants except the contention that by reason of the trustee's sale, the lesser estate merged into the greater; that all subsidiary liens merged in the realty, and by reason of the sale taking place prior to the trial, a waiver by operation of law had become effective; that the rents collected by the receiver reverted to appellants as owner of the property up to the date of the sale, i. e., June 12, 1939.

Counsel for appellants moved for judgment on the pleadings which was by the trial court denied. Thereafter, the court made its findings of fact and conclusions of law to the effect that the allegations of the complaint were true, and those of the answer contrary thereto were untrue; that appellants acquired title to the property with knowledge of the terms and conditions of the trust deed; that they had defaulted thereunder; that the appointment of a receiver was proper; that by reason of the assignment contained in section B–10 thereof, respondents were entitled to the rents, and that there remained unpaid on the original indebtedness the sum of $42,747.03.

Judgment was entered March 14, 1940, in favor of respondents for the balance of the rents in the hands of the receiver and for costs of suit. The court also approved and settled account of receiver and by order directed him to pay the sum of $2,617 to respondent Mortgage Guarantee Company as rental for furniture owned by it and used by receiver in operating the property; $698.50 to receiver as his fee; $175 costs, and the net balance of the rentals to respondent Mortgage Guarantee Company.

This appeal is prosecuted from the judgment and from the order denying appellants' motion for a new trial, but no appeal was taken from the order settling receiver's final account which directed him to pay net rentals to respondents.

It is first contended that the trial court had no jurisdiction to make an order setting the cause for trial on October 9, 1939, because an appeal was pending from the order sustaining respondents' demurrer to appellants' amended cross-complaint without leave to amend.

[1] As a matter of fact the order sustaining respondents' demurrer to appellants' cross-complaint was not an appealable order (Scott v. Security Title Ins. & Guar. Co., 9 Cal.2d 606, 72 P.2d 143, 117 A.L.R. 1049; Evans v. Shanklin, 16 Cal.App.2d 358, 60 P.2d 554), and therefore the attempted appeal therefrom which was dismissed by the Supreme Court on April 7, 1941, did not divest the trial court of jurisdiction to proceed with the trial on the merits pending such appeal.

In the case of Hayes v. Pierce, 15 Cal.2d 662, 667, 104 P.2d 499, 502, the Supreme Court stated: "The court had power to determine as a matter of procedure whether it should try the issues raised by the complaint and answer, and leave the issues formed by the cross-complaint to be determined later, or to await the action of a reviewing court to determine whether or not the cross-complaint was well founded, before proceeding with the trial. Klement v. Superior Court, 21 Cal.App.2d 456, 69 P.2d 869. In deciding that the trial should proceed, despite the pendency of appellant's appeal, the court exercised a wise discretion."

It is next urged that the sale of the property to Title Insurance and Trust

Company under the power of sale contained in the trust deed and the delivery of a trustee's deed to said corporation, annulled all provisions of the trust deed and terminated the right of respondent Mortgage Guarantee Company, the beneficiary under the trust deed, to the assigned rents which were collected by the receiver prior to the sale. Or, quoting from appellants' brief: "5. There can be no dispute, from the authorities, that the equitable lien (for rents) under said trust deed became void and extinguished and merged in the fee simple title of the trustee's deed after the sale held on June 12, 1939."

It is alleged in the complaint that on March 31, 1937, the Mortgage Guarantee Company, as beneficiary, assigned the note and trust deed to Title Insurance and Trust Company, as depositary and trustee, under a certain trust. By the terms of the assignment, Mortgage Guarantee Company reserved to itself the right to collect principal and interest of the said note, and also reserved to itself "the right to take over, manage and control the real property covered by the deed of trust in the event of default in the terms thereof; that said Title Insurance and Trust Company, as such depositary and trustee, and Mortgage Guarantee Company, ever since said date of transfer have been and now are the owners and holders of the note and deed of trust, as their respective interests appear under the terms of Trust No. 7298, Series 111."

In their amendment to the answer, appellants allege that "all equitable liens merged in the legal title and that as a result of the giving and delivery of said trust deed by the trustee, all of the provisions and terms in said deed of trust became null and void and of no effect."

On the question of merger, it was held in the case of Jensen v. Burton, 117 Cal. App. 66, 70, 3 P.2d 324, that where plaintiff became the owner of the fee to the land and at that time was also the owner of an encumbrance covering the property, with no intervening interest or lien, and there was evidence that the value of the land was in excess of the amount of plaintiff's and the prior encumbrance (both mortgages), a prima facie case of merger was presented.

In Sheldon v. La Brea Materials Co., 216 Cal. 686, 689, 15 P.2d 1098, 1099, it was stated:

"'When a greater and lesser estate coincide and meet in one and the same person, in the same right without any intermediate estate, the latter is in law merged in the greater.' 10 Cal.Jur. 606.

"'The whole title, legal as well as equitable, must unite in one and the same person. Where the two thus meet, without any intermediate estate, the less[er] is immediately annihilated, or, in law phrase, "merged."' [In re] Estate of Washburn, 11 Cal.App. 735, 746, 106 P. 415, 420.

"'Under ordinary circumstances, where the holder of a mortgage acquires the estate of the mortgagor, the mortgage interest is merged in the fee, and the mortgage is extinguished. This is the ordinary legal effect of the transaction, and ordinarily the intention is presumed to accord with the act accomplished.' Anglo-Californian Bank v. Field, 146 Cal. 644, 653, 80 P. 1080, 1083."

In Boye v. Boerner, 12 Cal.App.2d 186, 187, 54 P.2d 1116, 1117, in answer to the question for decision there presented, i. e.: "Does a merger of title result when the beneficiary under a trust deed assumes the right of ownership and dominion over the property described in the trust deed and causes the trustor's vendee to deliver a grant deed of the property to another person?"—the court held:

"In order to effect a merger, the whole title, legal, as well as equitable, must unite in one and the same person. In re Estate of Washburn, 11 Cal.App. 735, 746, 106 P. 415. In the instant case, the legal title to the premises at all times subsequent to the execution of the trust deed and prior to the sale by the trustee was vested in Title Insurance and Trust Company, the trustee (Anglo-California Trust Co. v. Oakland Rys. [Co.], 193 Cal. 451, 464, 225 P. 452; Sax v. Clark, 180 Cal. 287, 288, 180 P. 821), and the equitable title was vested in the defendant trustor or his vendee[s], Peter C. and Anna K. Boebel, or their grantee, Bertha A. Eschman. Bostwick v. McEvoy, 62 Cal. 496, 501; Bank of Italy [etc.] Ass'n v. Bentley, 217 Cal. 644, 645, 20 P.2d 940; Weber v. McCleverty, 149 Cal. 316, 320, 86 P. 706.

"It thus appears that the legal and equitable title at no time vested in one and the same person. Hence there was not a merger of title."

[2] Likewise, in the case here under consideration, the legal title prior to the

sale vested in the Title Guarantee and Trust Company, the trustee under the deed of trust; the equitable title vested in appellants Lee and their predecessor in interest Junior Capital Company, Ltd. (the trustor named in the deed of trust), and the beneficial interest created by the trust deed was in Mortgage Guarantee Company. By the assignment of March 31, 1937, the Title Insurance and Trust Company acquired a certain limited interest, but the sale to said Title Insurance and Trust Company as depositary and trustee of Mortgage Guarantee Company was not effective as a merger, for the reason that the latter even after the sale still retained some interest in the equitable title.

Another circumstance which precludes a merger herein is the fact that appellant took title to the hotel property with knowledge of and subject to the terms of the trust deed which was given to secure the balance of the purchase price. These terms authorized the giving of other and further security (paragraph B–6); provided for an assignment to beneficiary (Mortgage Guarantee Company) of the rents accruing from the property as further security for the note (paragraph B–10), as well as the right to enforce such assignment and the right to possession, independently of the right to have the real property sold by the trustee under the power of sale therein contained (paragraph B–12).

[3, 4] This equitable lien upon the rentals was in effect an intervening right or intermediate interest which would prevent a merger of the legal and equitable title in one person. The rights of appellants as grantees of the trustor are measured by the deed of trust and its terms are binding upon them.

As was stated in Title Guarantee & Trust Co. v. Monson, 11 Cal.2d 621, 628, 81 P.2d 944, 947: "In the case entitled Owsley v. Neeves, 179 Ill.App. 61, 63, appellant was deeded the premises 'subject to whatever lien appellees secured thereon by virtue of the trust deed'; and the court there said: 'Appellant cannot get away from the fact that his rights in the premises are subject to whatever lien was created in favor of appellees by their trust deed. Rents and profits are the subject of mortgage. A mortgagee has a specific lien upon rents and profits of mortgaged land when they are expressly pledged by the mortgage as part of his security. * * * Appellant, as subsequent purchaser, was bound by those terms of the trust deed * * *.' And in the case of Townsend v. Wilson, 155 Ill.App. 303, 308, it appeared that the purchasers of the premises there involved took the land 'subject to' a mortgage conferring the right to the rentals therefrom upon the mortgagee or his agent, at the time of foreclosure. In referring to the purchasers, the court said: 'But their implied agreement * * * by accepting the deed with that proviso that it was subject to the mortgage, was that the land and the rents and profits mortgaged * * * should stand good for that debt and be charged with that debt as against any right they received by virtue of the deed. Their action in this case in claiming these rents simply amounts to a breach of their contract and they have no standing in law or equity in their claims to the rents.' It follows that the right to the rentals which plaintiff is asserting here could not be defeated by a subsequent change in possession by virtue of a conveyance of the land." See, also, Mortgage Guarantee Co. v. Sampsell, 51 Cal.App.2d 180, 124 P.2d 353, and Hatch v. Security-First Nat. Bank, 19 Cal.2d 254, 120 P.2d 869.

[5] By authority of the cited case, the assignment of rentals, pursuant to the terms of the trust deed constituted additional primary security for the indebtedness, and became absolute and enforceable upon default. It is admitted that after the trustee's sale herein, $42,747.03 still remains unpaid on the indebtedness evidenced by the trust deed and that all of the rentals collected by the receiver to the date of sale was less than $5,000.

[6] It would therefore appear that under the terms of the trust deed, respondents have a lien upon the rents until they are paid the balance of the indebtedness, which lien is and was independent of the right to sell the real property upon default, and that the sale of the real property to the Title Insurance and Trust Company did not effect a merger of the equitable lien for rentals with the fee title acquired by the trustee's deed.

[7] It appears to be well-established law in this state that rent may be assigned as security, and as such is an independent, primary security for the indebtedness, so

long as the debt remains unpaid. Title Guarantee & Trust Co. v. Monson, supra.

Appellants' claim of prejudicial error by the court in its failure to make a finding on the material issue of merger raised by paragraph II of their amendment to the answer is without merit.

The court did find "that all the allegations contained in Paragraph II of the Amendment to the Answer of defendants Lazo Lee and Annie Lee to the plaintiffs' complaint, are untrue." During the trial, the court denied appellants' motion for judgment on the pleadings which motion was based on the ground of merger.

[8] It is further contended that the complaint failed to state a cause of action because the Title Guarantee & Trust Company, the trustee under the deed of trust, was not made a party to the instant action. Under the express terms of the deed of trust, the right of possession upon default was given to the beneficiary, not to the trustee. (Paragraph B-10.) Under paragraph B-6 of the trust deed, either beneficiary or trustee might "at the option of both, or either of them, exhaust any or more of said securities." These terms would indicate that respondents, as beneficiaries, were entitled to prosecute the instant action without interference from the trustee. Field v. Acres, 9 Cal.2d 110, 111, 112, 69 P.2d 422.

Appellants finally contend that the complaint does not state a cause of action because it was not alleged therein "that the consideration was adequate, fair and reasonable" as to them. By this is apparently meant that it was necessary for respondents to allege that the sale of the property by the original trustors was fair, just and for an adequate consideration as between such trustor and appellants.

[9] Appellants acquired title to the hotel property subject to the deed of trust which was executed by their predecessors in interest as part of the purchase price. The amendment to the complaint filed March 1, 1939, adding paragraph XVII thereto, sets forth details as to the consideration for the deed of trust and alleges that the transaction was fair, adequate, just and equitable; and that appellant Lazo Lee took possession of the property with full knowledge and notice of the rights of the respondents under the terms of the deed of trust. Having accepted the conveyance of the property subject to the lien of the trust deed, appellants are now estopped to deny its validity. Harris v. Whittier Bldg. & Loan Ass'n, 18 Cal.App.2d 260, 63 P.2d 840.

Although notice of motion to diminute the record was presented for filing, no motion was made by reason of the fact that the original trust deed was ordered filed and is to be returned to respondents when the judgment herein becomes final; also, because a photostatic copy of the County Recorder's record of the trust deed was ordered to be made a part of the record on appeal.

For the reasons stated, the judgment appealed from is affirmed. The purported appeal from the order denying motion for a new trial is dismissed.

DORAN and WHITE, JJ., concur.

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61 Cal.App.2d 335

FIREMAN'S FUND INDEMNITY CO. v. INDUSTRIAL ACCIDENT COMMISSION et al.

Civ. 14144.

District Court of Appeal, Second District, Division 3, California.

Nov. 12, 1943.

1. Workmen's compensation 🔑707

When employee has arrived at employer's premises and is thereon for purpose of immediately commencing his actual work, employee is performing "service incidental to his employment" within Workmen's Compensation Act. St.1937, p. 265 et seq., § 3201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Service Incidental to His Employment".

2. Workmen's compensation 🔑706, 748

The term "employment", within Workmen's Compensation Act, includes doing of the work and a reasonable margin of time and space required to be used in passing to and from the place where the work is to be done. St.1937, p. 265, et seq., § 3201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Employment".

3. Workmen's compensation ⚿707

Where janitor in saloon, who was required to be in saloon when it was closed in order that he might be locked therein for purpose of doing work from time it was closed until it was opened, arrived at saloon about 45 minutes before usual closing time, and was killed by a gunshot wound fired at one of bartenders about 30 minutes before closing time, janitor's death was compensable as caused by an injury "arising out of and in course of employment." St. 1937, p. 265 et seq., § 3201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Arising Out of and in Course of Employment".

4. Workmen's compensation ⚿707

A reasonable doubt as to what time an employee commenced his duties as an employee, and as to whether hazard was one to which an employee was exposed by his employment, should be resolved in favor of employee. St.1937, p. 265 et seq., § 3201 et seq.

5. Workmen's compensation ⚿1939

In reviewing findings of State Industrial Accident Commission, the courts are without power to disturb them unless there is a lack of substantial evidence. St.1937, p. 265 et seq., § 3201 et seq.

◆

Petition by the Fireman's Fund Indemnity Company, compensation insurance carrier, to annul a death benefit award made by the Industrial Accident Commission in favor of Bonina Vragnizan, widow of Marin J. Vragnizan, deceased employee, and Luke Vragnizan and Marin J. Vragnizan, Jr., minors, by their guardian ad litem and trustee, Bonina Vragnizan.

Award affirmed.

Clayton B. Thomas, of Los Angeles, for petitioner.

Everett A. Corten and Fred G. Goldsworthy, both of San Francisco, for respondents.

PARKER WOOD, Justice.

The compensation insurance carrier of the employer of the decedent, Marin Vragnizan, seeks by this petition for review to annul a death benefit award made by the Industrial Accident Commission in favor of the widow and minor children of decedent. The question for decision is: Was the injury which caused the death of Marin Vragnizan an injury arising out of and occurring during the course of his employment?

The decedent was employed as a janitor in a saloon in San Pedro. The employment agreement provided that the decedent should do the janitor work after the saloon was closed at 2 a.m. and before it was opened at 6 a.m., in order that such work would not interfere with the customers; and it provided further that decedent should not have a key to the place, but he should be in the saloon when it was closed in order that he might be locked therein from the time it was closed at 2 a.m. until it was opened at 6 a.m. The owner left the place each day about 11 p.m. and was not present at closing time. Two bartenders, who were in charge of the saloon after the owner left, closed the saloon and locked the janitor therein each night. Decedent had been so employed three weeks preceding the injury, and on occasions during that time, when there was no business, the bartenders closed the saloon one-half hour or an hour earlier than 2 a.m. The decedent usually left his home, which was about 12 blocks from the saloon, about 1 a.m., and arrived at the place each day a few minutes or one-half hour earlier than 2 a.m. in order to get his janitor's equipment ready, and to be there in time to be locked in the building if it should be closed before 2 a.m. On the day of the injury the decedent arrived there about 1:15 a.m. When he entered the place he was carrying an article which appeared to be a pail, and he went immediately to the back storeroom. About 5 minutes thereafter he came back to the barroom, and in a playful manner "made a couple of passes" at one of the bartenders, and then sat at the bar. About 1:30 a.m. he was killed by a gunshot fired at one of the bartenders.

One Jerkins, who was a Croat, and one of the bartenders, who was a Serbian, were friends, but they had had arguments on various occasions about the war. About 11 p.m., preceding the injury, Jerkins entered the saloon and began singing "funny" songs in Slavonian. There were a few customers in the place at that time. The duties of the bartender included that of maintaining peace and order, and ejecting disorderly persons from the saloon. The bartender (the Serbian) told Jerkins to quit such singing because people did not enjoy it in wartime. Then Jerkins in a loud voice called the bartender's father and mother vile names. After the bartender told him to quit and that if he did not quit the bartender would throw him out of the saloon, Jerkins reached across the bar and, with his fist, hit the bartender on the forehead. Jerkins then took his (Jerkins') coat off and asked the bartender "to come outside." When they were on the sidewalk in front of the saloon door the bartender knocked Jerkins down twice. After the fight on the sidewalk, Jerkins went back into the saloon and the other bartender ejected him. Jerkins said he was "going to get" the bartender who had knocked him down.

About 1:30 a. m. the bartender who had knocked Jerkins down went outside in front of the saloon for the purpose of "looking around on the street to see if anybody was passing by on account there wasn't any business," and to open the front door which had been shut. As he had his hand on the door and was turning to go back into the saloon a shotgun was fired toward him by Jerkins, who was across the street in an alley, and as a result thereof the bartender was injured and Marin Vragnizan, the janitor, was killed. After the shooting the decedent lay upon the floor of the saloon about 10 feet from the place where the bartender was standing when the gun was fired. Decedent was not connected in any way with any argument between Jerkins and the bartender.

[1, 2] The finding of the commission that the injury occurred during the course of decedent's employment is sustained by the evidence. The decedent knew it was the practice on occasions to close the saloon earlier than 2 a. m. In order to comply with the provision of the employment agreement that he should be locked in the saloon, and in order to co-operate with those in charge of closing the place in the event they should decide to close it earlier than 2 a. m., it was necessary that decedent be there during a substantial part of the hour preceding 2 a. m. His arrival at the saloon was not at such a long time prior to 2 a. m. that it should be concluded that such arrival was remote from, and unrelated to, reasonable and adequate preparation for the actual commencement of the specific janitor work. Apparently, insofar as decedent knew prior to his arrival, he might have been required, in view of the custom of closing early, to proceed immediately with the actual janitor work upon his arrival at 1:15 a. m. In the case of Judson Mfg. Co. v. Industrial Acc. Comm., 1919, 181 Cal. 300, at page 302, 184 P. 1, it was stated: "The right to compensation is by no means restricted to those cases where the injury occurs while the employé is actually presently manipulating the tools of his calling. * * * It seems to us, however, that when an employé has arrived at the premises of his employer, and is thereon for the purpose of immediately commencing his actual work, he is performing service incidental to his employment." In Freire v. Matson Navigation Co., 1941, 19 Cal.2d 8, 118 P.2d 809, a janitor, employed by defendant, who regularly reported for duty at 8 a. m., arrived at 7:45 a. m. in a taxicab at a pier where the ship upon which he was to work was moored. As he alighted from the cab he was injured by an automobile operated by defendant's employee. In holding that the injury arose out of and occurred in the course of the janitor's employment, the court said at page 13 of 19 Cal.2d, at page 812 of 118 P.2d: "He was obliged to be there on the morning of the accident before 8 o'clock in readiness to go on the pier and thence to his ship at that time." The court said further on the same page: "The fact that the accident happened some minutes before plaintiff was to begin work was immaterial." In California Cas. Ind. Exch. v. Industrial Acc. Comm., 1943, 21 Cal.2d 751, at page 754, 135 P.2d 158, at page 161, it was stated: "The term 'employment' includes not only the doing of the work, but a reasonable margin of time and space necessary to be used in passing to and from the place where the work is to be done. * * * In other words, the employment may begin in point of time before the work is entered upon and in point of space before the place where the work is to be done is reached."

[3] The finding of the commission that the injury arose out of the employment is sustained by the evidence. There was testimony by the bartender, who had been employed there seven years, that the reputation of the saloon was not very good; that the town was pretty rough; that the reputation of the district where the saloon was located was "not bad," and that the reputation of the district was "a little bit better, but down on the water front it is still worse"; that there were very few fights in the saloon; and that he had to throw the "drunks" out "to protect the other customers." Although Jerkins and the bartender had had arguments about the war pri-

or to the day of the injury, they had had "no mean arguments" and there had been no "threatening" between them. The injury to decedent was the result of an endeavor by the bartender in the performance of his duties to maintain order in the saloon. The gun was fired intentionally at the bartender and the saloon. It was not a "stray bullet," as referred to by petitioner, or one that was intended for some target not connected with that saloon. The reputation of the saloon, the occurrence of fights therein, and the fact that the bartenders' duties included that of forcibly removing intoxicated customers from the saloon in order to protect the other customers, show that one of the hazards to which an employee was exposed by his employment therein was personal injury resulting from brawls and fights. In the case of Stevens v. Industrial Acc. Comm., 1919, 179 Cal. 592, 178 P. 296, 297, a customer of a cafe engaged in an altercation with a waiter and drew a revolver. Another waiter who approached the scene of the scuffle, apparently for the purpose of assisting in disarming the customer, was killed when the revolver was discharged. The cafe sold intoxicating liquors and catered to persons who were "subject more or less to brawls." It was a part of the duties of the waiter to maintain order. In affirming an award to the widow of the deceased waiter, the court said on page 593 of 179 Cal., on page 296 of 178 P.: "* * * it needed only to be shown that the hazard was one to which deceased was exposed by his employment to warrant the award. [Citing a case.] On this point the evidence seems crystal clear." In General Accident, Fire & Life Assur. Corp., Ltd., v. Industrial Acc. Comm., 1921, 186 Cal. 653, 200 P. 419, an employee of a garage was struck accidentally by a bullet from a revolver which was fired intentionally by the employer at a man who had gone to the garage to buy gasoline and with whom the employer was having an altercation. The court said at page 656 of 186 Cal., at page 420 of 200 P., in affirming an award: "The controversy in which it [the injury] was received arose out of an incident which concerned his [employer's] business * * * that it ultimately resulted in a personal difference, or that the accident was an unusual one, not likely to occur, does not deprive it of its business character * * *."

[4] In view of the policy of liberal construction of the Workmen's Compensation Act, Labor Code § 3201 et seq., St.1937, p. 265 et seq., in favor of the employee, a reasonable doubt as to what time an employee commenced his duties as an employee, and as to whether the hazard was one to which an employee was exposed by his employment, should be resolved in favor of the employee. California Cas. Ind. Exch. v. Industrial Acc. Comm., 1943, 21 Cal.2d 751, 760, 135 P.2d 158.

[5] "In reviewing the findings of the commission, the courts are without power to disturb them unless there is a lack of substantial evidence." Pacific Lbr. Co. v. Industrial Acc. Comm., 1943, 22 Cal.2d 410, 139 P.2d 892, 899.

The award is affirmed.

SHINN, Acting P. J., and SHAW, Justice pro tem., concur.

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61 Cal.App.2d 485

THOMPSON v. COOK et al.

Civ. 14176.

District Court of Appeal, Second District,
Division 2, California.
Nov. 24, 1943.

1. Judgment 🔑869

The statute regarding revival of judgments is remedial in character and must be liberally construed. Code Civ.Proc. § 708.

2. Judgment 🔑862

Land belonging to a third party is "property not subject to execution and sale" within statute authorizing revival of judgment. Code Civ.Proc. § 708.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Not Subject to Execution and Sale".

3. Judgment 🔑862

Where judgment rendered after execution sale determined that third party was owner of real estate sold under execution and that purchaser at execution sale had no interest therein, court properly granted motion to revive judgment under which execution sale had been conducted. Code Civ. Proc. § 708.

4. Judgment ⚷866(2)

Where judgment creditor acted promptly to obtain revival of judgment after entry of judgment determining that property sold under execution did not belong to execution debtors, during pendency of appeal from order denying execution debtors' motion to vacate order of revival running of statute of limitations was tolled and second motion to revive judgment could be filed within one year from receipt of remittitur after reversal of order without encountering bar of statute of limitations. Code Civ.Proc. §§ 336, 355, 685.

5. Judgment ⚷866(2)

Where execution creditor acted promptly to obtain revival of judgment after entry of judgment determining that realty sold under execution was not property of execution debtors, and execution creditor filed second motion to revive judgment promptly after reversal of order denying execution debtors' motion to vacate order reviving judgment, revival of judgment was not barred by limitations or laches. Code Civ.Proc. §§ 336, 355, 685.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Leonard B. Colton against Marie E. Cook and another on a note, wherein K. W. Thompson was substituted as party plaintiff. From an order granting plaintiff's motion to revive the judgment, defendants appeal.

Affirmed.

See, also 20 Cal.2d 564, 120 P.2d 54; 127 P.2d 909.

Hankins & Hankins and Olin F. Nuckolls, all of San Francisco, for appellants.

George W. Zent, of Hollywood, for respondent.

W. J. WOOD, Justice.

A default judgment in the sum of $4,012.29 was entered on February 13, 1936, in favor of Leonard B. Colton and against defendants. Thereafter K. W. Thompson was substituted as plaintiff. Hereinafter the original and the substituted plaintiff will be referred to as plaintiff. At an execution sale held on August 17, 1936, the sheriff sold to plaintiff for the full amount of the judgment certain real estate situated in Glenn County and thereupon satisfied the judgment of record. An action was commenced in the superior court of Glenn County on June 4, 1937, by Glenn-Colusa Irrigation District to quiet its title to the land which had been sold to plaintiff at the execution sale, plaintiff herein being named as party defendant. Plaintiff herein appeared in that action and contested the right of Glenn-Colusa Irrigation District to a decree quieting title and on April 13, 1938, judgment was entered in favor of Glenn-Colusa Irrigation District quieting its title to the real estate involved. An order was made on June 9, 1938, granting plaintiff's motion under section 708 of the Code of Civil Procedure to revive the judgment herein on the ground that the real estate sold under execution sale in Glenn County was not subject to execution and sale. Defendants received written notice of the order granting this motion on October 15, 1938. Defendants filed a motion on March 12, 1941 to vacate the order reviving the judgment, which motion was denied on March 17, 1941. Defendants thereupon appealed from the order denying their motion to vacate the order reviving the judgment and on July 15, 1942, the Supreme Court reversed the order of the superior court, the basis of the ruling being that defendants had not received notice of plaintiff's motion to revive the judgment. Thompson v. Cook, 20 Cal.2d 564, 127 P.2d 909. The remittitur was received from the clerk of the Supreme Court on August 17, 1942, and on September 11, 1942 plaintiff served and filed a notice of motion to revive the judgment. From the order granting this motion, entered on February 1, 1943, defendants prosecute this appeal.

The real estate involved had stood in the name of one of the defendants, who became delinquent in the payment of assessments due the irrigation district. The property had been deeded to Glenn-Colusa Irrigation District by collector's deeds issued on September 5, 1935, recorded in the official records of Glenn County on September 12, 1935, which were based on a certificate of sale issued in October, 1932. A second set of deeds was obtained by Glenn-Colusa Irrigation District on August 22, 1936, five days after the execution sale. Defendants contend that the last-mentioned deeds were the only valid ones and that there was a period of five days between the execution sale and the delivery of the deeds in which the property sold under execution could have been redeemed. Plaintiff contends that the deeds issued prior to the execution sale to Glenn-Colusa Irrigation District were valid and that defendants had no title to or interest in the real estate in question on the date of the execution sale.

[1-3] Section 708 of the Code of Civil Procedure is remedial in character and should be liberally construed. Betty v. Superior Court, 18 Cal.2d 619, 116 P.2d 947. Land belonging to a third party is property "not subject to execution and sale" within the meaning of the section. Hitchcock v. Caruthers, 100 Cal. 100, 34 P. 627. Plaintiff has received nothing of value but his judgment stood satisfied of record before the entry of the order from which the appeal is prosecuted. The superior court of Glenn County has decreed by a judgment rendered after the execution sale that the Glenn-Colusa Irrigation District is the owner of the real estate sold under execution and that plaintiff has no interest therein. In view of these circumstances it is clear that the court acted properly in granting the motion to revive the judgment. We do not see any occasion to pass upon defendants' assertion, which is stoutly contested by plaintiff, that the deeds of December 5, 1935, were prematurely executed.

Defendants contend that plaintiff's "cause of action" is barred by sections 336 and 685 of the Code of Civil Procedure. These sections concern situations very different from the one now before us. Section 685 refers to an application for the enforcement of a judgment after the lapse of five years from the date of the entry of the judgment. Section 336 provides that an action upon a judgment must be commenced within five years. In Merguire v. O'Donnell, 139 Cal. 6, 72 P. 337, 96 Am.St.Rep. 91, it was held that the only statute of limitations applicable to the remedy under section 708 is section 343 of the Code of Civil Procedure, which provides: "An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued." In the Merguire case the assignee of the judgment was the purchaser at the execution sale. After the sale the judgment was satisfied. Thereafter an action was commenced to quiet title to the real estate sold under execution and it was finally determined on appeal that the sale was void and title to the property was quieted in the defendant. Sixteen days after the remittitur was issued in the quiet title action the plaintiff presented a motion under section 708 of the Code of Civil Procedure to revive the original judgment. The order of the trial court denying this motion was reversed on appeal. It was held that the plaintiff's remedy under the statute did not arise until the quiet title action was finally determined against him and that the statute of limitations did not begin to run until that time.

[4, 5] Defendants point to the date of the judgment in the quiet title action in the present case, April 13, 1938, and assert that more than four years elapsed between that date and the filing of the motion to revive the judgment, from the granting of which the present appeal is taken. But the record shows that plaintiff acted promptly after the entry on April 13, 1938, of the judgment in the quiet title action and on June 9, 1938, obtained an order to revive the judgment. This order was not reversed until the remittitur was received from the Supreme Court on August 17, 1942. Plaintiff filed his second motion to revive promptly thereafter. During the pendency of the appeal from the order denying defendants' motion to vacate the order of June 9, 1938, the running of the statute of limitations was tolled and plaintiff could file the second motion within one year from the receipt of the remittitur without encountering the bar of the statute. Sec. 355, Code of Civil Procedure; Archer v. Edwards, 19 Cal.App.2d 253, 65 P.2d 115; Kenney v. Parks, 137 Cal. 527, 70 P. 556.

There is no merit in defendants' contention that plaintiff should be denied relief because he is guilty of laches. Defendants alone are subject to criticism under the doctrine of laches, for they delayed from October 15, 1938, the date upon which they were notified of the first order reviving the judgment, until March 12, 1941, when they filed their motion to vacate the order.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.

61 Cal.App.2d 489

BEATTY, County Recorder, v. HUGHES, Acting County Purchasing Agent.

Civ. 14202.

District Court of Appeal, Second District, Division 3, California.
Nov. 24, 1943.

Rehearing Denied Dec. 9, 1943.

Hearing Denied Jan. 20, 1944.

1. Mandamus ⟹82

A county recorder's proceeding in mandate to compel the acting county purchasing agent to purchase for the recorder's use a certain machine which she had requisitioned was a proper mode of obtaining a determination whether the purpose for which the recorder sought to purchase the machine was lawful.

2. Statutes ⟹243

Required liberality of construction of the Political Code cannot go beyond the meaning of the words used where that is clear and unambiguous. Pol. Code, § 4.

3. Records ⟹6

Under statute requiring county recorders to record documents separately in a fair hand or typewriting in large well-bound separate books, etc., the Legislature did not intend to allow the recorder complete freedom of judgment on the manner in which recording shall be done, but he is limited both as to the mode of copying and as to the nature of the books in which it may be done. Pol. Code, § 4131.

4. Records ⟹6

The word "in" in statute requiring county recorders to record documents separately in a fair "hand" or typewriting, etc. means by means of, with, by, or through, and does not indicate only the result, and the word "hand" means handwriting. Pol. Code, § 4131.

See Words and Phrases, Permanent Edition, for all other definitions of "In" and "Hand".

5. Records ⟹6

The amendatory statute requiring county recorders to record documents in a fair hand or typewriting, in view of its legislative construction, excludes modes of reproduction other than handwriting and does not authorize recorders to use machines for photographic copying of documents. Pol. Code, §§ 4130, 4131.

6. Statutes ⟹220

The legislative construction of a statute, while not conclusive, is persuasive.

◆

Original application by Mame B. Beatty, as Recorder of the County of Los Angeles, against J. W. Hughes for a writ of mandate to compel respondent, as Acting Purchasing Agent of the County of Los Angeles, to purchase for petitioner's use as recorder a certain machine which she has requisitioned. On demurrer to the petition.

Demurrer sustained, and peremptory writ denied.

J. H. O'Connor, Co. Counsel, S. V. O. Prichard, Asst. Co. Counsel, and Gerald G. Kelly, Deputy Co. Counsel, all of Los Angeles, for petitioner.

Charles A. Sunderlin, of Los Angeles, as amicus curiae on behalf of respondent.

Fred M. Cross, of Los Angeles, for respondent.

SHAW, Justice pro tem.

[1] In this proceeding in mandate, the petitioner, as the Recorder of the County of Los Angeles, seeks to compel the respondent, as Acting Purchasing Agent of that County, to purchase for her use as Recorder a certain machine which she has requisitioned. The respondent has refused to purchase this machine on the ground that petitioner's proposed use of it is not authorized by law. The Supreme Court has twice accepted such a proceeding as a proper mode of obtaining a determination whether the purpose for which an officer seeks to purchase supplies is a lawful purpose (Kerr v. Russell, (1930) 209 Cal. 36, 285 P. 311; Kerr v. Russell, (1935) 4 Cal.2d 634, 51 P.2d 1095), and we now follow its example.

The machine sought by petitioner is described in her requisition as "Machine for Photographic Copying," with further details of its capacity and mode of operation. The parties assume, and therefore so do we, although the petition does not directly allege, that petitioner desires and intends to use this machine, if obtained, in the recording of documents filed with her, by photographing such documents and binding the photographic copies so made into books, in lieu of copying the documents into books by hand or with a typewriter. The question for decision therefore is whether a county recorder may lawfully use such photographic process in performing his duties as recorder.

[2] The powers and duties of a county recorder in this matter are prescribed by section 4131 of the Political Code, which, so far as material here, reads as follows: "He must, upon the payment of his fees for the same, record, separately, in a fair hand, or typewriting, in large well-bound separate books, either sewed books or an insertable leaf, which when placed in the book cannot be removed. * * *" Following this is a list of the various sorts of documents that may be recorded. This provision is "to be liberally construed, with view to effect its objects and to promote justice" (Pol. Code, sec. 4). But such liberality of construction cannot go beyond the meaning of the words used, where that is clear and unambiguous. Pacific Coast, etc., Bk. v. Roberts, (1940) 16 Cal.2d 800, 805, 108 P.2d 439; Anderson v. I. M. Jameson Corp., (1936) 7 Cal.2d 60, 67, 59 P.2d 962; Seaboard Acceptance Corp. v. Shay, (1931) 214 Cal. 361, 366, 5 P.2d 882; Mulville v. City of San Diego, (1920) 183 Cal. 734, 739, 192 P. 702; In re Jessup, (1889) 81 Cal. 408, 419, 21 P. 976, 22 P. 742, 1028, 6 L.R.A. 594.

The petitioner asserts in her briefs, with much emphasis and reiteration, that section 4131, above quoted, undertakes to prescribe only "the end result to be attained and not the means or methods by which that result is to be achieved," that end result, in petitioner's view, being "that the document shall be accurately, completely and legibly copied and recorded as a permanent document in a book."

In Cady v. Purser, (1901) 131 Cal. 552, 557, 63 P. 844, 82 Am.St.Rep. 391, the court said: "The word 'recorded' in ordinary usage signifies copied or transcribed into some permanent book. In Anderson's Law Dictionary the term 'recording' is defined 'copying an instrument into the public records in a book kept for that purpose by or under the superintendence of the officer appointed therefor.'" In Federal Construction Co. v. Curd, (1918) 179 Cal. 479, 486, 177 P. 473, the court said that official documents are required to be recorded "by copying them at length in a book of records to be kept for such purpose." In Dougery v. Bettencourt, (1931) 214 Cal. 455, 464, 6 P.2d 499, the definition above quoted by us from Cady v. Purser was quoted and approved. Had the legislature, in prescribing the duties of recorders, been content to require merely the "recording" of documents, or even their recording "in books," petitioner's argument would in view of the foregoing definitions of "recording," be more persuasive, and might even prevail. Such were the statutes construed in the two cases cited by petitioner on this point. (People ex rel. Armknecht v. Haas, (1924) 311 Ill. 164, 142 N.E. 549, and Town of Bennington v. Booth, (1928) 101 Vt. 24, 140 A. 157, 57 A.L.R. 156.)

[3] But, as stated in Cady v. Purser, supra, 131 Cal. at page 558, 63 P. at page 846, 82 Am.St.Rep. 391: "The policy of the law in this respect is to afford facilities for intending purchasers or mortgagees of land in examining the records for the purpose of ascertaining whether there are any claims against it, and for this purpose it has prescribed the mode in which the recorder shall keep the records of the several instruments; and an instrument must be recorded as herein directed in order that it may be recorded as prescribed by law." And in Caldwell v. Center, (1866) 30 Cal. 539, 543, 89 Am. Dec. 131, the court, in holding that a map, made in pencil, not ink, and pasted between the leaves of a book, was not recorded, said: "The Act concerning County Recorders provides that the several instruments entitled to record shall be recorded 'in large and strong books, and in a fair, large and legible hand.' The necessary implication from this provision is that the instrument must be copied into the proper book of record; and in view of the purpose to be subserved by the recording of the several classes of instruments mentioned in the Act—the making and preservation of accurate and durable official copies of such instruments—a copy made in pencil or other materials that would not permanently remain, would not be within the spirit of the Act." Looking again at the statute, to ascertain what mode of recording it now prescribes, we see that the recorder must "record, separately, in a fair hand, or typewriting, in large well-bound separate books, either sewed books or an insertable leaf, which when placed in the book cannot be removed. * * *" Here it is apparent that the Legislature did not intend to allow the recorder complete freedom of judgment on the manner in which recording should be done. He is limited both as to the mode of copying and as to the nature of the books in which it may be done.

[4] Petitioner stresses the use of the preposition "in" in the statutory specification of the mode of copying, arguing that it

indicates only the result, and that the preposition "by" would have been used if the means had been intended. However, the preposition "in" has many meanings; one of those attributed to it in the Century Dictionary is, "by means of; with; by; through." The Standard Dictionary also sanctions the use of "in" to express this meaning. We think it is so used in this statute. There has been a similar provision in the recording laws of this state from the beginning, as respondent points out. In the statute of 1850 (Stats.1850, p. 151) the recorder was required to record documents "by entering them word for word, in a fair hand. * * *" In 1851 (Stats.1851, p. 199) he was required "to record * * * in a fair, large and legible hand." In 1872, when this provision was inserted in section 4235 of the Political Code, it required recording "in a fair hand," and these words have been in the corresponding provision ever since, through its transpositions into the various County Government Acts and finally, into section 4131 of the Political Code. In 1905, section 4235 of the Political Code was amended by inserting the words "or typewriting," (Stats. 1905, p. 47) so that the provision regarding mode of recording read as it does now. In 1907, when this provision was placed in its present location in section 4131 of the Political Code, it appeared in its present form, and has remained unchanged ever since. The word "hand" in this provision of course means "handwriting." When this provision was first formulated, in 1850, it obviously specified the means by which the recording was to be done, for no other means than handwriting was then known. Photography was, indeed, in some use, but as then done it could not conveniently be used for copying documents. Had any recorder attempted so to use it he would have been barred by the statute. The addition of the words "or typewriting" in 1905 indicates a legislative knowledge of the fact that another means of copying was then available, but it shows no intention to convert the provision from a specification of means to a mere description of result. Indeed, it is a recognition of the formerly existing provision as a specification of means which excluded typewriting and of the necessity of an amendment to permit it. Loew's, Inc., v. Byram, 1938, 11 Cal.2d 746, 750, 82 P.2d 1.

[5, 6] In 1893, the County Government Act of 1883 was amended to provide that the books used "may contain printed forms of deeds, mortgages or other instruments of general use," (Stats. 1893, p. 376), and this provision perdures in section 4130 of the Political Code. As already stated, another part of the County Government Act then required recording "in a fair hand." If this provided only for the end result of a legible permanent record, as petitioner contends, the amendment to permit the use of partly printed books was unnecessary. This, as well as the 1905 amendment already discussed, shows a legislative construction of the statute amended as excluding modes of reproduction other than handwriting. Moore v. United States F. & G. Co., (1932) 122 Cal.App. 205, 210, 9 P.2d 562; Loew's Inc., v. Byram, supra. Such a construction, while not conclusive, is persuasive. Rutledge v. Dominguez, (1932) 122 Cal.App. 680, 684, 10 P.2d 1027.

The respondent's demurrer to the petition is sustained and the peremptory writ is denied.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

Hearing denied; EDMONDS, CARTER, and TRAYNOR, JJ., dissenting.

61 Cal.App.2d 455

EMERY et al. v. LOS ANGELES R. CORPORATION et al.

Civ. 13990.

District Court of Appeal, Second District, Division 3, California.

Nov. 23, 1943.

Hearing Denied Jan. 20, 1944.

1. Appeal and error 🔑110

An order denying motion for new trial is not appealable.

2. Automobiles 🔑244(6)

In action for death of pedestrian struck by defendant's motorbus while crossing street within crosswalk, evidence *held* sufficient to justify finding by jury that bus, in making left turn into such street from intersecting street, did not pass to right of center of intersection as required by statute. Vehicle Code, § 540(b), St.1935, p. 184.

3. Automobiles 🔑169

An act in violation of statute requiring vehicle driver, making left turn at street intersection, to pass immediately to right of center of intersection, is "negligence per se", unless prudence and safety of life or limb require doing of such act, so as to render it justifiable or excusable under circumstances. Vehicle Code, § 540(b), St. 1935, p. 184.

See Words and Phrases, Permanent Edition, for all other definitions of "Negligence Per Se".

4. Automobiles 🔑245(72)

Whether pedestrian, struck by motorbus making left turn into intersecting street, which he was crossing within crosswalk at slow trot without turning his head in either direction, was contributorily negligent, *held* fact question for jury on evidence. Vehicle Code, §§ 85, 540(b), 560, St.1935, pp. 99, 184, 188.

5. Automobiles 🔑245(73)

In action for death of pedestrian struck by defendant's motorbus, autopsy physician's testimony that decedent's blood contained percentage of alcohol, indicating acute intoxication during life, was insufficient to compel finding by jury that decedent was contributorily negligent, especially in view of testimony indicating that decedent's intoxication, if any, had no apparent effect on his conduct at time of accident.

6. Negligence 🔑88, 132(1)

In death action, evidence of decedent's intoxication at time of fatal injury is admissible on issue of his contributory negligence, but intoxication does not of itself constitute negligence, but is merely a circumstance to be considered by jury in determining whether intoxicated person was negligent.

7. Negligence 🔑88

A person's intoxication constitutes no excuse for abating care which ordinarily prudent sober person would exercise under same circumstances.

8. Death 🔑58(1)

In death action, presumption is that decedent exercised ordinary care at time of fatal injury.

9. Negligence 🔑72

A person suddenly confronted with unexpected danger, without any fault on his part, is required to use only such means for avoiding danger as would be used by person of ordinary prudence under similar circumstances and is not held to strict accountability requiring that course chosen by him be most judicious one.

10. Appeal and error 🔑1067

In action for death of pedestrian struck by defendant's motorbus making left turn at street intersection, refusal of instruction, stating rule that person suddenly confronted with unexpected danger without his fault is required to use only such means for avoiding danger as would be used by person of ordinary prudence under similar circumstances, *held* error requiring reversal of judgment on jury's verdict for defendants, in view of evidence of defendant bus driver's negligence in cutting corner and conflicting evidence on question of decedent's contributory negligence. Vehicle Code, § 540(b), St.1935, p. 184.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Mary Agnes Emery and others against the Los Angeles Railway Corporation and another for the death of Walter W. Emery. Judgment for defendants, and plaintffs appeal.

Reversed.

Hurt & Hurt, Arch R. Tuthill, and Montague S. Ross, all of Los Angeles, for appellants.

Gibson, Dunn & Crutcher, of Los Angeles, for respondents.

SHAW, Justice pro tem.

[1] Plaintiffs appeal from a judgment for defendants in an action brought to recover damages for the death of Walter W. Emery, and from an order denying their motion for a new trial. The latter appeal must be dismissed, since such an order is not appealable. Plaintiffs are the widow and children of Walter W. Emery and the defendants are respectively the owner and the driver of a motor coach with which he collided on March 25, 1941. The injuries received by him in this accident caused his death. The case was tried by a jury, which returned a verdict in favor of defendants. The witnesses called this motor coach a "bus" and we shall do likewise in our statement of facts.

Plaintiffs' points are that the evidence is insufficient to justify a finding either that the defendants were not negligent or that the deceased was guilty of contributory negligence, and that the trial court erred in refusing certain instructions requested by plaintiffs.

[2, 3] The accident in question occurred at about 12:30 A. M., at the intersection of Third Street and Beaudry Avenue, in the City of Los Angeles. Third Street runs east and west and at this point descends in a seven per cent grade from the west to Beaudry Avenue. Beaudry Avenue runs north and south and descends to the north from Third Street in a grade approximately the same as that of Third Street. The angle between Third Street on the west and Beaudry Avenue on the north is, however, slightly greater than a right angle. Each street has a roadway 56 feet wide. The Los Angeles Railway bus, driven by defendant Morris, came down Third Street from the west and made a left turn north into Beaudry Avenue, striking Emery at a point in line with the Third Street sidewalk and five feet west of the center line of Beaudry Avenue. The deceased, Emery, came up Third Street from the east, accompanied by the witness Vance. They walked on the northerly sidewalk of Third Street, stopping at the east curb of Beaudry Avenue as the bus was approaching Beaudry Avenue. As the bus neared Beaudry Avenue its speed, according to the testimony of its driver, Morris, was 20 miles per hour, and it made the left turn at that speed, but he applied the brakes 50 feet before reaching the center of the intersection. At this time no other vehicles and no other pedestrians were in the vicinity.

The jury could readily have inferred that in making the left turn the bus driver "cut the corner"; indeed, any other inference from the evidence would have been rather strained. There were no markers, buttons or signs at the intersection to control or direct the manner of making a left turn. Two police officers who arrived at the scene shortly after the accident testified that they saw a skidmark from 45 to 50 feet long extending back from the left rear wheel of the bus where it had stopped after the accident. They disagreed slightly as to the location of this skidmark, but each placed it so far to the left of the center of the intersection as to indicate that the whole bus must have passed to the left. The witness Vance testified that the bus passed even farther to the left of the center than the officers' testimony would place it. The bus driver, when asked, "Is it your recollection that you swung around the center?" answered, "No, I don't think I got plumb clear around. I might have got around, like that." If "that" refers to the mark which he immediately thereafter made on a diagram, it indicates that the bus *"might have"* gone to the right of the center, but on a curve which was very sharp for so long a vehicle. This is rather unsubstantial evidence to support a finding that it *did* go there.

The inference from this testimony that in making the left turn the bus did not pass to the right of the center of the intersection, there being no markers, buttons or signs directing otherwise, shows a violation by defendants of section 540, subdivision (b) of the Vehicle Code, St.1935, p. 184. An act in violation of such a statute is negligence per se (Gallichotte v. California Mut., etc., Ass'n (1935) 4 Cal.App.2d 503, 505, 41 P.2d 349; Benjamin v. Noonan (1929) 207 Cal. 279, 283, 277 P. 1045), unless prudence and safety of life or limb require the doing of the act, so that it is under the circumstances justifiable or excusable (Umemoto v. McDonald (1936) 6 Cal.2d 587, 590), 58 P.2d 1274. It appears from the testimony of three witnesses that when the bus stopped it was almost entirely to the left of the center line of Beaudry Avenue; the driver testified that only the left front corner of it was so situated. The driver presented what the jury may have regarded as a sufficient excuse for the manner of turning and the position in which the bus was found by testifying that he saw Emery "after my lights picked him up as I started to turn," that Emery was then three or four feet from the curb, headed west, that "he started walking, a real fast walk, across the street" and "I started clamping my wheels to the left in order to head him off, thinking he would see me in time to stop." Morris also said he then slammed on his brakes. Whether the jury accepted this version, we do not know, but in view of the weight of the evidence against the driver's testimony as to the course of the bus in making the turn, it seems more likely that their verdict was based on a finding of contributory negligence of Emery.

[4] On this issue the evidence was as follows: Vance testified that when he and Emery arrived at the northeast corner of Third Street and Beaudry Avenue they

stood on the curb and he looked north and south, and as he looked south, Emery stepped a few feet off the curb, that at this time he saw the bus about opposite the second lamp post from the southwest corner, on the car track to its right of the center line, and that Emery was then three or four feet into the street. When Vance again looked at the bus it was about opposite a traffic signal at the southwest corner and just starting to make its turn, and Emery was about five feet farther into the street than before. When Vance looked back from this view of the bus Emery was within two or three feet of the center line of Beaudry Avenue. Emery was going west across Beaudry on a line with the sidewalk on Third Street—in other words, he was in what is designated in the Vehicle Code, section 85, as a crosswalk and was in a proper place for him to cross the street and entitled to the right of way over the bus. (Vehicle Code, sec. 560.) Vance further testified that as Emery crossed Beaudry Avenue he was going at a slow trot, which he began after two steps into the street and continued until the point of impact and that this point was on the west side of Beaudry. Vance showed this point of impact to the officers later and they marked it with chalk. One of the officers testified that this point was five feet west of the center line of Beaudry Avenue. Vance further testified that Emery did not turn his head in either direction while crossing the street, and that the bus was about 10 or 12 feet from him when he trotted in front of it. When Emery was across the center line and in front of the bus, Vance "hollered, 'look out'" but Emery did not turn his head or indicate in any way that he heard. Morris, the bus driver, testified that when he first saw Emery, as the bus started to turn, Emery was 3 or 4 feet out from the curb, headed west, and started walking a real fast walk, "awful fast" across the street and never looked one way or the other, did not turn his head in Morris' direction. Vance and Morris agree that the headlights and all the other lights of the bus were burning and that the front end of the bus struck Emery.

The evidence for defendant further showed that in connection with the autopsy conducted on Emery's body an analysis of his blood was made from which it appeared that the blood contained .19 of one per cent of alcohol. The autopsy physician testified that "that is considered to be a state of acute intoxication during life" and that the amount of alcohol at the time of the analysis would be the same as when death occurred. Vance, who was acquainted with Emery, had walked with him on numerous prior occasions, and had been with him for about half an hour and walked with him several blocks, just before the accident, testified that on this occasion Emery walked his normal gait, did not stagger or weave from side to side, but proceeded in a direct line, and that he noticed no difference in his speech or articulation between that night and any other time.

Upon all the evidence it was a question of fact for the jury whether Emery was guilty of contributory negligence.

[5-7] The evidence of the autopsy physician, even if it stood alone, would not compel a finding in defendants' favor on that issue, for while evidence of a plaintiff's intoxication is admissible on the issue of his contributory negligence, in an action such as this (38 Am.Jur. 1019; 45 C.J. 1244), intoxication does not of itself constitute negligence but is merely a circumstance to be considered by the jury in determining whether the intoxicated person was negligent (45 C.J. 997; 38 Am.Jur. 884). It does not, of course, constitute an excuse for abating the care which an ordinarily prudent sober person would exercise under the circumstances. (45 C.J. 997; 38 Am.Jur. 883.) Moreover, the testimony of the autopsy physician was to some extent disputed by that of Vance, which tended to show that Emery's intoxication, if any, at least had not advanced, at the time of the accident, to the stage where it had an apparent effect on his conduct.

Because of the testimony of Vance and Morris, the only eye witnesses, who agree that Emery did not turn his head in either direction as he crossed the street, defendants contend that Emery was negligent in failing to look for danger before or while he crossed the street. This is not the only possible view of the situation. As Emery stood at the northeast corner and as he walked west across Beaudry Avenue, he was facing west, in the direction from which the bus approached; and even after he was out in the street, the bus on Third Street, as it approached the intersection for its turn, especially if it cut the corner, as several witnesses said, would be within range of his eyes, so that he could see it without turning his head. Taking this view of the facts and considering the evidence that after Emery got into the street he began to walk fast or trot, the jury may have inferred that he did see the approaching bus and recklessly proceeded in front of it in an attempt to beat it past the crossing of their paths. On this view of the matter, or on the theory that he failed to look at all for danger, the finding of contributory negligence would be supported. (See Jonas v. L. A. Ry. Corp. (1943) 57 Cal.App.2d 824, 827, 136 P.2d 39.)

[8-10] But an inference that Emery was not negligent could also have been drawn. In the first place, if he saw the bus coming down Third Street, it did not constitute a danger to him so long as it proceeded on Third Street and he would not be required to look out for it further until he had reason to expect a turn. There is no evidence that he was informed of its route or should for any reason have anticipated the turn before it was begun. When the turn was begun he was some distance out in Beaudry Avenue; according to Vance he was only 2 or 3 feet east of its center line. If the turn was commenced back of the west line of Beaudry and the bus cut the corner, as some of the witnesses said, Emery could easily have seen it without turning his head. In view of the presumption of ordinary care that applies in such cases (Westberg v. Willde (1939) 14 Cal.2d 360, 367, 94 P.2d 590), the jury could properly infer that he did look and see the bus as it started to turn. If he did, he would be struck in the eyes by the rays of its headlights when they "picked him up," as the bus driver put it. While there is no testimony as to the exact degree of their brightness, undoubtedly they were somewhat blinding and confusing and could very well have given him the impression that the bus was headed directly toward him. One who thus suddenly finds the headlights of a motor vehicle pointed directly at him has two choices, in the effort to escape from it; he may hastily retreat or he may hurry forward. In this case Emery hurried forward. His conduct in doing so must be judged by the well settled rule that "a person suddenly confronted with an unexpected danger, without any fault on his part, is only required to use such means for avoiding the danger as would be used by a person of ordinary prudence under similar circumstances, and he is not held to that strict accountability which would require that the course chosen be the most judicious one." (Mortensen v. Fairbanks (1934) 1 Cal.2d 489, 492, 35 P.2d 1030.) By the application of this rule it could properly be found that Emery was not negligent. The plaintiffs requested an instruction stating this rule but it was refused and no other instruction on the subject was given. Defendants do not deny that plaintiffs' proposed instruction was a correct statement of the law, so we do not set it forth here. The only justification advanced by them for the refusal of the instruction is that Emery by his own negligence got himself into the position of danger, and hence the rule above stated does not apply to the case. But, as we have already stated, the evidence is susceptible of a construction which frees him from negligence up to the time the sudden danger confronted him. The rule was, on that construction, fully applicable to the case, and it was error not to give the requested instruction or some other stating the same rule. (Varner v. Skov (1937) 20 Cal.App.2d 232, 238, 67 P.2d 123.)

Under the circumstances of this case we think this error must lead to a reversal. As already stated, the preponderance of the evidence appears to be that defendants were negligent in cutting the corner, and if they were, this negligence was obviously a proximate cause of the collision, for Emery would have cleared the path of the bus had it kept to the right of the center line of Beaudry Avenue. The question of Emery's contributory negligence is a close one on the evidence, and we cannot say that a different verdict would not have been returned had the jury considered the evidence on that point in the light of the law properly applicable thereto.

The appeal from the order denying plaintiffs' motion for a new trial is dismissed. The judgment appealed from is reversed.

DESMOND, P. J., and PARKER WOOD, J., concur.

Hearing denied; EDMONDS, J., dissenting.

23 Cal.2d 206

In re HERRERA et al.

Cr. 4499.

Supreme Court of California.

Nov. 18, 1943.

1. Constitutional law 🔑62
Infants 🔑69

Provision of the Youth Correction Authority Act vesting power in the authority to determine within prescribed limits how long convicted persons shall be detained and how they shall be treated is not an unconstitutional delegation of legislative or judicial power. St.1941, pp. 2522–2533, §§ 1700–1783.

2. Constitutional law 🔑70(1)

The authority and duty to ascertain the facts which will justify classified legislation must rest with the Legislature in the first instance and not with the courts, and the decision of the Legislature in that respect is ordinarily conclusive upon the courts. Const. art. 1, §§ 11, 14, 21; art. 4, § 25.

3. Constitutional law 🔑48

Every presumption is in favor of the validity of the legislative act, and the legislative classification will not be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason. Const. art. 1, §§ 11, 14, 21; art. 4, § 25.

4. Infants 🔑69

Provision of the Youth Correction Authority Act vesting a discretion in the authority up to January 1, 1946, in the acceptance of cases, was enacted to enable the authority to co-ordinate the necessary facilities for the treatment of those committed to it and is not invalid. St.1943, c. 236, § 1731.5.

5. Infants 🔑69

It is a matter of legislative discretion to fix theoretical lines in making classifications for youth correction where there are no real ones, and there is no abuse of such discretion when the theoretical lines are not unreasonable.

6. Infants 🔑69

The provision making the Youth Correction Authority Act applicable to all offenders who are less than 23 years of age is valid as based on a reasonable classification. St.1943, c. 236, § 1731.5.

7. Infants 🔑69

The Youth Correction Authority Act is not void in that it subjects to its provisions any offender less than 23 years of age and conflicts with statute fixing 21 as the age below which persons are minors for general purposes. St.1943, c. 236, § 1731.5.

8. Infants 🔑1

The age of majority is a matter of legislative regulation and Legislature may prescribe a longer period of minority for some purposes than for others.

9. Infants 🔑69

Provisions of the Youth Correction Authority Act excluding from the classification of those eligible for commitment to the authority persons who are sentenced to death or imprisonment for life, did not constitute discriminatory classification. St. 1943, c. 236, § 1731.5.

10. Infants 🔑69

The Youth Correction Authority Act is not unreasonably discriminatory because a person committed to the authority may remain in its custody for a period longer than the period of imprisonment that may be prescribed for a person convicted of the same offense but not committed to the authority. St.1941, pp. 2526, 2527, §§ 1731–1736.

11. Habeas corpus 🔑30(3)
Infants 🔑69

A commitment, reciting that petitioner had been convicted of the crime of assault with a deadly weapon and ordering petitioner to be committed to the Youth Correction Authority, was a judicial determination of the fact of conviction and pronouncement of sentence, and petitioner was not entitled to release from custody of authority on ground that no "sentence" or "judgment" had been imposed and that he had been therefor deprived of an appeal. Pen.Code, § 1191 et seq; St.1941, pp. 2526–2532, §§ 1731–1736.

See Words and Phrases, Permanent Edition, for all other definitions of "Judgment" and "Sentence".

◆

In Bank.

Proceeding in the matter of the application of Carlos Herrera and others, for a writ of habeas corpus to secure petitioner's release from custody of the Youth Correction Authority.

Writ discharged.

Prior opinion, 137 P.2d 82.

David C. Marcus, of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., Robert A. Neeb, Jr., Eugene M. Elson, and Lewis Drucker, Deputies Atty. Gen., for respondent.

TRAYNOR, Justice.

The petitioners were charged with the crime of assault with a deadly weapon. Petitioners Sandoval and Loya entered pleas of guilty of simple assault. Petitioner Herrera pleaded not guilty, and after trial was found guilty of the offense charged. Each of them was committed to the Youth Correction Authority. They have petitioned for a writ of habeas corpus, seeking their discharge from the custody of the Authority on the grounds that the statute authorizing their commitments in any event were not in compliance therewith. See In re Bell, 19 Cal.2d 488, 122 P.2d 22.

The Youth Correction Authority Act, Stats.1941, ch. 937, p. 2522, based on a model act drafted by the American Law Institute, adds section 1700 to 1783 to the Welfare and Institutions Code. (Section numbers cited hereinafter refer to sections of that code unless otherwise described.) The seriousness of the conditions that prompted its adoption are graphically set forth in the Introductory Explanation to the Model Act. (See, also, Report of Joint Legislative Fact Finding Committee on the Southern California Prison at Chino, p. 22; 9 Law and Contemporary Problems 579–759.)

The act creates a Youth Correction Authority of three members who are appointed by the governor to administer its provisions. Until January 1, 1946, no person may be committed to the Authority without its consent. (Sec. 1731.5, as amended, Stats. 1943, ch. 236.) With such consent, or irrespective of it after January 1, 1946, the court in which a person is convicted of a public offense shall commit him to the Authority if he is under twenty-three years of age at the time of apprehension and is not sentenced to death, imprisonment for life, imprisonment for not more than ninety days or to the payment of a fine, and, after January 1, 1946, is not granted probation (secs. 1731.5, 1732, as amended, Stats.1943, ch. 236), or is not proceeded against as a juvenile offender (sec. 1731). Nothing in the act can be deemed to interfere with or limit the jurisdiction of the juvenile court (sec. 1704), but the juvenile court may in its discretion commit persons subject to its jurisdiction to the Authority, which may in its discretion accept such commitments (sec. 1736).

By establishing the Authority as a central state agency to cooperate with hitherto uncoordinated public and private agencies in the reformation of socially dangerous persons, the act provides for a unified program of correctional treatment. To the extent that funds are available the Authority may "establish and operate a treatment and training service and such other services as are proper for the discharge of its duties; * * * employ and discharge all such persons as may be needed for the proper execution of its duties." (Sec. 1752.) It may also "make use of law enforcement, detention, probation, parole, medical, educational, correctional, segregative and other facilities, institutions and agencies, whether public or private, within the State" (sec. 1753), but nothing in the act "shall be taken to give the Authority control over existing facilities, institutions or agencies; or to require them to serve the Authority inconsistently with their functions, or with the authority of their officers, or with the laws and regulations governing their activities; or to give the Authority power to make use of any private institution or agency without its consent; or to pay a private institution or agency for services which a public institution or agency is willing and able to perform." (Sec. 1754.) Public institutions and agencies are required to accept persons sent to them by the Authority as if they had been committed by a court of criminal jurisdiction. (Sec. 1755.) The Authority is also authorized, when necessary and when funds are available, to establish and operate places for detention, examination, study and confinement of persons committed to it, educational institutions, hospitals, and other correctional, segregative or supervisional agencies and facilities for performing its duties. (Sec. 1760.)

The Authority is vested with wide discretionary power in the treatment of a person committed to it. "When a person has been committed to the Authority it may (1) Permit him his liberty under supervision and upon such conditions as it believes conducive to law-abiding conduct; (2) Order his confinement under such conditions as it believes best designed for the protection of the public; (3) Order reconfinement or renewed release under supervision as often as conditions indicate to be desirable; (4) Revoke or modify any order except an order of discharge as often as conditions indicate to be desirable; (5) Discharge him from its control when it is satisfied that such discharge is consistent with the protection of the public." (Sec. 1766.) The act embodies the penal theory that the primary objective in the treatment of an offender is not punishment but rehabilitation. In the correction of the socially harmful tendencies of a person committed to it, the Authority may "(a) Require participation by him in vocational, physical, educational and corrective training and activities; (b) Require such conduct and modes of life as seem best adapted to fit him for return to full liberty without danger to the public welfare; (c) Make use of other methods of treatment conducive to the correction of the person and to the prevention of future public offenses by him." (Sec. 1768.)

The Authority is entrusted with the determination of the fitness of an offender for discharge. "Except as otherwise provided in this chapter, the Authority shall keep under continued study a person in its control and shall retain him, subject to the limitations of this chapter, under supervision and control so long as in its judgment such control is necessary for the protection of the public. (b) The Authority shall discharge such person as soon as in its opinion there is reasonable probability that he can be given full liberty without danger to the public." (Sec. 1765.) The act affords insurance against the continuance of control through neglect by requiring the Authority to investigate the lives and crimes of all persons committed to it and to renew its investigation at least once a year. If the Authority is remiss in this regard the offender may "petition the superior court of the county from which he was committed for an order of discharge, and the court shall discharge him unless the Authority satisfies the court of the need for further control." (Sec. 1764.)

The California Act omits the provision of the model act enabling the Authority on application to an order of the court to keep a person in its custody for successive periods, and prescribes definite time limits upon the retention of control by the Authority over persons committed to it. "Every person committed to the Authority by a juvenile court shall be discharged upon the expiration of a two-year period of control or when the person reaches his twenty-first birthday, whichever occurs later." (Sec. 1769.) "Every person convicted of a misdemeanor and committed to the Authority shall be discharged upon the expiration of a two-year period of control or when the person reaches his twenty-third birthday, whichever occurs later." (Sec. 1770.) "Every person convicted of a felony and committed to the Authority shall be discharged when such person reaches his twenty-fifth birthday, unless a petition is filed under Article 5 of this chapter. In the event such a petition is filed, the Authority shall retain control until the final disposition of the proceeding under Article 5." (Sec. 1771.) Article 5 provides for a hearing by the committing court upon petition by the Authority if the date of discharge occurs before the expiration of a period of control equal to the maximum term prescribed by law for which the person was convicted, and the Authority believes that his unrestrained freedom would be dangerous to the public. The court may discharge the person, admit him to probation, or commit him to the state prison for a period equal to the maximum term prescribed by law for the offense for which he was convicted, less the period during which he was under the control of the Authority.

[1] There is no unconstitutional delegation of legislative or judicial power, as petitioners contend, in thus vesting power in the Authority to determine, within the limits prescribed, how long convicted persons shall be detained and how they shall be treated after commitment. The standards governing the Authority in determining the kind of treatment and release of such persons are well within constitutional requirements. Fillmore Union High School Dist. v. Cobb, 5 Cal.2d 26, 33, 53 P.2d 349; People v. Pryor, 17 Cal.App.2d 147, 152, 61 P.2d 773. The act is similar in this respect to the indeterminate sentence law, the validity of which has long been established. In re Lee, 177 Cal. 690, 693, 171 P. 958; People v. Ferlin, 203 Cal. 587, 603, 265 P. 230; People v. Ure, 68 Cal.App. 545, 549, 229 P. 987; see Wharton, Criminal Law, 12th Ed., vol. 1, p. 63.

[2, 3] Petitioners contend that because of the exclusions from the classification of those eligible for commitment to the Authority and because of the discretionary power of acceptance given the Authority, the act is discriminatory, uncertain, ambiguous, indefinite, and arbitrary and therefore violates the Fourteenth Amendment to the United States Constitution and article I, sections 11, 14 and 21, and article IV, section 25 of the California Constitution. This contention must be considered in the light of the established rule that the power of the Legislature to classify carries with it a wide discretion. "The authority and the duty to ascertain the facts which will justify classified legislation must of necessity rest with the legislature, in the first instance, to whom has been given the power to legislate, and not to the courts, and the decision of the Legislature in that behalf is ordinarily conclusive upon the courts. Every presumption is in favor of the validity of the legislative act, and the legislative classification will not therefore be disturbed unless it is palpably arbitrary in its nature and neither founded upon nor supported by reason." Martin v. Superior Court, 194 Cal. 93, 101, 227 P. 762, 765; People v. Dawson, 210 Cal. 366, 370, 292 P. 267; County of San Bernardino v. Way, 18 Cal.2d 647, 659, 117 P.2d 354; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78, 31 S.Ct. 337, 55 L.Ed. 369, Ann.Cas. 1912C, 160; Radice v. People of New York, 264 U.S. 292, 296, 44 S.Ct. 325, 68 L.Ed. 690; New York Rapid Transit Corp. v. New York, 303 U.S. 573, 578, 58 S.Ct. 721, 82 L.Ed. 1024; see 5 Cal.Jur. 832; 16 C.J.S., Constitutional Law, § 505, p. 998.

[4] Petitioners object to the discretion vested in the Authority up to January 1, 1946, in the acceptance of cases, contending that the Authority cannot accept any unless it accepts them all. Without such a provision, however, the Authority would have been overloaded at the outset and its effectiveness imperiled for lack of time to coordinate the necessary facilities for the treatment of those committed to it. The object of the Legislature was to enable the Authority to operate on a limited scale in the first stages so that it would have the opportunity to lay the foundations of an appropriate program in anticipation of the time when it would carry a full case load. In selecting its cases the Authority is guided by appropriate legislative standards, namely, the adequacy of available facilities and the likelihood of benefit to the person accepted for treatment. Sec. 1731.5; see Fillmore Union High School Dist. v. Cobb, 5 Cal.2d 26, 33, 53 P.2d 349; Carmichael v. Southern Coal Co., 301 U.S. 495, 511, 57 S.Ct. 868, 81 L.Ed. 1245, 109 A.L.R. 1327.

[5-8] Petitioners contend that an unreasonable classification results from the provision that any offender who is less than 23 years of age at the time he is apprehended may be committed to the Authority. There are convincing reasons, however, for such a classification. The great value in the treatment of youthful offenders lies in its timeliness in striking at the roots of recidivism. Reaching the offender during his formative years, it can be an impressive bulwark against the confirmed criminality that defies rehabilitation, for it is characteristic of youth to be responsive to good influence as it is susceptible to bad. Youth does not of course end abruptly to be superseded by maturity, and maturity comes more slowly to some than to others. It is a matter of practical necessity, however, and one of legislative discretion, to fix theoretical lines where there are no real ones, and there is no abuse of such discretion when the theoretical lines are not unreasonable. Martin v. Superior Court, 194 Cal. 93, 105, 227 P. 762; Brown v. City of Los Angeles, 183 Cal. 783, 789, 192 P. 716; Reynolds v. Barrett, 12 Cal.2d 244, 249, 83 P.2d 29. In the present case there is nothing unreasonable in fixing the age of 23 as the line for the treatment of youthful offenders by the Authority. While section 25 of the Civil Code fixes 21 as the upper age limit of minors for general purposes, the Legislature is free to exercise its judgment in fixing the age limits of minority for particular purposes. "It cannot be questioned that the age of majority is a matter of legislative regulation and that the Legislature may prescribe a longer period of minority for some purposes than for others." Gouanillou v. Industrial Acc. Comm., 184 Cal. 418, 421, 193 P. 937, 938; see, also, Ex parte Williams, 87 Cal. 78, 24 P. 602, 25 P. 248; Moore v. Williams, 19 Cal.App. 600, 610, 127 P. 509; In re Willis, 30 Cal.App. 188, 157 P. 819.

[9] There is no forbidden discrimination in the classification of those who are ineligible for commitment to the Authority even though they meet the age requirement. The Legislature may properly regard life imprisonment or the death penalty as necessary for the protection of the public in the

case of grave offenses, just as it may regard imprisonment for not less than 90 days or the payment of a fine as adequate in the case of minor offenses.

[10] Petitioners contend that the act is unreasonably discriminatory because a person committed to the Authority may remain in its custody for a period longer than the period of imprisonment that may be prescribed for a person convicted of the same offense but not committed to the Authority. This contention is answered by the many cases upholding similar provisions with respect to juvenile offenders. Boys' & Girls' Aid Society v. Reis, 71 Cal. 627, 12 P. 796; Ex parte Liddell, 93 Cal. 633, 640, 29 P. 251; Ex parte Nichols, 110 Cal. 651, 653, 43 P. 9; In re Daedler, 194 Cal. 320, 228 P. 467; In re Sing, 13 Cal.App. 736, 110 P. 693; People v. De Fehr, 81 Cal.App. 562, 254 P. 588; see People v. Smith, 218 Cal. 484, 488, 24 P.2d 166; In re Dunkerton, 104 Kan. 481, 179 P. 347, 3 A.L.R. 1614.

[11] Petitioners contend that their detention by the Authority is illegal because "no sentence or judgment" has ever been imposed upon them by the superior court, and they have been deprived of an appeal from their commitments to the Authority. On November 5, 1942, the court, having been advised by the Authority that it would accept the defendants, formally committed them thereto. The commitment in the Herrera case, typical of the form used in all the cases, after setting forth that defendant was convicted on September 4, 1942, of the crime of assault with a deadly weapon, a felony, and that he was under 23 years of age at the time of apprehension declares: "I do hereby certify that upon such conviction it is hereby ordered and adjudged by the Court on this 5th day of November, 1942, that for said offense the said Carlos Herrera be committed to the Youth Correction Authority of the State of California for the time prescribed by law. (signed) Clement D. Nye Judge of the Superior Court." This commitment is a judicial determination of the fact of defendant's conviction and a pronouncement of the sentence for the offense, namely, commitment to the Authority for the term prescribed by law, and is therefore the court's judgment and sentence of the convict within the meaning of title VIII, chapter I pt. 2, of the Penal Code, and is appealable. Sec. 1739; see 8 Cal.Jur. 465; 69 A.L.R. 792; Freeman on Judgments, 5th Ed., 172. To remove any doubts in this regard, the Legislature recently added section 1737.5 to the Welfare and Institutions Code providing that "A commitment to the Authority is a judgment within the meaning of Ch. I, Title 8 of Part 2 of the Penal Code, and is appealable." Stats.1943, ch. 898.

The writ heretofore issued is discharged and petitioners are remanded.

GIBSON, C. J., SHENK, CURTIS, EDMONDS, CARTER, and SCHAUER, JJ., concurred.

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61 Cal.App.2d 417

JENNINGS v. AMERICAN PRESIDENT LINES, Limited.

Civ. 12482.

District Court of Appeal, First District, Division 2, California.

Nov. 22, 1943.

Rehearing Denied Dec. 22, 1943.

See 144 P.2d 54.

1. Seamen 🔑29(5)

Recital in employee's written statement to shipowner that he let his end of container drop constituted evidence of negligence sustaining recovery against shipowner under Jones Act for back injury suffered by fellow employee when heavy container was jerked away from him without warning when the other end left helper's hands. Jones Act, 46 U.S.C.A. § 688.

2. Trial 🔑136(3)

Employee's written statement to shipowner describing accident in which, due to employee's alleged negligence, fellow employee was injured, was not an "instrument" which trial court under statute was required to construe when read in evidence in suit under Jones Act to recover for such injuries. Code Civ.Proc. § 1858; Jones Act, 46 U.S.C.A. § 688.

Though the term "instrument" as applied to documents necessarily imports a paper writing, every such writing is not necessarily an instrument within settled statutory meaning of the term. With reference to writings, the term as employed in statutes has been defined to mean an agreement expressed in writing, signed and delivered by one person to another, transferring title to or creating a lien on real property, or giving a right to a debt or duty.

See Words and Phrases, Permanent Edition, for all other definitions of "Instrument".

3. Continuance ⚷33

Trial court did not abuse its discretion in denying defendant's motion made on day set for trial requesting continuance to obtain deposition of absent witness, where affidavit failed to show due diligence to procure such deposition or what evidence defendant expected to obtain from absent witness, and witness' written statement to defendant was read in evidence without objection. Code Civ. Proc. § 595.

4. Continuance ⚷46(4)

A motion for continuance on ground of absence of evidence may be denied where affidavits in support of motion do not allege facts showing the materiality of the testimony sought to be produced. Code Civ.Proc. § 595.

5. New trial ⚷96

Trial court did not abuse its discretion in denying defendant's motion for new trial on ground of accident and surprise, in that written statement describing accident given by plaintiff's fellow employee was inaccurate and defendant was prevented from obtaining his deposition by delay of plaintiff's attorney in preparing cross-interrogatories, where it appeared defendant by due diligence could have obtained deposition and statement was introduced in evidence with defendant's consent after ample opportunity to examine it.

6. New trial ⚷96

A party may not complain of denial of motion for new trial on ground of accident and surprise unless he has himself acted with diligence.

7. New trial ⚷89

Where written statement of fellow employee and sole witness of accident giving rise to seaman's action under Jones Act for personal injuries contained contradictory statements as to whether injuries resulted from fellow employee's negligence, shipowner was not entitled to a new trial on ground of "surprise," since subsequently obtained deposition of fellow employee allegedly negativing negligence would be contradicted by prior written statement. Jones Act, 46 U.S.C.A. § 688.

See Words and Phrases, Permanent Edition, for all other definitions of "Surprise".

8. New trial ⚷82

"Surprise" as a ground for new trial denotes some condition or situation in which a party to a cause is unexpectedly placed to his injury without any negligence of his own which ordinary prudence could not have guarded against.

9. Appeal and error ⚷882(1)

Where the gravamen of action can be proved only by testimony of one witness, and parties knowing that fact plan a trial of action in his absence, neither party is entitled to complain of difficulties arising by reason of absence of such witness or delay in arrival of his deposition.

10. Trial ⚷252(20)

Where instruction on elements of damage in seaman's action under Jones Act for personal injuries did not mention medical or hospital expenses, refusal to give requested instruction, that since plaintiff did not allege the expenditure of any money for medical or hospital treatment such expenses should not be considered in arriving at a verdict, was not error. Jones Act, 46 U.S.C.A. § 688.

11. Trial ⚷260(1)

Trial court's refusal to give a requested instruction which was completely covered by another instruction which was given was not error.

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Suit under the Jones Act, 46 U.S.C.A. § 688, for personal injuries by Eddie Jennings against American President Lines, Limited. Verdict and judgment for plaintiff, and defendant appeals.

Judgment affirmed.

Treadwell & Laughlin, of San Francisco (Charles M. Haid, Jr., and Raymond M. Farley, both of San Francisco, of counsel), for appellant.

John J. Taheny, of San Francisco, for respondent.

STURTEVANT, Justice.

This was a suit for personal injuries under the Jones Act, 46 U.S.C.A. § 688, against the plaintiff's employer. The defendant employer appeals from a judgment in favor of the plaintiff employee which was entered following the jury verdict for plaintiff.

The injury of which plaintiff complained occurred on the high seas, while the plaintiff was employed by the defendant as a scullion. The plaintiff and George Gonzales, one of his co-helpers, both weighing under 140 pounds, were carrying a keg of cleaning powder weighing 125 pounds from the store room of the vessel up a stairway to the pantry. The plaintiff was carrying his end of the keg by ice tongs, preceding Gonzales who carried the keg in his bare hands up the stairs. At the top of the stairs the keg left Gonzales' hands, jerking the keg away from plaintiff without warning and thereby severely injuring his back. Gonzales did not warn plaintiff that he would let go of the keg; he did not trip on the stairs; nor did he make any effort to hold the container after it left his hands.

Only written statements by Gonzales were introduced at the trial, one given to plaintiff and one to defendant at different dates. Although the defendant on the day set for trial requested a continuance in order to obtain the deposition of Gonzales, the court denied the motion and plaintiff stipulated that the statement given by Gonzales to defendant could be read in evidence. Following the entry of judgment the defendant moved for a new trial on the grounds of surprise and newly discovered evidence which could not have been obtained before. It attached to its motion the deposition of Gonzales which it had just received.

The signed statement taken by defendant on February 24, 1942, in New York from Gonzales contained the statements that he, Gonzales, "let the container drop", that it had "slipped from (his) hands", and "that Jennings had more success with the ice tongs", the surface of the container being slippery. On the trial the plaintiff was allowed to testify that after the container fell, Gonzales' hands were hanging limply at his sides. He was not allowed to testify to his conclusion concerning how it fell.

The chronological sequence of events leading up to the trial is necessary in order to determine the merits of the defendant's claim of diligence in attempting to get Gonzales' deposition prior to the trial of the case. September 7, 1941, the complaint was filed. October 3, 1941, the answer was filed. October 11, 1941, memo of motion to set the case for trial was filed. October 21, 1941, defendant learned the name of Gonzales. October 25, 1941, plaintiff shipped to sea and the trial of the case was continued at his request. October 29, 1941, the statement of Gonzales was given to plaintiff's attorneys who located him through the hiring hall. November 25, 1941, Gonzales shipped out of San Francisco. February 24, 1942, Gonzales was located in New York by defendant, at which time his statement was obtained. No deposition was taken at this time because defendant wanted to check Gonzales' statement. April 6, 1942, plaintiff's and defendant's attorneys arranged for taking Gonzales' deposition in New York upon a written stipulation and interrogations. April 11, 1942, plaintiff's deposition was taken. April 17, 1942, the trial of the case was set for May 25, 1942, at request of plaintiff and with consent of defendant. April 28, 1942, one week after, promised cross-interrogatories were delivered by plaintiff. April 30, 1942, after request of plaintiff, defendant prepared written stipulation to take Gonzales' deposition in New York which was later agreed to stand for deposition in New Orleans where it was thought Gonzales was. May 26, 1942, a motion for continuance was made and denied. June 1, 1942, the trial commenced.

[1] The defendant contends that there is no evidence of negligence in the record. We think there is. The conceded facts show that the plaintiff and Gonzales, two fellow employees, were carrying the container and had nearly reached the place where it was to be delivered. To set it down properly the two men should have acted jointly and with some mutual understanding. But, as they attempted to enter the pantry door, Gonzales' end fell to the floor. Before it fell he did not inform the plaintiff that it was about to fall. In his written statement made February 24, 1942, Gonzales makes several recitals as to what did happen. The jury was entitled to select that recital which it deemed

most consonant with the evidence. One of the recitals was that he, Gonzales, "let the container drop". If the jury adopted that recital, and from its verdict we must assume it did, such recital was evidence of negligence on his part and sustains the verdict as rendered. That is the acts of Gonzales as shown by the facts recited show that he acted carelessly to the injury of the plaintiff. Koukouris v. Union Pac. R. Co., 193 Mo.App. 495, 186 S.W. 545; Texas Pipe Line Co. v. Johnson, 169 Ark. 235, 275 S.W. 329; Newark Gravel Co. v. Barber, 179 Ark. 799, 18 S.W.2d 331.

[2] But the defendant replies the written statement contained other recitals, the statement was in writing, it should have been construed by the court and effect given to all its recitals, and, as so construed, it was in effect a statement that Gonzales' hold "slipped". Code Civ.Proc. § 1858. The plaintiff answers that said section is not applicable. He cites and relies on the Marine Ins. Co. of Alexandria v. Young, 9 U.S. 187, 5 Cranch 187, 190, 3 L.Ed. 74. He quotes as follows: "Can this court reverse for error in fact? Suppose we should be of opinion that the court below ought to have granted a new trial, is it not an error in fact? I have another doubt. Whether it be the ground of a writ of error, if a judge gives or refuses to give an opinion on matter of fact. A written contract, a bond, note, etc. whatever is the act of the party, is a subject for the construction of the court; but this is not the act of the party, but a mere deposition. If the court can give the construction of depositions, they may as well try the whole cause when all the evidence consists of depositions." The statute relied on by defendant provides: "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained thereon, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." Sec. 1858, Code Civ.Proc. The defendant contends that by the clear terms of the statute the court should have construed the statement made by Gonzales but it did not do so and allowed the jury to construe it as though it were a copy of oral testimony. The trial court did not err. The word "instrument" is used in many places in our statutes. Its meaning is well settled. Weisbrod v. Weisbrod, 27 Cal.App.2d 712, 81 P.2d 633. At page 719 of 27 Cal.App.2d, 81 P.2d at page 637, the court quotes with approval: "Generally the term 'instrument' as applied to documents necessarily imports a paper writing; but every paper writing is not necessarily an instrument within the settled statutory meaning of the term. With reference to writings the term 'instrument' as employed in our statutes has been defined to mean an agreement expressed in writing, signed and delivered by one person to another, transferring the title to or creating a lien on real property, or giving a right to a debt or duty." To the same effect are Chipman v. Morrill, 20 Cal. 130; Hoag v. Howard, 55 Cal. 564; Miller v. Dunn, 72 Cal. 462, 466, 14 P. 27, 1 Am.St.Rep. 67; Beers v. California State Life Ins. Co., 87 Cal.App. 440, 457, 262 P. 380; Lattin v. Gillette, 95 Cal. 317, 322, 30 P. 545, 29 Am.St.Rep. 115; People v. Fraser, 23 Cal.App. 82, 84, 137 P. 276; Cardenas v. Miller, 108 Cal. 250, 256, 39 P. 783, 41 P. 472, 49 Am.St.Rep. 84.

[3] The defendant also claims that the trial court erred in denying its motion for a continuance. We think it may not be said the trial court abused its discretion. The motion was made May 25, 1942. It was supported by the affidavit of Mr. Treadwell. In that affidavit he averred:

"That he is one of the attorneys for the defendant in the above entitled action; that said action was commenced on September 17, 1941, but shortly thereafter the plaintiff Jennings went to sea and it was impossible to get his deposition; that we requested Mr. Taheny to notify us on his return so that we could take his deposition, but we were unable to take the same until the 11th of April, 1942.

"We were informed that the person referred to in the complaint as assisting plaintiff at the time of the injury complained of was named George Gonzales, and we desired to get his testimony as soon as the deposition of the plaintiff was taken so we would know the nature of the plaintiff's claim. On February 24, 1942, we located Gonzales in New York and he made a statement to the Shipowners Claims Bureau, a copy of which is attached hereto marked Exhibit 'A'. On April 6, 1942, we delivered to Mr. Taheny, attorney for the plaintiff, interrogatories to be propounded to Gonzales at New York, and urged Mr. Taheny to put in his cross-interrogatories as soon as possible, but he did not deliver his cross-interrogatories to our office until April 28, 1942. A stipulation was then signed for the taking of the deposition of Gonzales in New York and was sent to New York, but by the time the papers arrived there Gonzales could not be located, and we were informed that he had sailed, probably for New Orleans. We then sent the papers to attorneys in New Orleans but they were unable to locate Gonzales and as a result we were unable to obtain his deposition. As far as we know, there were no witnesses to the accident other than Gonzales and plaintiff Jennings, and it is impossible for us to have the benefit of the testimony of Gonzales at the present time." The exhibit "A" therein referred to was as follows: "SS President Pierce—Injury to Eddie Jennings, July 8, 1941.

"My name is George Gonzales and I am at present employed as Messman aboard the SS. Galveston. My mail address is in care of the N.M.U. Hall at whatever port I sail for. I have no relatives in this country.

"Back in July, I made one trip as scullion aboard the SS. President Pierce. I do not have any discharge papers on hand and I therefore am unable to state exactly when I signed on the President Pierce and when I signed off.

"At the time I was employed on the SS. President Pierce, Eddie Jennings was also employed on that ship as scullion. On or around July 8, 1941, both Jennings and I went down into the storeroom about three decks below the galley, in order to bring up a container of 'trukko,' (turco) a cleaning powder. This container weighed about one hundred or more pounds, was about three feet high when rested on the deck and 1½′ in diameter. It required two men to carry it and there was no catch on it by which one could grab it.

"In carrying it up, Jennings used an ice hook to hold the container. I used my bare hands and as he carried the front part of the container, I took the last part of it. Jennings preceded me up the stairs.

"We carried the container up one flight of stairs, then we had to carry it along the passageway (I forget which deck) aft to another stairway. As we reached the top of this second stairway, Jennings carrying the front end of the container and I the latter end, my end of the container slipped from my hands. The container slipped from my hands. Jennings was standing at the time on the door sill at the top of the stairs, leading into the pantry. Jennings, after I let the container drop, let his end go and began grabbing his back. I rolled the container the rest of the way. Jennings went to the doctor.

"The surface of the container was slippery and I was using my bare hands. Jennings had more success with the ice hooks. It was customary to bring such large quantities of cleaning fluid up to the galley. We were acting under orders of the Chief Cook at the time.

"Jennings was laid up from work for a few days after the accident occurred. I left the ship at San Francisco. The last time I saw Jennings, he was at the Union Hall on the West Coast. He told me he had a lawyer and I gave a statement of how the accident took place to his lawyer.

"There were no other witnesses to the accident."

A bill of exceptions shows that the following proceedings were had:

"Thereafter, and on the 26th day of May 1942, the said motion came on regularly for hearing before the Presiding Judge of said Court, Hon. E. P. Mogan, Mr. Charles M. Haid, Jr., on behalf of Treadwell & Laughlin, appearing for the defendant, and John J. Taheny appearing for the plaintiff, and thereupon the court read the notice of motion and the affidavit and exhibit attached thereto and asked the attorney for the defendant to state what he would be unable to prove unless the testimony of the absent witness was received; and the attorney for the defendant thereupon stated to the court that the absent witness was the only witness to the action other than the plaintiff, and therefore he felt that the defendant should have an opportunity to procure his testimony; the court thereupon asked the attorney for the defendant why the deposition of said witness was not taken at the time the signed statement was taken from him on February 24, 1942, a copy of which signed statement was attached to and made a part of the affidavit filed in support of the motion for continuance, and the attorney for the defendant stated that he wished to check on the truth of the statement as made by said

Gonzales before taking his deposition; the attorney for the plaintiff thereupon stated that his client was a sea-faring man who had just returned after a voyage of several months, and that it would work a hardship upon him to permit a continuance of the action for an indefinite period of time; that court asked the attorney for the plaintiff whether, in the event that the defendant was unable to produce the witness at the trial, he would consent to the reading of said statement of said witness at the trial, and asked said attorney for the plaintiff whether he would stipulate that it might be read into evidence by either party; that the attorney for the defendant voiced no objection or protest against the suggestion to the court that the defendant be permitted to read the same, and the court thereupon stated that it seemed to the court that the defendant's motion for a continuance should not be granted if the plaintiff is willing to stipulate that the defendant can read the statement at the trial; the attorney for the defendant thereupon stated that as long as the motion is being denied there is nothing more that he can do about it. No other or further evidence was introduced at said hearing.

"Thereupon the court made an order denying said motion for a continuance. Said defendant now excepts to said order."

The reporter's transcript shows that the plaintiff, without objection, read in evidence the said written statement.

In reply to the defendant's claim that the trial court abused its discretion in refusing a continuance the plaintiff asserts that the defendant had ample opportunity to take the deposition of Gonzales if it had been diligent. That answer is sufficient. Gonzales was in San Francisco from September 7 till November 25, 1941. Later he was located in New York in February, 1942. Defendant did not act till April 6, 1942. It stated that it did not act before because it wanted to take the deposition of the plaintiff. The latter was in San Francisco from September 7, till October 29, 1941. His deposition was not taken until April 11, 1942. When and where it was taken the record does not show nor does it show why it was not taken before.

At another place in the record the defendant says that it delayed taking the deposition because the defendant desired to interview the cooks and stewards regarding the statement of Gonzales. But the defendant does not state facts showing that its delay was excusable.

The plaintiff contends that the fact the parties stipulated that the statement of Gonzales might be admitted in evidence on the request of either party, and that later it was admitted without objection or exception, cured any error in denying defendant's motion. That contention is sound. Foster v. Hudson, 33 Cal.App.2d 705, 708, 92 P.2d 959.

[4] The plaintiff also asserts that the affidavit used in support of the defendant's motion was insufficient because it did not state what the plaintiff expected the witness Gonzales would state. The defendant answers that the law "does not require one to set forth more than he knows." That answer is insufficient. The defendant was asking for a continuance. It was bound to show what the witness Gonzales would state if called as a witness. Under the statute the defendant was required to make its showing by affidavits. Code Civ.Proc. sec. 595. In that section it is provided: "* * * A motion to postpone a trial on the ground of the absence of evidence can only be made upon affidavit showing the materiality of the evidence expected to be obtained, and that due diligence has been used to procure it. The court may require the moving party, where application is made on account of the absence of a material witness, to state upon affidavit the evidence which he expects to obtain; and if the adverse party thereupon admits that such evidence would be given, and that it be considered as actually given on the trial, or offered and overruled as improper, the trial must not be postponed. * * *" When the purported affidavits used on a motion asking for a continuance do not allege facts showing the materiality of the testimony sought to be produced it is not error to deny the motion. Everts v. Will S. Fawcett Co., 3 Cal.App.2d 261, 38 P.2d 868.

[5] The defendant also claims that the trial court should have granted its motion for a new trial on the ground of accident and surprise. It refers to that part of the record in which it is recited that on April 6, 1942, it delivered its interrogatories and Mr. Taheny promised he would deliver plaintiff's cross-interrogatories during the following week (April 12–18) but

Mr. Taheny did not deliver them until April 28, 1942. Continuing, it claims that in the meantime Gonzales had left New York. Bearing in mind all of these contentions and taking into consideration the other dates and other circumstances hereinabove set forth, we think the ruling on the motion for a new trial presented solely questions of fact which were addressed to the trial court and that we may not say it abused its discretion in ruling thereon.

It was alleged in plaintiff's complaint that the defendant's principal office is located in San Francisco, that the accident occurred on the SS. President Pierce, and that said ship was being operated by defendant between San Francisco and the Orient. Manifestly the defendant's attorneys had access to the documents showing the names and addresses of the members of the crew. The record shows no facts preventing the defendant from ascertaining and informing its attorneys at once of the names of the cooks and stewards on board and also of the names of the scullions who were engaged in moving the container. The gravamen of the action was negligence. There were no witnesses except the two scullions who were moving the container. The plaintiff was one and on October 29, 1941, defendant was informed that the plaintiff claimed George Gonzales was the name of the other. The defendant asserts it did not take the deposition of the latter because it wanted first to take the deposition of plaintiff. But it did not act. It cites no authority sustaining that excuse. It could be made with equal force in every case. It also says it wanted to interview the cooks and stewards. No fact is shown which prevented it from doing so. But it did not act.

[6] The gist of defendant's contention regarding the denial of its motion for a new trial is the same as its contention that the trial court erred in denying its motion for a continuance. We will not repeat what we have said above on the subject. However we add that the crux of both motions was the recital hereinabove referred to in the written statement given by Gonzales to defendant on February 24, 1942. It received said statement March 2, 1942. When it saw the statement it was aware of what contentions could logically be based on the meaning of each clause therein contained. However on May 25, 1942, both parties agreed that the statement might be introduced by either party at the time of the trial. During the trial the plaintiff introduced said statement, including the recital that Gonzales "let the container fall." The defendant now asserts said recital was inexact and defendant should have had the privilege of showing it was inexact—in short, that the container *slipped* out of Gonzales' hands and that he did not *voluntarily drop it*. Manifestly a similar contention, differing only in degree, could be made in nearly every case. But such practice is not permissible. The defendant was bound to act with diligence. 20 Cal.Jur. 182 "New Trial", sec. 119.

The defendant calls attention to the fact that both Jennings and Gonzales were seamen and then contends such fact shows or tends to show it acted with diligence. We think not. The fact they were seamen should have prompted both parties to duly consider such fact in getting their case ready for trial. The defendant cites and relies on Blankman v. Parsons, 73 Cal. App. 218, 238 P. 728. It is not helpful. Blankman sued on an open book account. The defendant answered and filed a cross-complaint seeking to recover an indebtedness of $1,000. The plaintiff introduced evidence he had made many payments. The defendant claimed said sums were paid on an Alaska "grub stake". Plaintiff asked an adjournment so he could call bank officials to prove the alleged debt of $1,000 had been paid. The motion was denied. Judgment was ordered in favor of the defendant. The plaintiff made a motion for a new trial. His motion was denied. On page 223 of 73 Cal.App., 238 P. at page 730, the court stated as follows: "However, in this affidavit, there is also the statement that the testimony regarding the so-called 'grubstake' agreement was a complete surprise to the attorney for the plaintiff, *who had never heard of the existence of such an agreement; that plaintiff was in Alaska and could not furnish information to counsel to refute the testimony of defendant regarding the making of such an agreement*; that plaintiff had informed his counsel that the payments made by him were to discharge his indebtedness to decedent and as an advance to her to enable her to pay her living expenses. There was nothing in the pleadings that would have given warning to plaintiff or his counsel that this testimony would be introduced, and, if it came as a surprise to plaintiff's counsel, justice and equity demanded that he be given an opportunity to dispute the claim put forth." (Italics ours.) As stated above the case does not support the defendant's contention.

[7, 8] However, we think the point may not be sustained. In the statement dated February 24, 1942, and received by defendant on March 2, 1932, George Gonzales made the statement he "let the container fall." He also stated that it "slipped from his hands." On the trial no doubt the plaintiff put his finger on the first statement and contended such was the fact, and that the defendant read the second statement and contended it stated the fact. It now contends that if a new trial is granted it will introduce the deposition which will sustain its theory and judgment must be rendered in its favor. But the conclusion does not follow. The written statement is still in existence. Whatever may be contained in the deposition may be contradicted by said written statement. In other words the deposition may be contradicted by said written statement whereas on the trial a part of said statement was used to contradict another portion of said statement. Therefore it does not appear the defendant was injured. On a new trial the jury may again say that the recital "I let the container drop" truly stated the fact. In Brandt v. Krogh, 14 Cal.App. 39, at page 59, 111 P. 275, at page 284, the court said: "Manifestly, even if plaintiff was surprised by the testimony of Krogh on this point, it cannot be said that he suffered any injury from such testimony, since Krogh acquiesced in and the court found with plaintiff's theory as to the relations between Abrams and Krogh in the transaction. 'Surprise,' as used in the statute prescribing the grounds on which a motion for a new trial may be urged, denotes 'some condition or situation in which a party to a cause is unexpectedly placed, to his injury, without any default or negligence of his own, which ordinary prudence could not have guarded against.' Bouv. Law Dict.; Anderson's Law Dict.; McGuire v. Drew, 83 Cal. [225], 229, 23 P. 312."

[9] When, as in the instant case, the gravamen of the action can be proved only by the testimony of one sole witness; and the parties knowing that fact plan a trial of the action in his absence, it is not clear that either party is entitled to complain of difficulties arising by reason of the absence of said witness or the delay in the arrival of his deposition.

The defendant complains because the trial court refused to give three instructions which it requested. One was as follows: "The plaintiff in his complaint does not allege the expenditure of any money for medical or hospital treatment and under such circumstances you will not give any consideration to any such expense in arriving at a verdict."

[10] The record shows no evidence on the subject was introduced. The trial court did instruct on the elements of damage. It did not mention the expenditures for medical and hospital treatment. The refusal to give said instruction was not error.

[11] Another instruction which the trial court refused to give was as follows: "If the defendant used reasonable care in the selection of a fit and competent person to act as ship surgeon on board the ship on which plaintiff alleges he was injured, the defendant is in no way liable for any mistakes of judgment of such ship surgeon in diagnosing the ailments of the plaintiff or in treating the same." It was completely covered by another instruction which was given. Therefore the defendant may not complain of the court's ruling.

The third request was as follows: "The plaintiff does not allege in his complaint that by reason of his alleged injuries he contracted pneumonia, and therefore in arriving at your verdict you will not consider any damage to the defendant growing out of the contraction of pneumonia." There was no error in this refusal. The subject matter was fully covered in instructions which were given.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

61 Cal.App.2d 560

SULLIVAN et al. v. COMPTON et al.

Civ. 6970.

District Court of Appeal, Third District, California.

Nov. 26, 1943.

1. Pleading ⟹4

The nature of a pleading is to be determined by the contents thereof and not by the designation given to it by counsel.

2. Pleading ⟹49

The prayer of a pleading is no part of the statement of the cause, but in some cases resort may be had to it to determine whether a pleading was intended to include any specific character of relief.

3. Dismissal and nonsuit ⟹19(1)

Where defendants did not counterclaim or cross-complain and allegations of answer were purely defensive, prayer that plaintiffs take nothing did not indicate that defendants were seeking "affirmative relief" within meaning of statute authorizing plaintiff to dismiss at any time before trial, provided defendant has not counterclaimed or sought affirmative relief by cross-complaint or answer, notwithstanding that defendants felt that a judgment that plaintiff take nothing would be all the relief defendants required. Code Civ.Proc. § 581, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Affirmative Relief".

4. Dismissal and nonsuit ⟹5, 19(1)

Where defendants, before trial, moved for judgment on the pleadings for plaintiffs' failure to file an affidavit denying the execution and genuineness of written instruments set forth in the answer, and it appeared that defendants had not counterclaimed or sought affirmative relief by cross-complaint or answer, plaintiffs were at liberty to dismiss at any time before trial upon payment of costs, and properly dismissed action without prejudice before trial court ruled on defendants' motion. Code Civ.Proc. §§ 448, 581, subd. 1.

◆

Appeal from Superior Court, Sierra County; Raymond McIntosh, Judge.

Action by Frank E. Sullivan and others against R. D. Compton and others to quiet title to certain mining claims. Defendants R. D. Compton, Edna Compton, Fisher Compton, Jessie Compton, and W. G. Farrell moved for judgment on the pleadings, whereupon plaintiffs dismissed the action without prejudice before a ruling was made on the motion. From an order denying named defendants' motions to strike plaintiffs' dismissal and for judgment on the pleadings, named defendants appeal.

Affirmed.

Seth Millington, of Gridley, for appellants.

Ward Sheldon, of Nevada City, for respondents.

PEEK, Justice.

This is an appeal by certain defendants from an order denying their motion to strike plaintiffs' dismissal, and for judgment on the pleadings.

The original action was one to quiet title to eleven mining claims located in Sierra county, known as the "Colombo-Bullion Mine". The complaint was in the usual form, and a lis pendens was duly filed. A general demurrer to the complaint was overruled, and by defendants' answer issues were joined except that defendants alleged a claim of interest in the property, and in support thereof pleaded in full certain written instruments and a deed alleged to show transfer of title from plaintiffs to defendants. The pendency of another action was alleged as a special defense. No cross-complaint or counterclaim was set forth in the answer. Defendants' answer concluded with the prayer "wherefore, said defendants pray that plaintiffs take nothing by said complaint and that they have judgment for their costs herein."

In his opening statement, plaintiffs' counsel indicated that they intended to attack the validity of the instruments under which defendants claimed title on the ground of non-delivery and the failure of defendants to perform certain conditions therein set forth. Defendants then moved for a judgment on the pleadings upon the ground that plaintiffs had not filed an affidavit, and served on them a copy thereof denying the execution and genuineness of the written instruments set forth in defendants' answer, as provided in Section 448 of the Code of Civil Procedure. During a short recess to enable plaintiffs to examine the authorities cited by defendants in support of their motion, and before the court had disposed of the same, plaintiffs filed with the clerk of the court a dismissal of their action without prejudice. A short time later defendants, by a written motion moved to strike plaintiffs' dismissal from the record, and for judgment on the pleadings. The court, after submission thereof, made its order denying said motion, and it is from such order that defendants now appeal.

Defendants contend that it was error to deny their motion for judgment on the pleadings in that plaintiffs by their failure to file an affidavit in accordance with the provisions of Section 448 of the Code of Civil Procedure, thereby admitted the genuineness of the written instruments set forth in defendants' answer. They have alleged further error by the trial court in the denial of their motion to strike plaintiffs' dismissal from the records and files in the case.

Plaintiffs' right to dismiss, if such there was, is found in Subdivision 1, Section 581 of the Code of Civil Procedure, which provides in part, as follows: "That an action may be dismissed, or a judgment of nonsuit entered, in the following cases:

"1. By the plaintiff, by written request to the clerk, filed with the papers in the case, or by oral or written request to the justice where there is no clerk, at any time before the trial, upon payment of the costs of the clerk or justice; *provided that a counterclaim has not been set up, or affirmative relief sought by the cross-complaint or answer of the defendant.*" (Italics ours.)

It is obvious from the wording of said section that the order of the trial court must be affirmed unless defendants have set up a counter-claim or have sought affirmative relief by cross-complaint or answer. In this regard defendants admit that neither a counter-claim nor cross-complaint has been alleged. Such admission leaves but one issue—was affirmative relief sought by defendants' answer? A determination of such question is likewise determinative of this appeal.

Although their answer admittedly contains no such affirmative allegations, defendants contend that the words "plaintiffs take nothing" as set forth in their prayer constitute, at least for all practical purposes, a request for affirmative relief in that a judgment in their favor in accordance with such prayer would operate as an estoppel against further action by plaintiffs. However, the question presented to this court is not what might be the practical effect of a judgment in their favor, but is as stated in the previous paragraph, did defendants by their answer specifically seek affirmative relief? That defendants may feel they would have received all the relief they desired by such answer is of no import, for such personal opinions are wholly immaterial to the determination of this appeal.

[1] It is elementary to state that the nature of a pleading is to be determined by the contents, not by the designation given to it by counsel. But to argue, as appellants do, that by virtue of such rule the prayer that "plaintiffs take nothing" by their complaint is for all practical purposes a request for affirmative relief, is to carry the principle of liberal construction to a point of legal license. The rights of the parties under the provisions of Section 581 of the Code of Civil Procedure must be measured by the pleadings as they stand, and such rights cannot be made to depend upon the litigants' personal opinion as to the practical effect of a judgment that might result after the case had been tried on its merits.

In substantiation of their argument defendants rely primarily upon the case of Islais & Salinas Water Co. v. Allen, 132 Cal. 432, 64 P. 713, 714, wherein the court denied plaintiff's motion to dismiss a quiet title action. That case is obviously distinguishable from the questions here presented, for there the defendant alleged his ownership and specifically prayed for a decree that he was the owner in fee of the property and entitled to the possession thereof. The court stated the question to be "whether a plaintiff in an action to quiet title to real estate is entitled to dismiss his action as against a defendant who has answered and put in issue all the plaintiff's material allegations, and also alleged the material facts entitling him to a decree quieting his title as against the plaintiff, and added a prayer therefor."

The court therein further held that "* * * The commencement of the action and the allegations of plaintiff's complaint were an attack upon defendant's title to his property. * * * It is therefore important to him to prevent a dismissal, and compel a trial of the action; and this he may do by setting up his own title and right of possession, and praying that it be quieted as against the plaintiff who has asserted an adverse right * * *,” and that “there were affirmative allegations, which, if sustained by the evidence, entitled the defendant to affirmative relief, and such relief was demanded.”

In the instant case no affirmative relief is sought of the court. The allegations contained in the answer are purely defensive, and therefore, defendants limited themselves to a resistance of plaintiffs' claim.

[2, 3] It is undoubtedly because of this that defendants do not seriously contend they have sought specific affirmative relief by the allegations of their answer, but rather urge that their prayer which requests that “plaintiffs take nothing” cures what otherwise would be a fatal defect. Although the prayer is no part of the statement of the cause, it is true that in some cases resort may be had to it to determine “whether a pleading was intended to include any specific character of relief.” Bancroft's Code Plead., Vol. 1, p. 35. However, no comparable problem is presented by defendants' answer herein. Here defendants are endeavoring to seek affirmative relief through the sole agency of a negative prayer which in no way can be considered as amplification of the allegations of the answer.

In the case of Hungarian Hill Gravel Min. Co. v. Moses et al., 58 Cal. 168, a case not wholly unlike the present, the defendants therein denied that their estate in the property was void or without right; and alleged to the contrary that they “are the owners of, and in possession of, and entitled to the possession, use, and enjoyment of all the real estate described in plaintiff's complaint * * *”, and prayed “that plaintiff take nothing by its action * * *.” At the conclusion of the hearing the trial court found that the plaintiff was not the owner of the property, that the defendant was, and “that said defendants' title thereto is adjudged to be quieted against all claims * * *”, and enjoined plaintiff from setting up any claim thereto. Upon appeal, the Supreme Court sent the case back with instructions to strike out of the decree the affirmative relief as “the answer * * * contained none of the elements of a cross-complaint, as distinguished from a defense to plaintiff's action, and contained no prayer for affirmative relief.”

If the answer in the Hungarian Hill case contained none of the elements of a cross-complaint as distinguished from a defense to plaintiff's action and did not contain a prayer for “affirmative relief”, then it cannot be said that comparable wording appearing in the answer now before this court on appeal constitutes either a cross-complaint or a request for affirmative relief. A negative prayer that “plaintiffs take nothing” cannot be construed to be a positive allegation that defendants take something. Such negation can mean only what it says; it cannot be a request for affirmative relief.

[4] Since no affirmative relief was sought by the answer of the defendants, Section 581 Code Civ.Proc., the plaintiffs were therefore at liberty to dismiss the action at any time before trial, upon payment of costs. Thompson v. Spraig, 66 Cal. 350, 5 P. 506.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

61 Cal.App.2d 540

GORDON et al v. McGASLIN et al.

Civ. 14026.

District Court of Appeal, Second District, Division 3, California.

Dec. 2, 1943.

1. Fraud 🔑58(1)

In purchasers' action for damages for fraud inducing purchase of real estate, evidence sustained finding that vendor did not represent that house was wholly on one lot, that house was free from termite infection, that annual taxes were approximately $80, or that lot was 150 feet deep.

2. Appeal and error 🔑1010(1)

Finding supported by sufficient evidence is binding on appellate court.

3. Appeal and error 🔑882(16)

Where, after trial court had affirmed its prior ruling excepting a witness from order of exclusion, plaintiffs' counsel stated that he withdrew motion to exclude witnesses, on appeal plaintiff could not raise objection that the exception as to such witness was not authorized. Code Civ.Proc. § 2043.

4. Trial 🔑41(1)

A request for the exclusion of witnesses is addressed to the discretion of trial judge. Code Civ.Proc. § 2043.

5. Trial 🔑41(2)

Where court, on plaintiffs' request, made an order excluding all witnesses, but excepted from order of exclusion agent of defendant who was absent, there was no abuse of discretion. Code Civ.Proc. § 2043.

6. Mortgages 🔑338

Where purchasers of realty sought damages for fraud and to have damages set off against balance due, sale under trust deed was imminent, and after trial judge had announced decision purchasers asked for time to raise money to make payment, even if request was for relief which court was authorized to grant, the granting of it was discretionary.

7. Mortgages 🔑338

Where purchasers of realty sought damages for fraud and to have damages set off against balance due, sale under trust deed was imminent, and after trial judge had announced decision purchasers asked for time to raise money to make payment, the denial of the request was not an abuse of discretion.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Action by M. J. Gordon and another against William R. McGaslin, as receiver for American Home Security Bank, and another, for damages for fraud inducing purchase of real estate. From the judgment, plaintiffs appeal.

Affirmed.

M. J. Gordon, of Los Angeles, in pro. per. and C. S. Mauk, of Los Angeles, for appellants.

Alfred E. Dennis, of Los Angeles, for respondent William R. McGaslin.

Alfred E. Dennis, Arch H. Vernon, Earl E. Johnson, and Gilbert E. Harris, all of Los Angeles, for respondent Title Insurance & Trust Co.

SHAW, Justice pro. tem.

Plaintiffs bought a house and two lots from the predecessor of defendant McGaslin as receiver, giving an installment note secured by trust deed for part of the price. Plaintiffs made default in the payments due on this note and the defendant receiver then took proceedings resulting in a notice of sale of the property given by the trustee named in the trust deed. Thereupon plaintiffs began this action against defendant receiver and the trustee, alleging that they were induced to purchase the property by certain false and fraudulent representations made to them by the receiver's agent, Pannell, and that by such fraud they were damaged in a sum which they asked to have set off against the amount due on the note, offering to pay the difference and praying that the sale be restrained until final disposition of the case. The false representations alleged were: (1) That a house on the property was wholly on one of the lots, which was numbered 32; (2) that the roof of the house had recently been placed in a first class condition and state of good repair; (3) that the house had been inspected and was free from termite infection; (4) that the annual taxes on the property were approximately $80 per year; and (5) that the lots were 150 feet deep. The trial court found that none of these representations was made, except No. (2) relating to the roof, and gave judgment allowing plaintiffs a credit by reason of No. (2) on the amount due on the note, dissolving a temporary injunction previously issued and permitting the sale to proceed. From this judgment the plaintiffs appeal.

[1, 2] Plaintiffs contend that the finding against the making of the other representations lacks support in the evidence. The receiver's agent who made the sale to plaintiffs, Pannell, testified that he did not make those numbered (1), (3) and (5), and as to No. (1) that he informed plaintiffs that the house was *not* wholly on lot 32 but projected upon lot 31. Plaintiff M. J. Gordon, who conducted the negotiations with Pannell, testified as to No. (4) that the latter never told him the amount of the taxes. The finding attacked is therefore supported by sufficient evidence and is binding on this court. Plaintiffs' further points based on the claim that these representations were made, particularly their contentions that the court should

have awarded them damages by reason of the falsity of these representations, must fail for lack of a foundation, and need no further discussion. No complaint is made of the amount of damages awarded for the defects in the roof.

In view of the finding above mentioned, the further findings complained of, that plaintiffs visited and inspected the premises and learned the facts about the property before the sale, and that they made no complaint of misrepresentations to defendants or the agent before bringing this action, are immaterial and the sufficiency of the evidence to support them need not be considered.

[3-5] At the beginning of the trial, the court, on plaintiffs' request, made an order excluding all witnesses, but permitted the witness Pannell to remain. Pannell was the agent of defendant McGaslin, who was absent, and it was for this reason that the court excepted him from the order of exclusion. Plaintiffs now complain that this exception was not authorized by section 2043 of the Code of Civil Procedure. But after the court had announced its ruling, and upon some argument had affirmed it, plaintiffs' counsel stated that he withdrew the motion to exclude the witnesses. In view of this fact plaintiffs are in no position to raise here the objection now presented. Moreover, a request for the exclusion of witnesses is addressed to the discretion of the trial judge. (People v. Garbutt (1925) 197 Cal. 200, 207, 239 P. 1080; People v. McClure (1931) 117 Cal. App. 381, 385, 4 P.2d 211), and no abuse of discretion is shown here.

[6, 7] When the trial judge announced his decision, at the close of the trial, plaintiffs asked for "time to raise the money to pay them off." The trial judge responded, after learning that defendant objected to further delay and that the sale was then noticed for a day four days ahead, "I don't think I have any power to stay that sale unless I stay the sale entirely." No further ruling was requested or made. Plaintiffs now claim that this was a request for a stay of proceedings pending motion for new trial and appeal and that the court erred in denying it; citing City of Pasadena v. Superior Court (1910) 157 Cal. 781, 109 P. 620 and Pierce v. City of Los Angeles (1911) 159 Cal. 516, 114 P. 818. These cases hold that a trial court, upon denying relief to a plaintiff who seeks an injunction, may, in the exercise of its equitable jurisdiction, make an order to preserve the status quo pending a motion for new trial or an appeal. It does not appear that plaintiffs requested or the court denied any such relief. All the plaintiffs requested was time "to pay them off," and the court did not unequivocally deny even this request. But if this colloquy can be construed as a request for the relief sanctioned by the above cited cases, they hold that the granting of it is discretionary with the trial court, and no abuse of discretion appears here.

The judgment is affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

61 Cal.App.2d 450

ZEMANSKY v. BOARD OF POLICE COM'RS OF CITY OF LOS ANGELES et al.

Civ. 14223.

District Court of Appeal, Second District, Division 2, California.

Nov. 23, 1943.

Hearing Denied Jan. 20, 1944.

1. Licenses 🔑22
Pawnbrokers and money lenders 🔑4

Board of Police Commissioners under ordinance requiring permit to engage in pawn shop and secondhand jewelry business had implied power to deny application for license upon ground that applicant was not a fit and proper person to conduct such business.

2. Licenses 🔑22

When by ordinance it is provided that a license shall not be issued until a permit has been granted by Board of Police Commissioners, the Board is vested with power to determine whether applicant is a fit and proper person to be permitted to conduct business.

3. Licenses 🔑22
Pawnbrokers and money lenders 🔑4

Evidence that applicant for license to conduct pawn shop and secondhand jewelry business had, while theretofore engaged in similar business, borrowed money from members of police department paying excessive interest charges thereon and had invested funds in various gambling enterprises justified denial of license on ground that applicant was not a proper person to engage in such businesses.

4. Evidence ⚷20(1)

Courts take judicial notice that secondhand stores and pawn shops constitute a ready and customary outlet for stolen property.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Petition by Sol Zemansky seeking a writ of mandate directing the Board of Police Commissioners of the City of Los Angeles to issue a license to conduct a pawn shop and secondhand jewelry business. Judgment sustaining a demurrer to the petition, and petitioner appeals.

Affirmed.

McLaughlin & McGinley, of Los Angeles, for appellant.

Ray L. Chesebro, W. Jos. McFarland, and John L. Bland, all of Los Angeles, for respondent.

McCOMB, Justice.

Appellant filed a petition in the Superior Court seeking a writ of mandate directing the Board of Police Commissioners of the City of Los Angeles (hereinafter referred to as the Board) to issue appellant a license to conduct a (1) pawn shop, and (2) secondhand jewelry business at 466 South Main Street, Los Angeles. This appeal is from the judgment in favor of respondents predicated upon the sustaining, without leave to amend, of their demurrer to appellant's petition.

The record of the testimony before the respondents was attached to appellant's petition, and was thus before the trial court. The evidence discloses the following material facts:

Section 24.10(b) of the Municipal Code of Los Angeles reads in part as follows:

"(b) Permit required. No person shall engage in, conduct, manage, carry on or deal in any business mentioned in subsection 'a'[1] of this section without first applying for and receiving a written permit from the Board[2] as hereafter provided.

"(c) Requisites of Permits.

"(1) Persons desiring to obtain a permit to conduct, manage or deal in any business mentioned in subsection 'a' of this Section shall file an application in writing with the Board specifying by street and number the place where such business is proposed to be conducted or carried on; junk collectors having no fixed place of business shall specify in such application their residence by street number. The application shall be signed by the applicant and shall contain his residence address * * *.

"(3) Upon receipt of such application the Board shall cause to be investigated the business of the applicant and location at which applicant proposes to engage in business as specified in said application. Thereafter the Board may issue a permit to the applicant which shall be effective for the remaining portion of the current year * * *.

"(5) No person holding a permit to conduct, manage, carry on or deal in any business mentioned in subsection 'a' of the Section shall buy, sell or otherwise deal in secondhand merchandise without first applying for and receiving a special permit therefore from the Board in the manner provided in this Section for securing ordinary permits * * *.

"(e) Compliance with Law:

"(1) The Board shall not grant any permits provided for in this Section to persons who fail, refuse or neglect to comply with the laws and ordinances relating to and regulating the business for which such permit is sought.

"(2) Persons applying for or obtaining permits under the provisions of this Section shall comply with the provisions of this Section."

Petitioner had previously been engaged in the business of a pawn broker and dealer in secondhand jewelry as a member of a partnership consisting of himself and his brother. Their business was conducted in Los Angeles under the name of Provident Loan Association until they were adjudicated bankrupt in 1939. For fifteen or twenty years of the period in which they had engaged in business they had borrowed from Herman Cline, a Captain, and part of the time, Chief of Detectives in the Los Angeles Police Department, approximately $15,000.00. Captain Cline was paid interest upon his money at the rate of twelve per cent per annum. The Provident Loan Association during the aforesaid period borrowed money from W. J. Jolen, W. H. Caddell and W. E. Powers, all members of the Los Angeles Police Department, who received interest on their money at the rate of twelve per cent per annum. Petitioner testified that the payment of this high rate of interest was a cause of the bankruptcy of his partnership.

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[1] Section 24.01 (a) defines a pawnbroker.

[2] Section 22.00 provides that whenever the word "Board" is used, it shall mean the Board of Police Commissioners, unless otherwise specifically designated.

Money of the partnership business had also been invested in gambling houses in the State of Nevada on various occasions.

There are two questions presented for our determination which will be stated and answered hereunder seriatim.

First: *Did the Board of Police Commissioners have the implied power under section 24.01 of the Los Angeles Municipal Code to deny petitioner's application for a license to conduct the businesses of (a) pawn brokerage and (b) dealer in secondhand jewelry upon the ground that he was not a fit and proper person to conduct such businesses?*

[1, 2] This question must be answered in the affirmative and is governed by the rule, that when by ordinance it is provided that a license shall not be issued until a permit has been granted by the Board of Police Commissioners, said Board is vested with power to determine whether the applicant is a fit and proper person to be permitted to conduct the business for which he seeks a license. (Co-Operative Junk Co. of Calif. v. Board of Police Commissioners, 38 Cal.App. 676, 679, 177 P. 308; State ex rel. Wagner et al. v. Fields, 218 Mo.App. 155, 263 S.W. 853, 858; Downes et al. v. McClellan, 72 Colo. 204, 210 P. 397; 37 Corpus Juris (1925) page 183, Licenses, sec. 28; People ex rel. Anderson v. City of Chicago, 312 Ill.App. 187, 37 N.E.2d 929.)

Second: *Was there substantial evidence to sustain the Board's finding that appellant was not a proper person to engage in the (a) pawn brokerage, and (b) secondhand jewelry businesses in Los Angeles?*

[3, 4] This question must also be answered in the affirmative. It is a fact, of which courts take judicial notice, that secondhand stores and pawn shops constitute a ready and customary outlet for stolen property (see Co-Operative Junk Co. v Police Commissioners, supra, 38 Cal.App. page 678, 177 P. 308), which indicates that such businesses should be conducted by persons who are above suspicion. It is the duty of the members of the Police Department of the City of Los Angeles to scrutinize closely the pawn brokerage and secondhand jewelry businesses in order to recover stolen property and apprehend thieves.

In order to conserve the public welfare and to maintain a healthy morality among the police force it should be observed as an invioable rule that there shall not be any private self-serving arrangements between a police officer and the proprietor of a pawnshop and secondhand jewelry store which might in the slightest degree tend to cause such officer to neglect his duty.

It needs no argument to demonstrate that if a police officer loans large sums of money to a pawn broker or dealer in secondhand jewelry, and receives a high rate of interest for such loan, the temptation exists for such officer to be extremely lenient and cursory in examining the manner in which the business of his debtor is conducted in order to insure that his debtor will be able to repay not only the principal amount loaned but the interest which the borrower has agreed to pay.

In the instant case, it appears that when appellant was previously engaged in the pawn brokerage and secondhand jewelry businesses, he had borrowed money which was not necessary for the conduct of his business from members of the police department, and that he paid such a high rate of interest for their money that according to his own testimony it was usurious and became one of the causes of his business failure.

That appellant has invested funds in various gambling enterprises is not an ornament to the character of one who offers himself as a ward of the police. The success of a gambling venture is at its best precarious. In no event does it contribute to the moral or material welfare of the state.

From the foregoing facts the Board was clearly justified in drawing an inference that appellant accepted loans from members of the police department and paid them a high rate of interest on the expectation that they would not scrutinize too closely the manner in which he conducted his business or be overly careful in examining the character of his customers.

Since appellant had in the past evinced a disposition to improperly influence members of the Los Angeles Police Department and to invest his funds in gambling enterprises, the Board was justified in drawing the inference that if permitted to conduct a pawn shop or deal in secondhand jewelry, he would conduct his business along the same line as he had previously done with the resulting probability that (1) a sinister influence would be exerted upon members of the Los Angeles Police Department, and (2) the funds of his business would be invested in gambling ventures and dissipated, with the result that his business might again be placed in the hands of the Bankruptcy Court. Thus the Board's finding that appellant was not a fit and proper person to have the permit he sought was sustained by substantial evidence.

For the foregoing reasons, the judgment is affirmed.

We concur: MOORE, P. J., and W. J. WOOD, J.

SCRIPPS MEMORIAL HOSPITAL, Inc., v. CALIFORNIA EMPLOYMENT COMMISSION.

Civ. 3313.

District Court of Appeal, Fourth District, California.

Nov. 30, 1943.

Rehearing Denied Dec. 17, 1943.

Hearing Granted Jan. 24, 1944.

1. Action 🔑10

Where administrative remedy is provided by statute, relief must be sought from the administrative body, and such remedy exhausted before courts will act.

2. Taxation 🔑543(2)

Even if Unemployment Insurance Act created an administrative remedy to review an assessment under the act, an employer was not required to first exhaust administrative remedy before bringing an action to recover contributions paid under protest, in view of provision in the act expressly authorizing an employer to bring such action. St.1939, pp. 2054, 2058, 3006, §§ 45.5, 45.10, 90.

3. Charities 🔑1

Generally, fact that fees are charged by a hospital is not controlling in determining whether hospital is a corporation organized for "charitable purposes" if fees go to pay expenses of operation and not to profit of founders or shareholders.

See Words and Phrases, Permanent Edition, for all other definitions of "Charitable Purpose".

4. Charities 🔑1

A "charity" is a gift to be applied consistently with existing laws for benefit of an indefinite number of persons, by bringing their hearts under influence of education or religion, by releasing their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening burdens of government.

See Words and Phrases, Permanent Edition, for all other definitions of "Charity".

5. Charities 🔑1

Originally, "charity", under a strict construction of the word, implied the giving of something or the rendering of gratuitous service, but by later usage and in common parlance it has been sometimes extended to embrace liberality and generosity by patrons or benefactors in conferring advantages of a social character other than the rendering of personal aid or the bestowal of alms.

6. Contracts 🔑159
Statutes 🔑199

The word "charity", if used in a statute or legal instrument, must be defined in conformity with the purpose or intention of the lawmakers or the parties to the instrument.

7. Taxation 🔑241(1)

The wide and varied nature of exemptions provided under Unemployment Insurance Act indicate an intention to give words "charitable purpose" as used in provision of the act exempting corporations, etc., operated exclusively for charitable purposes, a broad rather than a strict meaning, and that it was intended to apply the sort of standards to charitable institutions which are applied to the others specifically named. St.1935, p. 1227, § 7(g), as amended by St.1939, p. 2048.

8. Statutes ⚷226

Where language of Unemployment Insurance Act was practically identical with the federal statute and the statute adopted by many other states, interpretation of language of the statute by federal and other state courts would be persuasive. St.1935, p. 1227, § 7(g), as amended by St.1939, p. 2048.

9. Taxation ⚷241(2)

A hospital which provided treatment for persons regardless of race, creed, or ability to pay was a corporation organized for "charitable purposes", within provision of Unemployment Insurance Act exempting such corporations, etc., from operation of the act, although fees were charged based on ability of patients to pay, where all sums received from patients were used in operation of the hospital. St.1935, p. 1227, § 7(g), as amended by St.1939, p. 2048.

10. Taxation ⚷241(2)

Evidence supported finding that plaintiff hospital was entitled to exemption under provision of Unemployment Insurance Act exempting corporations, etc., organized for "charitable purposes" from operation of the Act. St.1935, p. 1227, § 7(g), as amended by St.1939, p. 2048.

11. Taxation ⚷241(2)

Plaintiff hospital, which was exempted by federal administrative rulings from payment of any tax under Federal Social Security Act, was entitled to exemption under section 7(k) of State Unemployment Insurance Act, notwithstanding that plaintiff's exemption under federal act had not been declared by a federal court of competent jurisdiction. St.1935, p. 1227, § 2, and § 7(k), as amended by St.1939, p. 2049; Social Security Act § 901 et seq., 42 U.S.C.A. § 1101 et seq.

◆

Appeal from Superior Court, San Diego County; Gordon Thompson, Judge.

Consolidated actions by Scripps Memorial Hospital, Inc., against California Employment Commission, a state agency, to recover taxes or contributions paid under protest. From a judgment for plaintiff, the defendant appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., Clarence A. Linn, Deputy Atty. Gen., and Forrest M. Hill and Doris H. Maier, both of Sacramento, for appellant.

Luce, Forward, Lee & Kunzel, of San Diego, for respondent.

Musick, Burrell & Pinney, Howard Burrell, Anson B. Jackson, Jr., and Philip C. Jones, all of Los Angeles, amici curiae in support of respondent.

BARNARD, Presiding Justice.

This is an appeal from judgments in three actions, consolidated at the trial and on this appeal, which were brought to recover taxes or contributions paid under protest. The underlying question is whether the respondent is exempt from such payments under the California Unemployment Insurance Act, as amended, Stats.1935, Chap. 352, p. 1226; Stats.1939, Chaps. 628 and 630, pp. 2048, 2051, which will be referred to as the Act. On September 5, 1936, the respondent was granted such exemption under Sec. 7 (g) of the Act. On April 5, 1941, the appellant revoked this exemption but granted an exemption under Sec. 7 (k). On March 6, 1942, the appellant revoked that exemption. The respondent then paid this tax covering a period from March, 1942, to September, 1942, under protest and brought these actions to recover the amounts paid. The court found in its favor and the Employment Commission has appealed. At all times material here the respondent has been exempted under similar provisions of the Federal Social Security Act and other federal acts.

The respondent is a nonprofit corporation organized in 1924 under the laws of this state and since that date it has conducted a hospital, metabolic clinic and dietetic school at La Jolla. It has land, building and equipment costing some $800,000 and an endowment of about $700,000, all acquired through gifts made by Ellen Browning Scripps. In addition, several other funds have been established for the benefit of the respondent through gifts of various individuals which aggregate over $100,000. The trust under which these donations to the respondent were made by Miss Scripps and the articles of incorporation of respondent provide very completely and thoroughly that all funds acquired by the respondent in any manner shall be used solely for charitable, scientific and educational purposes, that no part thereof and no beneficial interest therein shall at any time vest in any of the members, officers or directors of the respondent, and that in the event of its dissolution at any time all property and funds shall be transferred to a similar corporation and used for the same purposes.

The court found, among other things, that this hospital and its departments were founded by Miss Scripps for the treatment of persons regardless of race, creed or ability to pay and that such purpose has been fully carried out by the respondent; that the hospital and its departments have never at any time refused admission to anyone because of race, creed or inability to pay; that all who have sought admission have been received when the hospital and its departments were able to render any service; that no funds for the construction of said hospital or for the maintenance or operation of any of its departments were derived from any capital paid in by members or stockholders or shareholders but were provided exclusively from donations; that no part of the net earnings of the corporation have inured to or been paid to or for the benefit of any private shareholder or individual; that it also obtains funds, with which it conducts its affairs, from patients admitted and treated, from endowment funds, from contributions made by organized charitable organizations and from other contributions; that the hospital and its departments are open to everyone, poor patients and pay patients alike and to those unable to pay anything as well as to those able to pay a part or all of its charge for services; that it is the practice to make a full charge where a patient has the ability to pay, to make a lesser charge in proportion to their ability to pay where patients are able to pay something but not the full charge, and to make no charge to those unable to pay for the services received; that approximately 25% of the services rendered by the various departments are rendered without pay; that all sums received from patients are used in the operation and maintenance of the hospital and its departments, and that no profit is or has been accumulated for any other purpose; and that no profits or accumulations have been shared by or distributed to any stockholders or individuals. The court also found that the respondent is not an employer under the provisions of the Act; that it is organized and operated exclusively for charitable purposes and no part of its net earnings do or have inured to the benefit of any shareholder or individual; that the respondent is exempt from the requirements of the Act under Sec. 7 (g) thereof; that the respondent is not subject to a tax under Title IX of the Social Security Act of the United States, 42 U.S.C.A. § 1101 et seq., and has been properly exempted from the payment of said tax by the proper officials of the United States Government; and that the respondent is exempted from the requirements of the Act by Sec. 7 (k) thereof.

[1] The appellant first contends that the court erred in denying its motion to dismiss these actions on the ground that the respondent had failed to exhaust its administrative remedies before filing this suit. The usual rule is thus stated in Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 949, 132 A.L.R. 715: "The rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." It is argued that under Sec. 45.5 of the Act, as added by St.1939, p. 2054, the commission is authorized to levy assessments where the employer neglects or refuses to make a return; that under that section the employer has the right to petition for a reassessment; that under Sec. 90 the commission is given the power to adopt rules and regulations; that under Rules 45.5 and 90.6, adopted by the commission, the employer is given the right to have an order revoking an exemption heard before the entire commission; that the respondent failed to seek such a review as permitted by these rules; and that it follows that it is not entitled to maintain this action.

Sec. 45.5, which was added to the Act in 1939, provides that an employer against whom an assessment has been made may ask for a reassessment but it is not provided that this must be done before any other relief will be available. On the other hand, Sec. 45.10, which was added to the Act in the same year, expressly provides that any employer may pay any contribution sought to be collected under protest and may then bring an action to recover the amount thus paid. As the court said in Bodinson Mfg. Co. v. California E. Com., 17 Cal.2d 321, 109 P.2d 935, 938: "The only express provision for court review is made by section

45.10, St.1939, p. 2058, which permits an employer to contest the legality of the contribution sought to be enforced against him by paying it under protest and then suing to recover the amount so paid."

[2] If it may be said that there was here an administrative remedy provided by this statute and by the rules of the commission which was available to the respondent, it cannot be said that that remedy was exclusive or that its exercise was a necessary precedent to the use of the other remedy expressly given by the statute. None of the cases cited in support of the usual rule go to the extent of holding that that rule applies as against another remedy expressly provided in the same statute which creates the administrative remedy. It would be somewhat illogical to require one who claims an exemption from such an assessment to follow a procedure in which he must ask for a pretended reassessment before he may follow the direct remedy applicable to his case which is also provided in the same statute and expressly made available to him. While the legislature could have so provided, we cannot believe that it intended to do so here. The right to pay under protest and bring such an action is directly given in this statute without qualification, and it is not for the courts to add conditions to the exercise of that right which are not imposed by the statute. Assuming that an administrative remedy existed the most that can be said is that alternative remedies were available to the respondent, and the court correctly refused to grant the motions to dismiss.

It is next contended that the court erred in holding that the respondent was entitled to exemption under Sec. 7 (g) of the Act which exempts "a corporation, community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual."

The appellant first contends, generally, that the respondent is not such a corporation as was intended to be included in the exemption thus provided, even if no part of its net earnings inure to the benefit of any shareholder or individual, because only a small part of its operations are purely charitable in the sense that they are services rendered gratuitously to persons unable to pay therefor. Reliance is placed on certain language used in speaking of or defining charity and charitable purposes in various cases in this state involving trusts, bequests and torts. It relies particularly upon the cases of La Societe Francaise, etc., v. California Employment Comm., 56 Cal.App.2d 534, 133 P.2d 47, and California Employment Com. v. Betthesda Foundation, 54 Cal.App.2d 348, 128 P.2d 874. In the first of these cases it was held that the organization came within the usual rule applying to fraternal societies organized for the benefit of their own members. In the other case, it was held that the evidence sufficiently supported the finding that the net earnings inured to the benefit of certain individuals.

[3-6] There are many cases in this and other jurisdictions defining charity and charitable purposes in various ways and with varying degrees of strictness and liberality depending upon such matters as the circumstances involved, the statutes or instruments in question, and the nature and form of the action or the particular question presented. It has generally been held that the fact that fees are charged by such an institution as a hospital is not controlling if these go to pay the expenses of operation and not to the profit of the founders or shareholders. It is also usually held that it is immaterial that such an institution is supported in part by full-pay or part-pay patients, and that it is the use to which any profit or income is devoted which is controlling. These general principles have been recognized in this state. Estate of Henderson, 17 Cal.2d 853, 112 P.2d 605; Estate of Bailey, 19 Cal.App.2d 135, 65 P.2d 102. In the Matter of the Estate of Merchant, 143 Cal. 537, 77 P. 475, 477, the following definition was approved: "'A charity in a legal sense may be more fully defined as a gift to be applied consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering, or constraint, by assisting them to establish themselves in life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government.'"

In Dingwell v. Seymour, 91 Cal.App. 483, 267 P. 327, 333, the court said: "Any person, the rich as well as the poor, may fall sick or be injured or wounded and become a fit subject for charity. St. Luke, chapter

10, verses 30–37. A trust may be and often is charitable in its nature, uses and purposes without giving alms to the poor. It is true that poverty is a condition which, even when brought about by indolence and waste of life's opportunities, arrests the attention and commands the consideration of charity. Yet perhaps more worthy and deserving members of society than the ne'er-do-well poor may under certain conditions be proper objects of charity. A gift to establish and maintain a public institution where the misery and unhappiness of any person of high or low degree, rich or poor, may be considered and sanely dealt with would come within the purview of the definition of a public charity."

In La Societe Francaise, etc., v. California Employment Comm., 56 Cal.App.2d 534, 133 P.2d 47, 51, the court said: "The definition of charity originally, under a strict construction of the word, implies the giving of something, or the rendering of gratuitous service. However, by later usage and in common parlance its meaning is sometimes extended to embrace liberality and generosity by patrons or benefactors in conferring advantages of a social character other than the rendering of personal aid or the bestowal of alms. If used in a statute or legal instrument, the word must be defined in conformity with the purpose or intention of the law makers or the parties to the instrument."

[7] In defining the phrase "operated exclusively for * * * charitable * * * purposes" in Sec. 7 (g), in conformity with the purpose of the law makers, the context and surrounding provisions should not be overlooked. In general, broad language is used. Among the organizations which are to be exempted are community chests and funds or foundations which ordinarily include in the scope of their operations many things aside from the relief of the poor and needy, in the strictest sense of the word charity. Again, the organizations to be exempted include also those organized and operated for religious, scientific, literary or educational purposes, and even those for the prevention of cruelty to children or animals. The wide and varied nature of the exemptions thus provided rather clearly indicate a purpose and intention to give the words here in question a broad rather than a strict meaning, and that it was intended, for exemption purposes, to apply the sort of standards to charitable institutions which are applied to the others named. In the broader meaning of charitable purposes the general principle usually applied in cases in this and other states is that such an institution as a hospital, in order to come within that meaning, must be one which is open to all persons irrespective of race, color, creed or ability to pay and must be one where no individual or entity may benefit or profit from its operation or from its assets on dissolution.

That the legislative purpose and intention in adopting the language used in Sec. 7 (g) were as we have suggested is also indicated by the fact that although the appellant commission had for some years thus interpreted Sec. 7 (g), as shown by its exemption of the respondent through all those years, the legislature, in extensively revising the Act in 1939, made no change in that provision but instead enlarged the scope of such exemptions by adding the one provided for in Sec. 7 (k).

[8, 9] That this was the intention of the legislature is further indicated by the fact that this act was adopted as a part of a plan for a uniform system of unemployment compensation then proposed and later adopted by the federal government and many of the states. Gillum v. Johnson, 7 Cal.2d 744, 62 P.2d 1037, 63 P.2d 810, 108 A.L.R. 595. The language used in Sec. 7 (g) is practically identical with that used in similar sections of the federal legislation and in that of many states, and is precisely similar to the language used in other federal statutes which have been in effect for many years. For that reason the interpretation placed upon that language by federal and other courts is unusually persuasive here. Union Oil Associates v. Johnson, 2 Cal.2d 727, 43 P.2d 291, 98 A.L.R. 1499. In passing upon practically the same language in a case involving quite similar facts the Supreme Court of the United States said in Trinidad v. Sagrada, etc., 263 U.S. 578, 44 S.Ct. 204, 68 L.Ed. 458:

"The exceptions covered, among others, any corporation 'organized and operated exclusively for religious, charitable, scientific or educational purposes, no part of the net income of which inures to the benefit of any private stockholder or individual.'

"* * * Two matters apparent on the face of the clause go far towards settling its meaning. First, it recognizes that a corporation may be organized and operated exclusively for religious, charitable, scientific or educational purposes, and yet have a net income. Next, it says nothing about the source of the income, but makes the destination the ultimate test of exemption.

"* * * That the transactions yield some profit is in the circumstances a negligible factor. Financial gain is not the end to which they are directed.

"Our conclusion is that the plaintiff is organized and operated exclusively for religious, charitable and educational purposes within the meaning of the excepting clause."

In passing upon a similar question, involving the same language as used in the New York statute, the court said in In re Mendelsohn, 262 App.Div. 605, 31 N.Y.S. 2d 435, 440:

"The record shows that the hospital was organized exclusively for hospital purposes and is engaged exclusively in operating a hospital of a non-profit character.

"That fees are charged by a university or hospital is not controlling as to its being a charity, for only when such income is devoted to the profit of the founders and not used to carry on the work by adding to the endowment, etc., does it show the institution is a business and not a charity. * * *

"A hospital association not conducted for profit, which devotes all its funds including those received from patients, exclusively to the maintenance and improvement of the institution is, therefore, a charity in every sense of the word. * * *

"Charitable purposes include non-profit hospital corporations, organized and operated exclusively for hospital purposes irrespective of whether they charge their benefactors for their services and facilities."

This same interpretation has been given this or similar language in Virginia Mason Hospital Association v. Larson, 9 Wash. 2d 284, 114 P.2d 976; Commissioner of Internal Revenue v. Battle Creek, 5 Cir., 126 F.2d 405, and in many other cases which might be cited. Our attention has been called to no case involving the same question where the holding has been to the contrary.

[10] Aside from the main legal question, some contention is made that the evidence is not sufficient to support certain particular findings. A finding that 25% of the services rendered by the respondent are rendered without pay is attacked. Not only is the exact percentage of such services which may be rendered immaterial, under the views above expressed, but the arguments here made are in the nature of criticisms of the method of bookkeeping employed and in the final analysis go only to the weight of the evidence. The most that can be said is that there was conflicting evidence in this regard. It is argued that other findings, to the effect that no part of the net earnings of the respondent have inured to the benefit of any private shareholder or individual, are not supported by the evidence because there is evidence that bonuses were given to the doctors employed by the respondent to conduct its operations and evidence that discounts had been given to members of the board of directors of respondent and their wives. With respect to the first of these matters, it appears that certain doctors who were employed by the respondent worked on small salaries for a number of years and that in some more recent years certain fixed sums were divided between these doctors by way of additional compensation. Under the evidence the court was justified in considering these payments as a moderate, although temporary, increase in salary. The other criticism boils down to an instance where a member of the board of directors, who had been subjected to great expense because of his wife's illness, was given a discount from the regular rates. The evidence justifies the court's conclusion that this was done in conformance with the usual policy of charging in proportion to ability to pay. Upon oral argument it was contended that the finding that the respondent has never refused admission to anyone because of inability to pay is contrary to two letters which are in evidence. In 1937, a man at San Marcos wrote the respondent stating that his wife had an ulcer on her leg, that she "has been taking treatments from a local physician", that he would like to bring her in for diagnosis and treatment, and asking what the cost would be, as his resources were limited. The respondent replied that it was "necessary that patients be referred to us by the physician in charge of the case", and suggested that the inquirer take advantage of the services of the County Hospital. Aside from any other consideration, no direct refusal of admission here appears, there was nothing unreasonable in hesitating to take a case away from the physician in charge without a report from him, the entire matter presented a question of fact for the court, and it cannot be said from this incident alone that the finding is contrary to

the evidence. In our opinion, the court's finding that the respondent is entitled to exemption under Sec. 7 (g) of the Act is supported both factually and legally.

[11] The appellant's final contention is that the court erred in finding that the respondent was entitled to exemption under Sec. 7 (k) of the Act. That section provides for such exemption where the services are performed "in the employ of a nonprofit organization or corporation, nonprofit safety organization, chamber of commerce, service club, or fraternal organization, where none of the foregoing corporations or organizations is subject to a tax under Title IX of the Social Security Act." While the respondent has at all times been exempted by federal administrative rulings from the payment of any tax under Title IX of the Social Security Act, the appellant argues that it is not entitled to similar exemption under Sec. 7 (k), in the absence of a decision to that effect handed down by a federal court of competent jurisdiction. The interesting question is suggested as to just how such a corporation could proceed to obtain such a decision of a federal court when it had already been exempted by administrative ruling and no controversy existed. In any event, the respondent has been thus exempted by federal administrative rulings and many federal cases support those rulings in principle, although it is true that the respondent was not directly involved in those cases. This should be sufficient to establish an exemption under Sec. 7 (k) of our Act, at least until such time as the respondent becomes actually subject to a tax under Title IX of the Social Security Act. That this interpretation of Sec. 7 (k) conforms to the intention and purpose of the legislature in adopting it is very strongly indicated by Sec. 2 of the Act which, after stating the purposes of the Act as a part of a national plan of unemployment reserves and social security, goes on to provide, in effect, that the contributions required shall be collected only during times when similar contributions are required under federal legislation and against which the contributions under our Act may be credited. It seems apparent that during the times here in question the contributions which the appellant seeks to compel the respondent to pay could not have been credited against any similar federal taxes. It would seem to follow that under any view of the matter the respondent was exempt from the contributions here in question under Sec. 7 (k) of the Act and the court correctly so held.

For the reasons given the judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

61 Cal.App.2d 495

FEWELL v. SHAMGOCHIAN et al.

Civ. 6990.

District Court of Appeal, Third District, California.

Nov. 24, 1943.

1. Torts 🔑12

Evidence justified judgment against seller of grape crop for damages sustained by buyer on ground that failure of buyer's vendee to pay buyer purchase price of grapes was due to claims improperly interposed by seller.

2. Appeal and error 🔑996

Findings of fact are for the trial courts and it is within province of such courts to draw inferences from evidence and from facts established by the evidence.

3. Appeal and error 🔑996

If a finding of fact is based on a reasonable inference, it is not within the power of an appellate court to set it aside.

Appeal from Superior Court, Merced County; Ranse R. Sischo, Judge.

Action for damages for alleged improper acts by I. W. Fewell against H. Shamgochian and another, wherein the named defendant filed a cross-complaint. Judgment for plaintiff, and defendants appeal.

Affirmed.

Stephen P. Galvin, of Merced, for appellants.

Gilbert Moody, of Turlock, for respondent.

ADAMS, Presiding Judge.

After trial of the above entitled action by the court sitting without a jury, the court found "that M. Shamgochian and H. Shamgochian sold to I. W. Fewell a certain crop of grapes for the sum of $350.00, which sum was paid by the purchaser; that said crop was harvested by I. W. Fewell and was delivered to K. Arakelian, Inc., for an agreed price in the sum of $1,178.56. K. Arakelian, Inc., refused to make payment to I. W. Fewell because of a claimed interest by the Shamgochians. I. W. Fewell demanded of the Shamgochians that the said sum of $1,178.56 be released to him, but such release was refused. That in an effort to collect the money properly due him, I. W. Fewell made two trips to Madera from his home at Livingston, California, was obliged to commence an action in the Superior Court in and for the County of Stanislaus, State of California, for the recovery of said money, and thereby incurred attorney's fees and court costs and said sum of $1,178.56 was withheld from him to his further damage. The Court finds that the total damage suffered by said I. W. Fewell by reason of the unlawful actions of the Shamgochians is the sum of $100.00."

Judgment was entered accordingly and defendants have appealed, the sole question presented being the sufficiency of the evidence to sustain the finding that K. Arakelian, Inc., refused to make payment to plaintiff because of a claimed interest by the Shamgochians, it being argued that there is no evidence to sustain the finding, and, therefore, no justification for the award to plaintiff of damages because of acts of defendants.

The evidence in the case establishes that H. Shamgochian, the son of M. Shamgochian, owned a crop of grapes; that as he was about to be inducted into the military service he sought to sell said grapes on the vine to plaintiff Fewell; that plaintiff, after some negotiations with both defendants, finally agreed to buy said grapes for $350; that the younger Shamgochian in his father's presence instructed plaintiff to deal with his father and that plaintiff paid to the father, M. Shamgochian, the sum of $350 and received from him a receipt "in full payment of Tokay grapes on vines." H. Shamgochian had, in the meantime, secured the K. Arakelian, Inc., winery to take the grapes when harvested, at an agreed price per ton; and on harvesting them plaintiff delivered them to Arakelian, stating that he had bought them and was delivering them under the contract, and presenting the receipt executed by M. Shamgochian as evidence of his ownership. The evidence also shows that while plaintiff was still harvesting the crop M. Shamgochian called upon plaintiff and made a demand for more money, which plaintiff declined to pay, and that after plaintiff had delivered the grapes to Arakelian the latter refused to make payment to plaintiff without a release from Shamgochian, which release the latter refused to give. Plaintiff thereupon filed suit against Arakelian for the purchase price of the grapes, and also commenced a suit against M. Shamgochian for damages, including the purchase price of the grapes.

At the trial plaintiff called as his witnesses Y. B. Torosian, buyer for Arakelian, Inc., who had made the contract with H. Shamgochian. Though this witness had written a letter to K. Arakelian to hold up payment for the grapes delivered by plaintiff he denied that he had talked with or seen M. Shamgochian after the contract was signed or that he had talked to him by telephone or received any letter from him. Plaintiff also called William Sublette, manager for the Arakelian winery, who testified to the receipt of the grapes from Fewell, and his refusal to pay for them. When asked why he did not make payment he said:

"A. Well, it seemed that there was some sort of a controversy as to whose grapes were being delivered there and until we could get it settled we held up payment, until they could determine whose money it was. We did not make the payment until they could come together.

"Q. What knowledge did you have concerning the controversy? A. We received a letter from Mr. Torosian, who is our buyer and who made this contract, not to pay Mr. Fewell any money. Now, whether that letter came before Mr. Fewell came to the office the first time, I don't recall offhand for I was very busy at that time, but the first knowledge that I had of it, Fewell came into the office with a copy of the contract and said that he had bought the grapes and was the owner of the grapes and was delivering under the contract.

"Q. And did you see Mr. Shamgochian also? A. I did not, not until after that for several days.

"Q. And what was said by Mr. Shamgochian when he came down? A. I don't recall, just what there was to it. I think he told me something about the grapes being his son's or something.

"Q. Did he ask for payment? A. He did not; I don't think he asked for payment. I told him that if he and Fewell would get together, we would make out a joint check to them, if they would settle their own difficulties. That is what I told him." M. Shamgochian testified that he did not get in touch with Mr. Torosian, but he did say that Mr. Sublette told him: "That gentleman sitting there, he told me that it is confused and that he was not going to pay any money to either one of us; he said he was going to make a joint check if we could settle it between ourselves. I said, 'Why don't you give us our part, and then pay the rest of it to him?' He said, 'No, we can't do that at all.'"

Because of the testimony of Torosian and Sublette it is contended by appellants that there is no evidence to show that the refusal of Arakelian to pay plaintiff was due to some representation or act of defendants.

In view of the contention of appellants here, it is interesting to note that M. Shamgochian in his answer to plaintiff's complaint alleged that plaintiff had agreed to pay $600 (not $350) for the grapes, that he (as agent for H. Shamgochian) had demanded of plaintiff the payment of the additional sum of $250, which plaintiff refused to pay, and "That upon plaintiff's refusal to pay said sum, defendant, as agent of said H. Shamgochian, advised the said K. Arakelian, Inc., Y. B. Torosian, and Agnes Torosian that there was due to H. Shamgochian out of and from the sale price of said grapes made to them or to the said K. Arakelian Inc. the sum of $250.00 and requested the said K. Arakelian, Inc. under its contract with the said H. Shamgochian and under the contract by the said Y. B. Torosian, and Agnes Torosian with the said H. Shamgochian, to withhold said sum from the said plaintiff and to pay the same to this defendant for the use and benefit of the said H. Shamgochian, and to defendant as agent of said H. Shamgochian. That thereupon the said K. Arakelian, Inc., Y. B. Torosian, and Agnes Torosian, refused to pay any portion of said sum of $1,178.56, or any other sum that they might owe for the said grapes, either to the plaintiff or to the defendant, as agent for the said H. Shamgochian."

By stipulation of the parties H. Shamgochian was made a defendant with his father, and he filed an answer and cross complaint, but denied therein that because of any representation by M. Shamgochian the buyers refused to pay to plaintiff the purchase price of the grapes. In his cross-complaint he sought to recover an additional $250 from plaintiff.

[1-3] In view of the foregoing we cannot say that there was not sufficient evidence to justify the trial court's conclusion that the failure of Arakelian to pay plaintiff was due to claims interposed by defendants. Findings of fact are for the trial courts, and it is within the province of such courts to draw inferences from the evidence and from the facts established by the evidence (Estate of Barrow, 27 Cal. App.2d 402, 405, 80 P.2d 1006); and if a finding of fact is based upon a reasonable inference it is not within the power of an appellate court to set it aside. Silva v. Gustine Creamery, 217 Cal. 146, 149, 17 P.2d 699; Tartar v. Industrial Acc. Comm., 191 Cal. 703, 710, 218 P. 39; Dorr v. Rehkopf, 35 Cal.App.2d 366, 367, 95 P.2d 461; Kossine v. Styliano, 40 Cal.App.2d 721, 724, 105 P.2d 952.

It is obvious that defendants were claiming an interest in the grapes after they had received full payment of the agreed price, that M. Shamgochian went to plaintiff and demanded more money before the grapes were fully harvested, that he refused to give plaintiff a release when he knew that Arakelian was holding up payment to plaintiff, that Torosian wrote Arakelian to hold up the payment, and that M. Shamgochian admitted that he went to Mr. Sublette and demanded that a part of the purchase price be paid to him; and, in view of the allegation in M. Shamgochian's answer that he as agent of his son advised Arakelian et al. to withhold payment of $250 to Fewell but to pay said amount to him, and that thereupon Arakelian refused to pay any portion of the purchase price to plaintiff, we cannot say that the trial court's conclusion, that by reason of the acts of defendants plaintiff sustained damages, is without adequate support.

The judgment is affirmed.

PEEK and THOMPSON, JJ., concur.

61 Cal.App.2d 471

DAWSON v. BOYD et al. (two cases).

Civ. 12358.

District Court of Appeal, First District, Division 1, California.

Nov. 24, 1943.

Hearing Denied Jan. 20, 1944.

1. Appeal and error ⚷930(1)

All conflicts would be resolved in favor of defendants in whose favor verdicts were returned and all legitimate and reasonable inferences indulged to uphold verdicts if possible.

2. Appeal and error ⚷989

Where verdict is attacked as unsupported by the evidence, appellate court's power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

3. Appeal and error ⚷996

Where two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of trial court.

4. Appeal and error ⚷930(1)

Appellate court must accept all evidence and reasonable inferences therefrom which tend to support implied findings of jury, to consider evidence in its most favorable aspect toward prevailing party, and to resolve all material conflicts in favor of respondent.

5. Trial ⚷139(1), 140(1)

Jury is sole judge of the effect, sufficiency, and weight of evidence, and sole judge of credibility of witnesses.

6. Trial ⚷139(1)

Evidence presented question for jury as to whether negligence of driver of defendants' trailer-truck caused automobile in which plaintiff was riding, and which was proceeding in same direction as truck, to collide with rear end of truck, as against plaintiff's contention that physicial facts demonstrated as a matter of law that defendant truck driver was making a U turn in violation of law at time of collision and that such negligence was sole proximate cause of the accident. Vehicle Code, § 604, St. 1939, p. 2198, § 4.

7. Automobiles ⚷204

In action arising out of automobile collision, where jury found that defendants were not negligent, issue of contributory negligence was not involved.

8. Automobiles ⚷242(8)

Evidence that motorist ran into back or side of a well-lighted truck on a straight highway was sufficient to justify jury in holding that presumption of due care on part of motorist was rebutted.

9. Trial ⚷296(3)

An instruction that, if defendant truck driver was operating truck as a reasonable and prudent man at time of accident, verdict should be for defendants, was not erroneous on ground that a violation of a statutory requirement was basis of plaintiff's case, and that such violation could not be excused upon ground that driver acted as a prudent man, where jury was fully and fairly instructed on plaintiff's theory of statutory violation.

10. Trial ⚷295(3)

Where omitted element in formula instruction was fully, fairly, and correctly covered by other instructions, and, from a reading of the instructions as a whole, it was obvious that jury was not misled, failure to include the element in the formula instruction was not prejudicial.

11. Trial ⚷208

In action arising out of collision between automobile and trailer-truck, where testimony of two investigating officers and an automobile mechanic sought to be offered by plaintiff was properly refused, an instruction, telling jury that certain unnamed witnesses who did not see accident sought to give their views and versions as to how accident happened and that jury should disregard anything expressed by any of them, was proper.

12. Automobiles ⚷246(60)

An instruction on presumption of due care of deceased automobile driver with whom plaintiff was riding, which stated that such presumption is in itself a species of evidence which continues with the plaintiff throughout the trial and until overcome by contrary evidence, was not erroneous because of refusal to add that such presumption must control jury's deliberations until overcome by satisfactory evidence.

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Action by Elizabeth C. Dawson against William Bert Boyd and M. J. Krug, individually and transacting business under the fictitious name and style of Modern Freight Lines, and Modern Freight Lines, an unincorporated association, for personal injuries sustained in automobile collision, consolidated with an action by Elizabeth C. Dawson, as administratrix of the estate of James B. Dawson, also known as James Dawson and Jim Dawson, deceased, against same defendants, for wrongful death of plaintiff's intestate as result of same collision. From judgments in favor of defendants, the plaintiff appeals.

Affirmed.

Jaffa & Sumski, of San Francisco, for appellant.

Bronson, Bronson & McKinnon, of San Francisco, for respondents.

PETERS, Presiding Justice.

At about 7:30 p.m. on December 30, 1940, an automobile driven by James B. Dawson, and in which his wife, the plaintiff Elizabeth C. Dawson, was riding, collided with a truck-trailer, in which the owner, the defendant M. J. Krug, was riding, and which was being driven by defendant William Bert Boyd, on the Bayshore Highway just south of Redwood City. As a result of the accident, James B. Dawson died, and Elizabeth C. Dawson received serious personal injuries. Thereafter, Elizabeth C. Dawson instituted two actions against defendants, one to recover for damages for her personal injuries, and the other, as administratrix of her husband's estate, to recover damages for his wrongful death. The cases were consolidated, and were tried before a jury. The jury brought in verdicts for the defendants. From the judgments based thereon plaintiff prosecutes these appeals. Her main contention is that, as a matter of law, the evidence demonstrates that the accident occurred as a result of the negligence of defendants, and that her husband was free from contributory negligence. She urges that the judgments should not only be reversed, but that the trial court should be directed to enter judgments in her favor, and the causes remanded for a retrial on the issue of damages alone.

[1-5] The problems presented are primarily factual. The rules applicable to such an appeal were stated as follows in Crawford v. Southern Pacific Co., 3 Cal. 2d 427, 429, 45 P.2d 183, 184: "In reviewing the evidence on such an appeal, all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary, but often overlooked, principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." See, also, Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660, 115 A.L.R. 836; Juchert v. California Water Service Co., 16 Cal.2d 500, 106 P.2d 886; Dickinson v. Pacific Greyhound Lines, 55 Cal.App.2d 824, 131 P.2d 401. Stated another way, it is incumbent upon the appellate court to accept all evidence and the reasonable inferences therefrom which tend to support the implied findings of the jury, to consider the evidence in its most favorable aspect toward the prevailing party, and to resolve all material conflicts in favor of respondent. De la Motte v. Rucker, 55 Cal.App.2d 226, 130 P.2d 444. As was said in Albaugh v. Mt. Shasta Power Corp., 9 Cal. 2d 751, at page 773, 73 P.2d 217, at page 229: "Of course, the jury is the sole judge of the effect, sufficiency, and weight of the evidence, and the sole judge of the credibility of the witnesses. Whatever our opinion may be as to the weight of the evidence, if there is material, credible evidence to support the verdicts, this court is without power to disturb them."

Plaintiff, while recognizing the existence of these rules, actually disregards them. By disregarding conflicting evidence and the reasonable inferences therefrom, she makes a quite convincing showing that the accident must have happened as a result of the negligence of defendants and without contributory negligence on the part of her husband. To reach this conclusion, however, plaintiff finds it necessary to resort to the arguments that all evidence conflicting with that given by her witnesses was "inherently improbable," and was "irrefutably" contradicted by the physical facts. There is evidence, ample evidence, perhaps a preponderance of the evidence, to support plaintiff's theory of the case. But there is also evidence, substantial evidence, to support the implied findings of the jury. Under such circumstances, this court has no power to upset the verdicts.

The accident happened after dark on a four-lane highway that is practically straight for some distance both north and south of the place where the accident occurred. There were no eyewitnesses to the actual collision. Plaintiff was admittedly asleep at the time of the accident, as was defendant Krug, who was riding in the cab of the truck-trailer operated by his employee Boyd. The car, driven by Dawson, and the truck-trailer were both proceeding southerly on the highway. The Dawson car collided with the rear or left side of the trailer. Admittedly, six clearance lights, two red reflector tail lights, and the headlights were properly lit on the truck-trailer. The major contention of plaintiff is that, although Krug and Boyd testified to the contrary, the physical facts demonstrate, to a certainty, that at the time of the collision Boyd was making a U turn in violation of law (§ 604, Vehicle Code, St.1939, p. 2198, § 4), and that this negligence was the sole proximate cause of the accident.

The truck-trailer was approximately fifty feet long, and had an aggregate of twenty-two wheels, twelve on the trailer and ten on the truck. The trailer had three axles towards the rear, on the end of each of which were dual wheels. The front portion of the trailer rested on the truck. The truck and trailer weighed empty (as they were at the time of the accident) about 19,000 pounds. The Dawson car was a Studebaker sedan. The accident happened on the Bayshore Highway (which runs generally north and south) about midway between Main and Chestnut Streets, in Redwood City, which streets cut into the highway from the west. The two streets are about a half a mile apart, Chestnut Street being the most southerly of the two. Just about opposite where Chestnut Street comes into the Bayshore Highway from the west, a road cuts off on the east side of the highway on a southeast angle which leads to a cement plant, where Boyd and Krug expected to pick up a load. Just north of this cement company road a railroad track crosses the Bayshore Highway, the railroad roughly paralleling the cement plant road and Chestnut Street.

The paved portion of the Bayshore Highway, at the scene of the accident, is divided into four marked lanes, each about ten feet wide, two for northerly traffic and two for southerly. Double solid white lines run down the center of the highway. Bordering the highway on each side are nine-foot asphalt shoulders, and bordering that, dirt, gravel and grass. At the northwest corner of the junction of Main Street and the Bayshore Highway is a Standard Oil Company service station.

Boyd, who was in the armed services and was not available at the time of trial, testified by means of deposition. He testified that he was driving the truck-trailer; that Krug was riding with him, but was asleep or dozing at the time of the accident; that he had left Oakland earlier in the evening intending to go to the cement plant to pick up a load; that he did not know the exact location of the cement plant, but knew the general locality; that he proceeded over the San Mateo-Oakland bridge and turned south on the Bayshore Highway; that he drove beyond the road that leads to the cement plant and made a U turn, missed the road again, and drove northerly to the Standard Oil Company service station at Main Street; that here he made another U turn so that he was headed south; that he inquired of the attendant the way to the cement plant, and was given directions. Krug testified that the attendant told them that the road cut off to the east about half a mile south just after crossing the railroad tracks. Boyd testified that after leaving the service station he was in the outside southbound lane; that shortly before the accident he moved over to the inside southbound lane, preparatory to making a left turn; that he had straightened out in the inside lane and was proceeding straight down the highway at about twenty-five or thirty miles per hour when the accident happened; that his six clearance lights, two tail lights and headlights were lit; that the first thing he knew of the accident was the impact on the back end of the trailer; that the force of the impact threw the trailer forward and "jackknifed" the truck so that, after the accident, the trailer was facing south, in the inner southbound lane about parallel to the double white lines, while the truck was about at right angles facing east and partially in the inner northbound lane; that after the accident the Dawson car was behind the truck but not in contact with it; that because of the awkward position of the truck-trailer they immediately moved it off the highway and, for convenience, drove it to the east side of the highway facing north; that he saw scratches and dents on the rear of the trailer, and that the inside right rear dual tire was cut; that he told several police officers, who arrived shortly after the accident, the facts as he knew them; that, among other things, he told the police officers that the Dawson car hit the trailer from behind; that after the police officers came, they drove to the police station in Redwood City, and then drove to the cement plant and changed the cut tire and loaded the trailer.

Krug corroborated Boyd as to most of the material facts above set forth. He also testified that after leaving the gas station he was dozing; that the force of the accident threw him straight back against the cab; that after the accident he "jackknifed" the equipment and got it off the highway facing north because that was the easiest thing to do; that in performing this operation he drove the truck-trailer forward and then backward and then forward, heading it north; that he explained to the officers what had happened; that he told the officers that the trailer was struck from the rear; that he explained to the officers why the equipment was facing north and that they had agreed that he had got the equipment off the highway the fastest way; that he knew they were hit from the rear because he was thrown against the back of the cab; that after the accident the right rear radius rod which holds the axle was broken; that the radius rod was of steel and was one inch thick, two inches wide and thirty-six inches long, and located in the rear of the trailer; that he noticed it freshly broken right after the accident; that the impact knocked both tail gates off the trailer, these being attached by hinges; that the right inside rear tire had a hole through it; that one of the rear tail lights had its glass broken, although it was still burning; that the bed of the trailer was about thirty-eight inches off the ground; that he knew that the truck was in high gear at the time of the accident because otherwise the noise of the transmission would have awakened him; that he did not tell the officers that the truck-trailer was making a U turn at the time of the accident; that after the accident the Dawson car was headed south at a slight southeast angle; that the left front wheel of the Dawson car was over the center line; that, although the trailer was only two weeks old at the time of the accident, it had been damaged, scratched and dented on the left side near the rear in a prior accident, while backing into a loading platform.

[6] From this evidence it is obvious that the jury could find that Mr. Dawson drove his car into the back of the well lighted trailer, and that defendants were not negligent. Plaintiff, while recognizing that this is so, urges that the physical facts demonstrate, to a certainty, that the accident could not have happened as stated by Boyd and Krug; that, in view of the physical facts, their testimony is so inherently incredible and improbable that it must be disregarded; that from these physical facts the only conclusion possible is that the defendants were negotiating a U turn when struck, and were, therefore, guilty of negligence per se.

Plaintiff introduced into evidence various photographs of the damaged Studebaker taken shortly after the accident. She points out that these photographs show that the Studebaker was crushed entirely across the front and from the bumper up. She argues that, since the bed of the truck was thirty-eight inches above the ground, it would be physically impossible to so damage the Studebaker by hitting the trailer from the rear because the hood of the automobile would have gone at least partially under the bed of the trunk; that, therefore, the automobile must have struck the truck on its left side. She also points out that the photographs show the imprint of tires upon the right and left aprons of the crushed front fenders of the Studebaker. The photographs show that on the right apron of the Studebaker, just below the right headlight, there is the imprint of the word "Heavy." The evidence shows that the trailer was equipped with practically new tires which had the words "Heavy Duty" printed in raised letters on the sides of the tires. It is argued that this imprint could have been affixed to the apron only if the Studebaker hit the trailer from the side and could not have been affixed in a rear end collision.

These physical facts strongly support plaintiff's theory of the accident, but they do not demonstrate, as a matter of law, that these facts can be accounted for only on the theory advanced by her. The courts have frequently held that in most automobile accident cases arguments based on physical facts will not, as a matter of law, upset a jury verdict. In Fishman v. Silva, 116 Cal.App. 1, at page 3, 2 P.2d 473, at page 474, it is stated: "It is needless to add, as in all such cases, there is presented a wide field for argument, the main theme of which is physical facts and the so-called immutable laws of physics. Contentions based on these foundations are usually not convincing, strange as it may seem, for the simple reason that in partisan presentation there is an ever-present temptation to forget essential facts which do not fit in. For instance, where it is argued that, where there is a contact of two bodies in a given position, the direction of the applied force will control the position of the bodies after the impact, any rule or law, in the abstract, will be found of little value when we have the additional factors of each body in motion and controlled by independent agencies. Experience has shown the futility of attempted demonstration in accident cases; there are too many varying factors. Among these variants we may class indefinite rate of speed, condition of the highway, judgment or lack thereof in the drivers, a direct blow or a glancing one, and the balance or equilibrium of each car at the time of impact." See, also, Gardini v. Arakelian, 18 Cal. App.2d 424, 64 P.2d 181; Corcoran v. Ward, 115 Cal.App. 180, 1 P.2d 455; Roselle v. Beach, 51 Cal.App.2d 579, 125 P.2d 77; Morris v. Fortier, 59 Cal.App.2d 132, 138 P.2d 368. There are many factors that were not made known to the jury, and which would have to be known before plaintiff's theory would be sound. The jury had no knowledge of the speed of the Dawson car. It had no way of knowing what occurred to the Dawson car just before the accident. All it knew was that after the accident the Dawson car, badly smashed, was behind the trailer in the southbound inside lane, and at an angle. Dawson may have tried to pass to the right and then changed his mind and turned sharply to the left, or he may have tried to pass to the left and turned sharply to the right. The Dawson car may have hit the rear of the trailer head on, or at an angle. In view of these possibilities this court cannot say, as a matter of law, that the Studebaker could have been damaged only in the way claimed by plaintiff. Had it crashed into the right rear of the trailer, it might have hit the right spring, axle and radius rod, and could have, in this fashion, received the damage shown in the photographs. The word "Heavy" could have been imprinted by the inside of the right dual rear tire. If this is the way the accident happened, it would explain the broken radius rod, the cut right rear inside tire, the broken glass on the tail light, and the broken tail gates. Plaintiff's argument does not fully explain this damage. It is obvious that while the jury could have found the accident occurred as claimed by plaintiff, it was not compelled to so find. There being other reasonable explanations, implied findings in favor of defendants cannot be disturbed.

Plaintiff also contends that the position of the truck-trailer after the accident, on the east side headed north, is the normal position in which it would have been, had it been hit while making a U turn. Boyd and Krug explained this factor to the evident satisfaction of the jury. Their explanation was not so incredible that, as a matter of law, it can be disregarded. Their credibility was for the jury.

Plaintiff next points out that, on the morning after the accident heavy tire marks were observed in the dirt just off the west shoulder of the highway, which indicated that someone made a U turn at about that point. Some attempt was made to identify the marks as having been made by the tires of defendants' truck. Evidence was offered that the tread marks in the mud were similar to the tread marks that would have been made by the tires on the truck-trailer, and that the tread marks were made by a vehicle equipped with dual wheels. These marks might have been made when the truck-trailer was "jackknifed" across the highway after the accident. The tires were of a brand in common use. The marks might have been made by another truck. Several other cars, including an ambulance and tow car, made U turns at about that spot after the accident. Under such circumstances, it was for the jury to determine whether to adopt plaintiff's or defendants' interpretation of these facts. The same can be said about certain mud and tire smudge marks on the highway immediately in front of where plaintiff's car stopped as disclosed by photographs and testified to by the police officers. These might very well have been made after the accident while the equipment was being cleared from the highway.

Plaintiff places some weight upon the testimony of one of the investigating police officers that there were scratches and dents on the side of the trailer. Both officers testified that the tail lights were intact, but admitted that the rear tail gates were knocked off in the collision. Krug testified that the scratches and dents on the side of the trailer were caused in a previous accident, which he described. Krug also described the damage to the rear of the trailer. Under such circumstances, the jury's implied finding in favor of defendants cannot be disturbed.

The plaintiff next points out that both investigating officers, testifying with the aid of their reports made out by them the night of the accident, stated that Boyd and Krug told them that the truck-trailer was in the process of making a U turn when struck. Both Boyd and Krug denied making such a statement, but testified that they told the officers of the two earlier U turns made by them. There was a direct conflict on this issue. The credibility of the witnesses was for the jury.

From what has been said, it is apparent that plaintiff's theory, while somewhat convincing, does not rebut, as a matter of law, the theory and explanation of defendants. The plaintiff has not demonstrated, as a matter of law, that defendants' story is incredible. The jury was presented with two opposing theories, each credible, and each supported by material evidence. The burden of proof to show negligence was, of course, on plaintiff. The jury impliedly found defendants were not negligent. Under these circumstances, and under the rules above stated, that implied finding is binding on this court.

Plaintiff also argues that, as a matter of law, there was no evidence that her husband was guilty of contributory negligence. The argument is that there is a presumption that the deceased was acting as a reasonable and prudent man with due regard for his own safety (Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590); that while this presumption is rebuttable, it is a species of evidence and unless controverted the jury must find in accordance with the presumption. It is contended that no evidence was introduced by defendants on this issue.

[7, 8] To these contentions there are two answers. In the first place, as already held, the jury would have been justified in finding that defendants were not negligent. If the jury did so find, and we must assume it did, the issue of contributory negligence was not involved. In the second place, there was enough evidence and reasonable inferences from that evidence, to justify the jury in holding that the presumption of due care on the part of deceased was rebutted. From the physical facts, the jury would have been justified in finding, even if defendants were negligent, that for Mr. Dawson to run into the back or side of a well lighted truck, on a straight wide highway, was contributory negligence.

[9] Plaintiff next objects to the giving, or refusing to give certain instructions. The jury was instructed that the degree of care that should be exercised in the operation of a truck was that of a reasonable and prudent man, and that if Boyd was so operating the truck at the time of the accident, the verdict should be for defendants. If Boyd was not making a U turn in violation of a statute at the time of the accident, this was undoubtedly a correct instruction. Plaintiff urges that the instruction was erroneous because a violation of a statutory requirement was the basis of her case, and such violation cannot be excused upon the ground that the driver acted as a prudent man. Plaintiff cites Duncan v. J. H. Corder & Son, 18 Cal.App.2d 77, 62 P.2d 1387, and Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 113 P.2d 244, where the giving of similar instructions was held to be reversible error. It should be first pointed out that the jury was fully and fairly instructed on plaintiff's theory of statutory violation. The jury was told that if the defendants were making a U turn at the time of the accident, it was a violation of the statute; that violation of the statute was negligence as a matter of law; that if the jury should find such negligence was the sole proximate cause of the accident, it should find for plaintiff.

Neither of the above cited cases is controlling here. In the Nance case, the defendant was a common carrier. Obviously, an instruction setting up a standard of ordinary care was erroneous and prejudicial. In the Duncan case, the only theory involved was a violation of a statute. The defendant there admitted he had no horn and did not blow any horn, as required by statute, and the sole question was whether that admitted negligence was a proximate cause of the accident. The trial court refused to instruct on the violation, and gave an instruction on due care. The appellate court properly held it was prejudicial error to refuse to instruct on the violation of the statute, and that it was improper, under the facts, to give the reasonable care instruction. Such holding has no applicability here. The trial court properly instructed on two theories: First, if defendants were violating the statute, it was negligence as a matter of law, and second, if defendants were not violating the statute, whether they were negligent depended upon whether they were exercising reasonable care. Both sets of instructions were correct and both were properly given.

[10] Plaintiff also urges that the due care instruction was a formula instruction, and contends that since it omitted all reference to the theory of a statutory violation it was incomplete and erroneous, citing Rush v. Lagomarsino, 196 Cal. 308, 237 P. 1066. She also contends the due care instruction was in conflict with the statutory violation instruction. The rigid rules formerly applicable to formula instructions have been greatly modified in recent years. Where the omitted element is fully, fairly and correctly covered by other instructions, and where, from a reading of the instructions as a whole, it is obvious that the jury was not misled, the failure to include one element in a formula instruction is not prejudicial. Reuter v. Hill, 136 Cal.App. 67, 28 P.2d 390; Douglas v. Southern Pacific Co., 203 Cal. 390, 264 P. 237; Barham v. Widing, 210 Cal. 206, 291 P. 173; Ramos v. Service Bros., 118 Cal.App. 432, 5 P.2d 623; Mahoney v. Murray, 140 Cal. App. 206, 35 P.2d 612; Christiansen v. Hollings, 44 Cal.App.2d 332, 112 P.2d 723. That is exactly the situation in the instant case.

[11] Plaintiff next objects to an instruction which told the jury that certain unnamed witnesses "sought here to give their views and versions as to how this accident happened—witnesses who did not see it. I instruct you, however, that since their versions or views were not permitted to disregard anything expressed by either, or any of them." This instruction was aimed at the two investigating officers and at an automobile mechanic. Various objections were properly sustained to questions propounded to the police officers calling for their opinion or conclusion. The mechanic attempted to give his opinion of how the radius rod was broken. Plaintiff, while conceding that objections to these questions were properly sustained, and that the jury was properly instructed to disregard such questions, objects to the above instruction on the ground that it told the jury to disregard all of their testimony. Although the instruction is awkwardly worded, it could not have misled the jury. Properly and reasonably interpreted, the instruction merely told the jury to disregard the improper questions.

[12] Plaintiff next contends that the instructions that were given as to the presumption of due care on the part of the deceased driver were prejudicially erroneous in that, the trial court, after instructing that there was such a presumption, and that this presumption "is in itself a species of evidence which continues with the plaintiff throughout the trial of this case and until overcome by contrary evidence," refused to add, as proposed, "Such presumption must prevail and control your deliberations until and unless it is overcome by satisfactory evidence." Olsen v. Standard Oil Co., 188 Cal. 20, 204 P. 393, is cited, and it is contended that the omitted language was taken verbatim from an instruction in that case which was upheld by the Supreme Court.

All that the Olsen case held was that it was not error to give the instruction, including the language in question. The case does not hold that it would be error to fail to include the questioned language. When the omitted language is compared with the given language it is at once apparent that, had both been given, the instruction would have been tautological.

Objections are also made as to other instructions on various grounds. We have read the entire charge, including the challenged instructions. We are convinced that the charge, as a whole, was fair and complete. No prejudicial error was committed.

The judgments appealed from are affirmed.

KNIGHT and WARD, JJ., concur.

Hearing denied; CARTER, J., dissenting.

61 Cal.App.2d 432

McMANUS v. OTIS et al.

Civ. 2998.

District Court of Appeal, Fourth District, California.

Nov. 22, 1943.

Rehearing Denied Dec. 15, 1943.

Hearing Denied Jan. 20, 1944.

1. Waters and water courses ⚷115, 118

One has no right to obstruct the flow onto his land of what are technically known as "surface waters", but the term does not include all waters which may be on or moving across the surface without being collected into a natural water course, being confined to waters falling on the land by precipitation or arising thereon in springs.

See Words and Phrases, Permanent Edition, for all other definitions of "Surface Water".

2. Waters and water courses ⚷173

One has the right to protect himself against "flood waters," that is, waters flowing out of a natural water course which were once a part of a stream and have escaped from it, and for that purpose may obstruct the flow on his land even though such obstruction causes them to flow onto the land of another.

See Words and Phrases, Permanent Edition, for all other definitions of "Flood Water".

3. Waters and water courses ⚷38, 51, 78

One may not divert or obstruct the flow of a natural water course, "water course" not meaning the gathering of errant waters while passing through a low depression, vale, or gully, but a real stream with a definite channel, with bed and banks within which the stream flows when streams of the region habitually flow.

See Words and Phrases, Permanent Edition, for all other definitions of "Water Course".

4. Waters and water courses ⚷38, 115, 173

"Flood waters" from which a property owner may protect himself are distinguished from "surface waters" by the fact that the former have broken away from a stream while the latter have not yet become part of a water course, and the term "flood waters" indicates waters which escape from a water course in great volume and flow over adjoining lands in no regular channel, though the fact that such errant waters make a temporary channel or follow some natural channel, gully, or depression does not affect their character as flood waters or give to the course which they follow the character of a natural "water course."

5. Waters and water courses ⚷38

It is not essential to a "water course" that the bank shall be unchangeable or that there shall be everywhere a visible change in the angle of ascent marking the line between bed and bank.

6. Waters and water courses ⚷171(1)

An improvement for protection of lands above does not give a lower riparian owner cause of action merely because such improvement increases the volume of water in the stream as it comes to his land even though the burden of protecting his land is thereby increased and his land is injured because of his failure to meet such increased burden and increased volume makes the stream exceed the capacity of its channel.

7. Waters and water courses ⚷171(1)

Drainage improvements must follow natural drainage of the country, and if water is diverted out of its natural channel and discharged into a different channel or upon neighboring lands, the diverter is liable to the owner whose land is injured by such discharge.

8. Waters and water courses ⚷119(3)

There is no "diversion" if surface waters flowing in no defined channel are for reasonable purpose gathered together and discharged into the stream that is their natural means of drainage, even though stream channel is inadequate to accommodate increased flow.

See Words and Phrases, Permanent Edition, for all other definitions of "Diversion".

9. Appeal and error ⚷931(1)

Because of the presumptions in favor of the findings and judgment an appellate court when reviewing the evidence in support of a finding must accept as true all evidence tending to establish the finding and must consider it in the most favorable aspect toward the prevailing party and give him the benefit of every inference that could be reasonably drawn in support of his claim.

10. Appeal and error ⚷931(1)

When the evidence is conflicting, a District Court of Appeal will presume that the evidence in support of the findings is true and construe it and resolve every substantial conflict as favorably as possible in support thereof.

11. Appeal and error ⚷931(5)

On appeal from judgment denying an injunction and damages to realty as the result of defendants' construction of two parallel dykes diverting rain and storm waters from their natural course onto plaintiff's land, District Court of Appeal in reviewing the evidence in support of the findings was required to consider facts that the trial judge had visited the scene and made his own observations on the ground.

12. Waters and water courses ⚷179(4)

In action for an injunction and for damages to realty as the result of defendants' construction of two parallel dykes diverting rain and storm waters from their natural course onto plaintiff's land, evidence supported finding that the waters were "flood waters" against which defendants were entitled to protect themselves by constructing dykes, precluding recovery.

13. Waters and water courses ⚷179(4)

In action for an injunction and for damages to realty allegedly as result of defendant's construction of two parallel dykes diverting rain and storm waters from their natural course onto plaintiff's land, evidence justified denial of recovery on ground that construction of the dykes did not cause the damage, if any.

◆

Appeal from Superior Court, Riverside County; G. R. Freeman, Judge.

Action by Pearl M. McManus against H. W. Otis and others for an injunction and for damages for diversion of rain and storm waters from their natural course onto plaintiff's land. Judgment for defendants, and plaintiff appeals.

Affirmed.

Hill, Morgan & Bledsoe, and Vincent Morgan, all of Los Angeles, and William A. Wood, of Riverside, for appellant.

Evans & Boyle, of Pasadena, and Sarau & Thompson, of Riverside, for respondents.

GRIFFIN, Justice.

The appeal is by plaintiff and appellant Pearl M. McManus from a judgment in favor of the defendants and respondents H. W. Otis and Smoke Tree Properties, Inc., a corporation, alias Mardo Corporation.

The action is one for injunction and to recover damages for injuries to real property alleged in the complaint to have been sustained as a result of the construction by defendants of two parallel dykes whereby the "rain and storm waters" flowing out of Palm Canyon and over the alluvial cone thereof were in 1937 and 1938 collected and concentrated into a narrow channel and so diverted from their natural course as to damage plaintiff's land. The original complaint recites a cause of action based upon damage alleged to have occurred in February, 1937, and the supplemental complaint recites a cause of action based upon injuries alleged to have occurred to the land in March, 1938.

Palm Canyon, situate in Riverside County, lies between a range of mountains known as the San Jacinto Mountains on the west, and another range known as the Murray Mountains on the east. The waters from this canyon during periods of heavy rainfall and melting snow have their watershed in Palm Canyon, which watershed comprises approximately 94 square miles. Two other tributary watersheds known as the Murray Canyon and the Andreas Canyon watersheds have a watershed area of 17.3 square miles. These waters were accustomed to flow northerly through and out of Palm Canyon onto its alluvial cone or fan which extends from the mouth of Palm Canyon to a point where that cone is intercepted by the Tahquitz flood plane. The main channel in which the waters flow is along the foot of the Murray Mountains until they reach the state highway at a place known as Araby Point, where they flow generally northeasterly and easterly across section 30 and across appellant's land in section 29, township 4, south range 5 east, S. B. B. & M., hereinafter referred to as section 29. The main Palm Canyon cone was crossed by a paved highway extending in an easterly direction from a point south of the town of Palm Springs to the town of Indio, and which was designated throughout the testimony as the "state highway". This highway, at the times of the two floods here involved, crossed the fan or cone of Palm Canyon at roughly a right angle, passing by the northerly end of Murray Mountains at Araby Point, thence following an easterly and southerly course toward Indio. In doing so it traversed a portion of the southerly half of section 29. The west line of this section lies approximately one mile east of Araby Point. It was stipulated that it was only the property in the south half of section 29 which plaintiff claims was damaged by the action of the defendants. From Araby Point the mountains turn abruptly and follow a general easterly and southeasterly direction forming the southerly boundary of the Coachella Valley, and are known as the Santa Rosa Mountains. The San Jacinto Mountains, which form the west boundary of Palm Canyon and the Palm Canyon alluvial fan or cone, continue on in a northerly direction for a distance of several miles. At their easterly base to the north of the cone and north of the flood plane of Tahquitz lies the town of Palm Springs, approximately a mile or more north from where the alluvial fan or cone is crossed by the state highway. From Palm Springs the Tahquitz River, having its origin in the San Jacinto Mountains, flows across the Coachella Valley in an easterly and southeasterly direction and across portions of section 29, the property of plaintiff. Whitewater River flows north of the city of Palm Springs and in a southeasterly direction to where it joins with Tahquitz River at a point south and east of section 29, and continues on past Cathedral City to the general vicinity of Indio. Palm Canyon River is dry except during and immediately after the rainy season.

The Palm Canyon alluvial fan has a definite sweep and extent until it is interrupted by another topographical feature, namely, the Tahquitz flood plane. Northerly of Tahquitz flood plane there exists the Whitewater River system and the Whitewater alluvial fan below what is known as Whitewater Point. The channel of the Whitewater River system passes below what is known as Windy Point or Whitewater Point. The Palm Canyon alluvial fan comes in from the south and meets the alluvial fan of the Whitewater stream system, and confines the Tahquitz flood plane to a comparatively narrow belt between the two, the sand hills to the north of the flood plane representing the sweep of the Whitewater cone or fan, and the southern bank of the Tahquitz representing the extent of the Palm Canyon alluvial fan. Whitewater River starts easterly down the north side of Coachella Valley and then makes a sweep of about 45 degrees, crosses over its fan and joins the Palm Canyon stream system just below section 29 against the foot of the Santa Rosa Mountains. The junction is the lowest point in the drainage system of Whitewater, Palm Canyon River and Tahquitz River.

Palm Canyon Cone has a peculiarity not typical of most cones, i.e., its tilt. Instead of coming out and flowing at equal gradients from the apex, it has been tilted, governed by the grade of Tahquitz Creek which intercepts its northern extension. The tilt of the cone has resulted in a raising of the western portion or a dipping of the eastern portion, with the steepest gradient along the eastern margin of the cone, namely, along the line of the channel at the foot of the Murray Mountains.

In the vicinity of Smoke Tree Point, which juts out into the line of drainage of the main cone, is a subsidiary cone. The tilt of the major alluvial fan also governs this subsidiary cone, causing the flow on this cone to return in a northeasterly direction to what is described as the main channel. Another subsidiary cone occurs at Araby Point. This cone is similar to the cone at Smoke Tree Point, except that it has no support on the east by the mountains. The waters leaving the apex of Araby Point cone not only naturally continue northerly or northeasterly, but also swing around into a northeast and easterly direction, and even in a southeasterly direction. This is influenced by the tilt of the Palm Canyon cone as well as the Tahquitz flood plane. There is a drop of 113 feet in elevation from a point known as Black Tent, which is located on the state highway on the Palm Canyon alluvial cone, approximately a mile west of what is known as the Smoke Tree Ranch, to the southwest corner of Cree's Date Garden, located in section 29.

A further factor of importance is the slope of the land from Tahquitz Wash to the foot of Santa Rosa Mountains. There is an eight-foot drop to the south along the west line of section 29. At the north and south center line of section 29 there is approximately a twelve-foot drop from Tahquitz Wash to a point in front of

Cree's Date Gardens at the southwest corner thereof.

The land of defendant Smoke Tree Properties, Inc., and a portion of the land of defendant Otis lie on the Palm Canyon alluvial cone,. hereinbefore referred to, south of the state highway, and these lands are adjacent to each other. The Otis lands are in the east half of section 25, township 4 south, range 4 east, S. B. B. & M., and the Smoke Tree property constitutes the west half of said section 25, which property is referred to as the Smoke Tree Ranch.

Plaintiff has been the owner of section 29 for many years. In 1929 she appeared before the Coachella Valley Storm Water District Board of Trustees, at a meeting which was called to discuss the construction of a public dyke leading northeasterly from Araby Point. At that time she stated that she had been paying storm water taxes. She asked the trustees to appropriate money "to do some construction work at Araby Point for the purpose of protecting these lands, section 29" and lands northeasterly from that point from overflow waters of Palm Canyon wash. She stated that some of the waters of the 1927 flood had flowed over her land from Palm Canyon. A public dyke was subsequently constructed by the County of Riverside. Plaintiff contributed to its cost. The length of the public dyke, as originally designed, was 2,600 feet and was designed for the purpose of closing in two washes in the northwest corner of section 30. The dyke, as actually constructed, was 1,500 feet long. The south end of it was 21 feet north from the center line of the then proposed highway. At Araby Point, between the south end of the public dyke and the highway, as later constructed, a levee was built across the 21-foot gap. That gap was lower than the dyke for two or three years before the 1937 flood. The construction of the levee consisted of sand bank and wire fence, with iron pipe driven on the west side of it. The area between the pipe and wire and the top of the levee was filled with brush. The posts were in the ground 10 feet and protruded four feet above it. Wire was strung from those fence posts and each post was 7½ to 8 feet apart. The levee was 18 feet at the base, 6 feet on the top and was 4 to 4½ feet high. It was agreed that the levee was not constructed to meet a flood of the magnitude of 1927.

During the latter part of 1936 the defendants constructed on sections 25 and 36 two dykes of earth, rock and wire. The most easterly of those dykes extended in a northeasterly direction along the base of Murray Mountains from a point known as Smoke Tree Point in a straight line to where it ended at the State Highway at Araby Point, a distance of approximately one-half mile. The westerly dyke commenced a short distance south of the southwest corner of section 25 and extended northeasterly therefrom in a straight line to the state highway opposite Araby Point, a distance of approximately one mile. At all points where the two dykes paralleled each other, they were 170 feet apart. Those dykes were constructed of earth, brush and trees, together with a wire fence erected to aid in the retention of the materials comprising the dykes. The earth fill back of the wire fence was 12 feet wide at the bottom, 6 feet wide at the top, and 4 feet high, with the exception that commencing at a point 900 feet southwesterly from the center line of section 25, and extending northeasterly for a distance of 500 feet to a point 400 feet southwesterly from said center line, the earth fill back of the wire fence was 18 feet in width at the bottom, 9 feet wide at the top, and 6 feet high. This last-mentioned section was referred to in the testimony as the "Super Dyke". Some of the material for constructing those dykes was obtained by scraping the soil and clearing the same of the brush and trees from the area between the dykes. Additional trees and brush were obtained from other areas.

In 1937 a major flood occurred, overflowing and destroying major portions of the dykes constructed by defendants and also sapping and practically destroying the public dyke erected in 1929. Portions of those waters turned easterly at Araby Point, washed across and damaged the southwesterly portions of plaintiff's land in section 29. The flood peaks at Palm Canyon, taken at the U. S. G. S. Station shows a flow in 1927 of 9,400 second feet. There was a greatly reduced flow for the following years until 1937, when there was a flood peak flow of approximately 4,000 second feet. In 1938 the flood peak was approximately 2,250 second feet. Among the many exhibits received in evidence and considered by the court will be found a picture (Exhibit 49). It was taken of the flooded area a few hours before the peak flow of 1937. A stalled truck was on the highway at Araby Point where the water crossed the state highway. The water at that point practically submerged the truck in its entirety. The water appeared to be of an estimated depth of 6 to 8 feet at that time. The estimated width of the main channel at that point is greatly in dispute. From defendants' evidence it appears that that distance ranged from 100 feet to 200 feet, and that any waters which extended beyond that were overflow flood waters which escaped from the main channel.

Plaintiff contends that in previous years several channels crossed the state highway as far north as the Smoke Tree Ranch and that in 1937 the main flow of water crossed the state highway between the dykes erected by defendants. The evidence in reference to this contention will be hereinafter discussed.

The trial judge, during the course of the trial, accompanied by an expert witness for each party, visited the scene. They pointed out to the judge the facts in dispute, the general contour of the alluvial cone, the existing banks of the main channel, the remains of the several dykes, and such other facts as were essential to a proper determination of the issues presented.

The main points now involved in this case on appeal are (1) Did the defendants have a right to build and maintain their dykes at the place and in the manner in which the same were constructed and maintained? (2) Did the construction and maintenance of the dykes cause the damage to plaintiff's land, i.e., is there any causal connection between the acts of the defendants and the damage, if any, done to plaintiff's land? The lower court found in favor of the defendants on both of the above issues. In addition, the court found that the waters which escaped from Palm Canyon River were overflow waters, i.e., flood waters against which the defendants had the right to protect themselves.

Appellant challenges the correctness of those findings and asserts that the uncontradicted evidence shows that the waters flowing out from Palm Canyon and to and over the alluvial cone thereof were seasonal storm waters arising from rainfall and melting snow in the mountains to the south thereof; that they flowed from the alluvial cone in washes and spread over a wide area on their way to Tahquitz River, none of which were well defined channels with beds and banks; that no main river course existed with a defined bed or bank out of which or through which "flood waters", as defined by our courts, could have overflowed or broken out so as to justify defendants in the construction of the dykes; that the dykes brought about the collection and concentration of those waters in a narrow, artificial channel, discharging them at one point where, as a necessary consequence, they flowed to and across plaintiff's lands.

Plaintiff has cited many cases which establish the principle of law that in a case of surface waters having no defined channels, an upper appropriator cannot gather and concentrate surface water from a large area in a single channel and precipitate it in volume upon the servient tenement. Everett v. Davis, 18 Cal.2d 389, 115 P.2d 821; San Gabriel Valley Country Club v. County of Los Angeles, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200; LeBrun v. Richards, 210 Cal. 308, 291 P. 825, 72 A.L.R. 336; Sanguinetti v. Pock, 136 Cal. 466, 69 P. 98, 89 Am.St.Rep. 169; Rudel v. County of Los Angeles, 118 Cal. 281, 50 P. 400; Humphreys v. Moulton, 1 Cal. App. 257, 81 P. 1085.

Defendants recite that "there is no disagreement between the parties in this case concerning the legal principles involved", and cites Barnes v. Marshall, 68 Cal. 569, 10 P. 115, where it was held that in case of storm waters, a property owner has the right to protect his land from the threatened change in the channel of an adjoining stream by erecting along the border a bulkhead as high as the original bank of the stream. Since this early decision, more important cases decided by our California courts on this subject are Lamb v. Reclamation District No. 108, 73 Cal. 125, 14 P. 625, 2 Am.St.Rep. 775; McDaniel v. Cummings, 83 Cal. 515, 23 P. 795, 8 L.R.A. 575; Jones v. California Development Co., 173 Cal. 565, 160 P. 823, L.R.A.1917C, 1021; Gray v. Reclamation District No. 1500, 174 Cal. 622, 163 P. 1024; Horton v. Goodenough, 184 Cal. 451, 194 P. 34; Weinberg Co. v. Bixby, 185 Cal. 87, 196 P. 25; and the more recent decisions of Mogle v. Moore, 16 Cal. 2d 1, 104 P.2d 785; Everett v. Davis, supra; and Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1.

[1-3] In Horton v. Goodenough, supra, at page 453 of 184 Cal., at page 35 of 194 P., the court stated: "First, one has no right to obstruct the flow onto his land of what are technically known as surface waters. (Citing cases.) But by 'surface waters' are not meant any waters which may be on or moving across the surface of the land without being collected into a natural water course. They are confined to waters falling on the land by precipitation or rising thereon in springs. Putting it conversely, they do not include waters flowing out of a natural water course, but which yet were once a part of a stream and have escaped from it, 'flood waters' in other words. (Citing cases.) Second, one has the right to protect himself against 'flood waters,' that is, waters of the character last described, and for that purpose to obstruct their flow onto his land, and this even though such obstruction causes the water to flow onto the land of another. (Citing cases.) Third, one may not obstruct or divert the flow of a natural water course. But by a 'water course' is not meant the gathering of errant water while passing through a low depression, swale, or gully, but a stream in the real sense, with a definite channel with bed and banks, within which it flows at those times when the streams of the region habitually flow. (Citing cases.)"

[4] These general rules have been followed in subsequent cases and the courts have in practically all cases defined the general character of waters from which a property owner might or might not protect himself. Illustrative of this is the case of Mogle v. Moore, supra, which quotes from 26 California Jurisprudence, p. 280, section 493, defining flood waters, as follows [16 Cal.2d 1, 104 P.2d 789]: "Flood waters are distinguished from surface waters by the fact that the former have broken away from a stream, while the latter have not yet become part of a watercourse. The term 'flood waters' is used to indicate waters which escape from a watercourse in great volume and flow over adjoining lands in no regular channel, though the fact that such errant waters make for themselves a temporary channel or follow some natural channel, gully or depression does not affect their character as flood waters or give to the course which they follow the character of a natural watercourse."

It has been further held in this state that the liability of one who installs, maintains, or operates structures to protect his property against flood waters, depends on whether the acts of the owner of such structures were reasonable under the circumstances. Wade v. Thorsen, 5 Cal.App.2d 706, 709, 43 P.2d 592.

From the above it is apparent that in view of the different rules applicable to the cases of flood and surface waters, we must now review the testimony to determine whether or not there is sufficient evidence to support the court's finding that the waters here involved were flood waters against which the defendants were entitled to protect themselves.

As to the nature of those waters, the evidence shows that plaintiff's expert witness, Mr. Hall, after duly qualifying himself as such, and stating his reasons for his opinion, in speaking of the Palm Canyon River, gave as his opinion that the "principal amount of water flowed down close to the hills (Murray Mountains) and smaller quantities have left this (channel) and wandered across the (alluvial) fan to the west, in temporary channels,—" which changed from time to time.

Mr. Rowe, a duly qualified expert witness for defendants, who also testified as a lay witness, described conditions as they existed in the Palm Canyon River commencing with the year 1920. In that year he saw that water had flowed past Araby Point, but could not give the exact width of the flow. He did not see any area, either north or south of the highway, on which water had flowed west of the wash at Araby Point. In the 1921–1922 season he stated that the main body of water hugged Araby Point; that in 1926 the water again hugged Araby Point, and south of the highway was confined to an area now bounded by the dykes, or possibly the eastern boundary was a little more to the east than the easterly dyke; that on April 5, 1926, after the peak of the 1926 storm, there had been no flow of water across the highway west of the flow at Araby Point, except at the northwest corner of section 25. In 1927, he stated the active channel was right at Araby Point, i.e., the channel was right along the line where the dykes were later constructed, or possibly extended more to the east. Photographs in evidence support that statement.

The above-mentioned testimony generally concerns the area at Araby Point. Mr. Rowe's testimony with regard to conditions as they existed at the southerly end of the defendant's westerly dyke is that there was a channel which apparently came into the southerly end of the westerly dyke at an angle; that he measured the maximum flow of that channel and found it to be 80 second feet; that another small channel joined the above-mentioned channel at the south end of the dyke and came in from the southwest. He stated it to be his opinion that that channel was "an overflow channel from the main channel". On the west side of the channel above Lone Ranch Point, there existed a 7-foot bank. Between it and Lone Ranch Point flow the combined waters of Palm Canyon, Murray Canyon and Andreas Canyon. The width of the wash at that point in 1936 before the 1937 storm was 170 feet. After the 1937 storm it was 340 feet wide and the 1938 storm widened it to 382 feet. Mr. Rowe identified a westerly bank from Smoke Tree Point south to Lone Ranch Point, which existed prior to the 1937 flood. The easterly bank lies along the foot of the Murray Mountains through that area. He also testified that there was a continuous westerly bank along that course 18 inches to 4 feet high and that another channel leading from the main channel at Smoke Tree Point was an overflow channel because it had to flow over that bank, and that in 1927 the active channel of Palm Canyon River was right along the lines where the dyke was later constructed; that the dykes did not interfere with the natural flow of the waters at Smoke Tree Point, but did prevent overflow.

Other testimony of importance bearing upon that general subject was the testimony of the witness Rowe with respect to the gradients along the Palm Canyon alluvial cone. He showed that the steepest gradients were along the foot of the Murray Mountains. He illustrated his discussion with a model which was explained in his testimony. He also testified that the waters of Palm Canyon in 1935 and 1936 followed the course of the dyke after crossing Smoke Tree Point, and that the dykes did not interfere with the natural flow of the waters at that point.

An engineering expert, Mr. Adams, testified for defendants. Most all of his factual data was gathered years prior to the institution of this suit, while he was employed by the Coachella Valley Storm Water District. He testified that the waters of Palm Canyon in the flood of 1922, passed Araby Point right at the point but that he did not make any measurements as to the width; that in the 1921 flood, the waters ran adjacent to Araby Point and that he was hauled across the water on the road for a distance of 200 to 300 feet; that during the floods of 1921–1922 and 1925–1926 water was likewise immediately adjacent to Araby Point; that the width depended on how much water was running; that "the widest I saw water, or evidences water had crossed the road, there at that point, was 400 feet"; that water crossed the road immediately at Araby Point when there was none at other places; that he made his observations two days after the peak of the 1927 storm; that at some time during the flood, waters had covered "all of the area from Araby Point to a point 600 or 700 feet west of the bend". But he stated that this area had been sheet flooded and there were no defined channels west of the channel at Araby Point; that he noticed the west bank of Palm Canyon channel to the north of the highway and stated it was about a half foot above the bottom of the wash; that the wash at Araby Point from the east side to the west side was 200 feet.

In this connection, it should be borne in mind that the 1927 flood was the largest flood of which any record had been kept. He then testified that "90% of the waters of Palm Canyon flowed down along the foot of the Murray Mts." all the way to Araby Point; that that figure included all of the storms concerning which he testified, including the 1927 flood.

Several lay witnesses produced by the defendants also gave corroborating testimony concerning the location and width of the main channel. One testified that excluding the 1937 storm, after the main waters of the rivers subsided, the water ran in Palm Canyon wash 25 to 30 feet from Araby Point and was in substantially the same place each time. One witness testified that "the main wash extended from 100 to 200 feet west of Araby Point" and that there were no westerly banks to the wash at Araby Point, but they were slopes rather than sharp banks.

It is from Smoke Tree Point northerly to Araby Point that any difficulty is encountered with regard to the establishment of a definite channel or embankment, but even here there is substantial evidence to support the court's findings that a main channel did exist along the main wash, and it is admitted on both sides that the main wash extended along the foot of the Murray Mountains and that there was an easterly embankment extending northerly to Araby Point. The evidence shows that the main wash ran between the two dykes and that the tilt of the cone is toward the east and the steepest gradients are along the foot of the mountains and that the natural tendency is for the water to flow along the foot of the mountains.

It will be seen from this summary that the west bank of the channel between the points questioned is defined more by the tilt of the cone and the gradual rise of the land than by any vertical bank on the ground. The trial court was justified in finding that the channel is from 100 to 200 feet in width and that any waters which extended beyond a distance of 200 feet from Araby Point were overflow waters which escaped from the channel. While the width of the channel from Smoke Tree Point to Araby Point cannot be definitely established as 170 feet, because sometimes water flowed in a channel 25 feet wide and other times 200 feet wide, nevertheless, the lower court found that the dykes were reasonably spaced as to location of the channel and as to where waters flowed in the channel prior to the time of the construction of the dykes.

[5] In Lux v. Haggin, 69 Cal. 255, at page 418, 4 P. 919, 10 P. 674, at page 770, the court said: "It is not essential to a water-course that the banks shall be unchangeable, or that there shall be everywhere a visible change in the angle of ascent marking the line between bed and banks. * * * We can conceive that along the course of a stream there may be shallow places where the water spreads, and where there is no distinct ravine or gully. Two ascending surfaces may rise from the line of meeting very gradually for an indefinite distance on each side. In such case, if water flowed periodically at the lowest portion of the depression, it flowed in a channel, * * *".

[6] A nearly analogous case to the instant one is San Gabriel Valley Country Club v. County of Los Angeles, supra [182 Cal. 392, 188 P. 555, 9 A.L.R. 1200]. In that case, where the storm drain "follows the general direction of the wash, and for some of the distance is laid in it, but for some of the distance departs from it" it was stated at page 406 of 182 Cal., at page 559 of 188 P., 9 A.L.R. 1200, that: "* * * an improvement for the purposes of the drainage and protection of lands above does not give a lower riparian owner on the stream a cause of action merely because such improvement increases the volume of water in the stream as it comes to his land, even though the burden he is necessarily under of protecting his land against the stream is thereby increased and his land is injured because of his failure to meet such increased burden, * * * the rule is not subject to the limitation that the increased volume must not be such as to make the stream exceed the capacity of its channel."

[7, 8] Another case quite similar in its facts to the instant case is Archer v. City of Los Angeles, supra, where the defendant straightened, widened and deepened a creek and its tributaries and constructed concrete storm drains to improve drainage. The Supreme Court, speaking through Mr. Justice Traynor, attempted, in a very able discourse on the law, to reconcile all of the former cases decided by the courts of this state on the point involved. It was there stated at pages 26, 27 of 19 Cal.2d, at page 5 of 119 P.2d: "The improvements must follow the natural drainage of the country. If the water is diverted out of its natural channel and discharged into a different channel or upon neighboring land, the diverter is liable to the owner whose land is injured by such discharge. * * * Likewise there is no diversion if surface waters, flowing in no defined channel, are for a reasonable purpose gathered together and discharged into the stream that is their natural means of drainage even though the stream channel is inadequate to accommodate the increased flow. * * * 'Not to permit an upper land owner to protect his land against the stream would be in many instances to destroy the possibility of making the land available for improvement or settlement and condemn it to sterility and vacancy. Such a rule would seriously interfere with the development of the country. Because of this and because of the necessity of permitting the utilization for

drainage of the means afforded by nature for the purpose, a very great preponderance of the decisions in other states go further than it is necessary to go in this case and hold that a riparian owner has no right to complain because the volume of water in the stream is increased by artificially draining surface waters into it above, provided only the stream is the natural drainage channel for the lands so drained. * * * If the surface waters are gathered and discharged into the stream which is their natural means of drainage, so that they come to the land below only as a part of the stream, it is held that no action lies because of their being added.'"

[9, 10] Many of the cases cited by appellant have been analyzed and discussed in that opinion. We will not elaborate further, but suffice it to say that many of the cases cited were cases wherein the trial court found that the waters were diverted from their natural course and as a result thereof injured the plaintiff's land. In the instant case the trial court has found otherwise. Here considerable evidence was produced which might have supported a contrary finding had the trial court so determined, and a different question would then be presented to us. Under the time-honored rule, because of the presumptions in favor of the findings and judgment of the trial court, the appellate court, when reviewing the evidence in support of a finding, must accept as true all evidence tending to establish the correctness of the finding, and it must consider it in the most favorable aspect toward the prevailing party and give him the benefit of every inference that can be reasonably drawn in support of his claim. When the evidence is conflicting this court will presume that the evidence in support of the findings is true and construe it and resolve every substantial conflict as favorably as possible in support thereof. Bancroft-Whitney Co. v. McHugh, 166 Cal. 140, 134 P. 1157; 2 Cal.Jur. p. 879, sec. 515.

[11, 12] Some consideration must also be given to the fact that the trial judge visited the scene and made his own observations on the ground. Robinson v. County of San Diego, 115 Cal.App. 153, 300 P. 971; Anderson v. State of California, 61 Cal.App.2d 140, 142 P.2d 88. The finding of the trial court on this issue will not, therefore, be disturbed.

[13] We will next consider the question whether there was sufficient evidence to support the finding of the trial court that the construction of defendants' dykes did not cause the damage to plaintiff's land, that is, that there was no causal connection between the acts of the defendants and the damage, if any, done to plaintiff's land. While there was evidence that might have supported a court's finding to the contrary, there was ample evidence to support the finding as made. In this respect the witness Mr. Rowe testified as follows: "Taking into consideration the matters heretofore referred to, that is, my studies, my observations, my knowledge of the testimony and of the documentary evidence * * * the effect the construction of defendants' dyke had upon the flow of the waters of Palm Canyon River, I say that in my opinion the construction of defendants' dykes had very little effect, if any, upon the normal flow of Palm Canyon water at the time of the peak of the flow of the 1937 storm"; that "in my opinion the public dyke would have failed in the same manner in which it did, even if the defendants had had no dykes"; "that the same amount of damage would have been incurred on the south half of section 29 * * *"; and that "assuming that neither defendants' dykes nor the public dyke had been built, it is my opinion that the damage to the south half of Sec. 29 would have been identical to that which occurred during the flood of 1937."

In view of the evidence above related and the opinion of the expert witness, it appears that the finding of the trial court on this subject is sufficiently supported by the evidence.

Several exceptions have been taken to the admissibility of certain testimony and the court's rulings thereon. We have duly noted these exceptions and are thoroughly convinced that they were not prejudicially erroneous. The evidence supports the findings and the findings support the judgment.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

Hearing denied; CARTER, J., dissenting.

61 Cal.App.2d 505

REDWOOD FIBRE PRODUCTS CO., Inc., v. MILLER MFG. CO. et al.

No. 12408.

District Court of Appeal, First District, Division 1, California.

Nov. 29, 1943.

1. Attachment ⟹250

On motion to dissolve an attachment on ground that action was in tort and not upon contract for payment of money, it was presumed that allegations of complaint were true. Code Civ.Proc. § 537, subd. 1.

2. Attachment ⟹5

Under statute authorizing an attachment in actions upon contracts for direct payment of money, all that is required is that the action be based on a contract for payment of money; the word direct, being deemed surplusage. Code Civ.Proc. § 537, subd. 1.

3. Attachment ⟹5

Buyer's action against seller for breach of warranty involving manufacture and sale of two mills was an "action upon a contract for payment of money" within statute authorizing attachment, and not "in tort" where pleaded sale contract embodied an express promise by seller to pay to buyer purchase price of mills in event of a breach of warranty. Code Civ.Proc. § 537, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Action in Tort" and "Action Upon a Contract for Payment of Money".

4. Attachment ⟹5

An attachment will lie upon a cause of action for breach of contract where the damages are readily ascertainable by reference to the contract, and the basis of computation of damages appears to be definite and reasonable. Code Civ.Proc. § 537, subd. 1.

5. Attachment ⟹5

Where purchase price was one of the sums which buyer sought to recover from seller for breach of warranty and purchase price was readily ascertainable by mere reference to sale contract, buyer was entitled to an attachment against seller's property, notwithstanding that buyer united in its complaint a non-attachable cause of action and that seller's express promise to repay the purchase price was conditioned on a breach of warranty was immaterial where it positively appeared from complaint that there was an actual default in performance of condition. Code Civ.Proc. § 537, subd. 1.

6. Attachment ⟹6
Sales ⟹391(1)

When a sum of money has been paid pursuant to a sale contract and the consideration for the sale has entirely failed, the law will imply a promise on part of seller to repay the money to the buyer and an attachment will lie against seller's property in favor of buyer. Code Civ.Proc. § 537, subd. 1.

7. Attachment ⟹103

That affidavit pursuant to which attachment was issued averred that sums sued for were due upon an implied contract for payment of money, when in fact the sums were due upon an express contract, did not invalidate the attachment. Code Civ.Proc. § 537, subd. 1.

8. Attachment ⟹232

A motion to discharge an attachment cannot serve as a "demurrer" if the defect in the complaint can be cured by amendment. Code Civ.Proc. § 537, subd. 1.

See Words and Phrases, Permanent Edition, for all other definitions of "Demurrer".

9. Attachment ⟹5

Buyer's complaint against seller for breach of warranty sufficiently alleged rescission of sale contract embodying seller's express promise to repay the purchase price to buyer in event of a breach of warranty, notwithstanding failure to allege service of a formal notice of rescission upon seller and therefore an attachment lay against seller's property on theory of an express promise for repayment of the purchase price. Code Civ.Proc. § 537, subd. 1; Civ.Code, § 1789(1) (d), (3–5).

Appeal from Superior Court, Stanislaus County; G. B. Hjeim, Judge.

Action by Redwood Fibre Products Company, Inc., against Miller Manufacturing Company and others, etc., for breach of warranty involving the manufacture and sale of two mills. From an order dissolving an attachment, plaintiff appeals.

Reversed.

A. Don Duncan, of San Francisco, for appellant.

Nathan B. McVay, of Modesto, for respondents.

KNIGHT, Justice.

Plaintiff appeals from an order dissolving an attachment levied on a small bank deposit and the undisclosed contents of a safe deposit box.

[1] The writ was issued in an action to recover several sums of money, aggregating $8,782.80, claimed to be due plaintiff on account of the alleged breach of a contract of warranty involving the manufacture and sale by defendants of two mills or machines designed to grind and shred redwood bark. Under the terms of the contract as pleaded defendants expressly agreed that in the event of a breach of the warranty they would repay to plaintiff the cost of the mills, and one of the sums sought to be recovered, to wit, $1,339, represents such cost. The other sums represent items of damage plaintiff claims to have sustained as the result of the alleged breach. The motion to dissolve the attachment was made and granted upon the sole ground that it appeared from the complaint that the action "is one in tort for damages and not on contract", and therefore does not fall within the scope of that part of subdivision 1 of section 537 of the Code of Civil Procedure, which provides that a plaintiff may have the property of the defendant attached "1. In an action upon a contract, express or implied, for the direct payment of money * * *." The single issue to be determined by the appeal is therefore whether the construction so placed by the trial court upon the cause of action pleaded is sustained by the allegations of the complaint; and in considering and determining that issue it must be presumed that such allegations are true.

The essential facts alleged are as follows: For some time prior to March 5, 1941, plaintiff had been preparing to engage in the business of grinding and shredding redwood bark into bark wool, which it intended to place upon the market and sell for insulation purposes; but in order to do so profitably it was necessary to have two mills built which would be capable of turning out a minimum of 30 tons of bark wool each week. The defendant company operated a manufacturing plant in Modesto where it built grinding mills and machines of different types, and on March 5, 1941, as the result of negotiations between the officers of the two companies, which extended over a period of about three weeks, the defendant "assured and warranted to plaintiff," so the complaint alleges, "that said defendant could and would build and manufacture two mills for the plaintiff, which would be in all respects fit and proper and suitable for the aforesaid purposes, and would do the aforesaid work satisfactorily and in the required volume, to-wit, that said mills would produce a minimum of at least one car, or 15 tons per week of the finished product, per machine, or a total of 30 tons per week, for a total price for the two machines of Fourteen Hundred ($1400.00) Dollars, plus sales tax; and the said defendant then and there offered to plaintiff to build and manufacture said two mills within thirty days and deliver them to plaintiff's plant at Santa Cruz, California, for said price; and then and there said defendant assured and warranted to plaintiff that if said mills would not do the aforesaid work satisfactorily, that defendant would make them do the work satisfactorily, without any expense, in this connection, to plaintiff, or *that in the event said machines should not do the aforesaid work satisfactorily, that the cost of the said mills would be paid by said defendant to plaintiff.*" (Italics ours.)

Continuing, the complaint alleges "that on or about the 7th day of March, 1941, the said offer and warranty was confirmed by defendant to plaintiff in writing. That on or about March 10, 1941, the plaintiff transmitted to defendant a written acceptance of the said offer and warranty and accompanied same with a down payment, or deposit of $300.00, as agreed"; that "on or about April 23, 1941, the said mills were delivered by defendant to plaintiff's plant and coincident therewith, plaintiff paid to defendant the balance in full of the purchase price of said mills with sales tax."

The complaint then goes on to allege that the mills were installed under the supervision of defendant's mechanics and factory superintendent, and were set in operation about May 9, 1941, but that they "were never able to do the said required work"; that from May 9, 1941, up to October 1, 1941, defendant's employees were "continually experimenting and tinkering with said mills" in an endeavor to make them do the required work, and that during that period defendant assured plaintiff that it would make them do the work and "would remedy all defects and deficiencies in said mills at its own expense"; "that on or about August 15, 1941, one of said mills became a complete wreck through its improper construction and unfitness for the required purpose, and said defendant offered to fix same at its own expense if it was returned to said defendant's factory at Modesto, but after same was so returned by plaintiff, and on or about September 18, 1941, said defendant notified plaintiff that said mill would not be returned at all except upon the condition that plaintiff pay an additional sum of $185.00 for repairing said mill, upon receipt of the mill; which demand was in express violation of said defendant's aforesaid assurances and warranty. That on or about September 20, 1941, plaintiff notified said defendant that said machines would not and could not do the aforesaid required work, and that said demanded charge for repairing said wrecked mill was improper and in violation of the aforesaid assurances and warranty, and that if said demanded charge was not withdrawn that plaintiff would return both mills. That said charge was never withdrawn. That on October 1, 1941, on account of the total inability of the said machines to do the aforesaid required work, and on account of the aforesaid failure and refusal of the said defendant to make any further repairs or changes in said machines without charging the plaintiff therefor, and on account of the aforesaid refusal and failure of said defendant to return the mill in its possession except upon condition of plaintiff's paying the demanded charge for repairing said machine, to-wit, on account of the aforesaid breaches of defendant's assurances and warranty, plaintiff was forced to abandon any further attempts to make said machines do the required work, and any further expenses in trying to make them work, and was forced to purchase other machinery to do the aforesaid required work, and so notified said defendant on said date of October 1, 1941. * * * That neither of the said mills was able to do the required work at all under the normal conditions of the business as known to the defendant, for more than an average continuous run of one-half hour at a time, before a major breakdown would occur, nor for more than a maximum continuous period of operation of four hours, on one occasion, on which occasion that mill completely wrecked itself. That the said mills were not constructed properly by defendant to do the required work. That the said machinery was never able to grind or shred the redwook bark as required, or as warranted, or properly or suitably, nor were they ever able to turn out the produce satisfactorily, or in any volume. That the total finished product turned out by said machines within the entire period from May 9, 1941, to October 1, 1941, was and is negligible. That the aforesaid mills were and are, and each of them were and are, worthless and of no value whatever for the uses and purposes aforesaid, for which defendant made and sold them to, and warranted them to plaintiff, and that the consideration for the payment for said machines has wholly failed."

The remainder of the complaint is devoted to allegations of elements of damage plaintiff claims to have sustained as the result of the alleged breach of warranty, the largest item being for $5,200 for loss of profits, "less profit on 12 tons sold, $120.00." The other items, aggregating $2,363.80, consist of cost of labor, welding, drayage, "handling charges," repairs and telephone calls and cost of various trips to Modesto.

[2, 3] We are of the opinion that under the terms of the contract as pleaded plaintiff was entitled to an attachment. All that is required by the provisions of the code section authorizing an attachment is that the action be one based on a contract calling for the payment of money, the word "direct" as used in said provision being deemed surplusage (McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642, 95 A.L.R. 1019); and in the present case, as will be noted, the contract as pleaded embodies an express promise on the part of defendant to pay to plaintiff a specific sum of money, to-wit, the purchase price of the mills, in the event of a breach of the contract of warranty.

[4, 5] The fact that the action arose out of the alleged breach of a contract of sale does not take it out of the operation of the attachment statute, for as said in Force v. Hart, 205 Cal. 670, 272 P. 583, it is a well recognized rule of law in this state that an attachment will lie upon a cause of action for breach of contract where the damages are readily ascertainable by reference to

the contract, and the basis of computation of damages appears to be reasonable and definite. Citing Hale Bros. v. Milliken, 142 Cal. 134, 75 P. 653; Hamburger v. Halperm, 28 Cal.App. 317, 152 P. 61; 3 Cal.Jur. p. 423; see also Donnelly v. Strueven, 63 Cal. 182; Greenebaum v. Smith, 51 Cal.App. 692, 197 P. 675. Here, admittedly, the amount of the purchase price, which is one of the sums plaintiff seeks to recover, is readily ascertainable by mere reference to the contract. Plaintiff was therefore entitled to an attachment notwithstanding that it united in its complaint a cause of action for the recovery of other sums of money as damages for the breach of the contract, which if sued for alone would not entitle plaintiff to an attachment. Force v. Hart, supra; Hamilton v. Baker-Hansen Mfg. Co., 176 Cal. 569, 169 P. 238; Baldwin v. Napa, etc., Wine Co., 137 Cal. 646, 70 P. 732. The rule in this regard is stated in 3 California Jurisprudence at page 424 as follows: "It is immaterial that plaintiff has also demanded in the complaint other sums which are not liquidated. Section 427 of the Code of Civil Procedure authorizes a plaintiff to unite in his complaint several causes of action, where they all arise out of contracts; and under this section he may unite with a cause of action upon a contract for the direct payment of money another cause of action arising out of contract wherein the damages for its breach are unliquidated, and for which he is not entitled to a writ of attachment." Furthermore, it is immaterial that the express promise to repay the purchase price was made conditional, since it positively appears from the allegations of the complaint that prior to the commencement of the action there was an actual default in the performance of the condition. The basis for the rule in such cases is that upon actual default of the condition the liability for the payment of money is no longer contingent and the obligation to pay becomes a debt within the meaning of the attachment statute. See note, 65 A.L.R. p. 1440; also 4 Am.Jur. p. 627.

The position taken by defendant in support of the order granting the motion is summarized in the concluding paragraph of their brief. In substance it is this: That under the contract as pleaded defendant "did not contract to pay money, but rather to build and deliver two mills; therefore, there was no express contract to pay money." They then go on to say that: "If an attachment should lie it would be on the theory that there was an implied contract on the part of the defendant to repay the purchase price"; that such implied contract does not arise unless there has been a total failure of consideration, and that the complaint herein "shows that there was not a total failure of consideration, in that the mills were actually delivered and used."

[6, 7] It is well settled that when a sum of money has been paid pursuant to the terms of a sales contract and the consideration for the sale has entirely failed, the law will imply a promise on the part of the vendor to repay the money; and in such case an attachment will lie. McCall v. Superior Court, supra; Bennett v. Superior Court, 218 Cal. 153, 21 P.2d 946; Hamilton v. Baker-Hansen Mfg. Co., supra; Santa Clara Valley Peat Fuel Co. v. Tuck, 53 Cal. 304; 3 Cal.Jur. 424. And in this connection it should be here stated that on this appeal plaintiff seeks to invoke the application of the above doctrine as an additional ground for the reversal of the order. In fact, both parties have devoted a considerable portion of their briefs to a discussion of the question of whether the allegations of the complaint are sufficient to show a total failure of consideration. However, since the contract as pleaded embodies an express promise for the repayment of the purchase price, for which plaintiff is entitled to an attachment, it becomes unnecessary to inquire into the alternative question as to whether the facts alleged are sufficient to give rise to an implied promise for the repayment thereof. Defendant points out that the attachment herein was issued pursuant to an affidavit in which it was averred that all sums of money sued for were due upon an implied contract for the payment of money; but as held in Hamilton v. Baker-Hansen Mfg. Co., supra, the statement in the affidavit for the attachment that the money is due upon an implied contract, when in fact it is due upon an express contract, does not affect the validity of the attachment.

In support of its main contention that plaintiff was not entitled to an attachment defendant relies largely on the case of Willett & Burr v. Alpert, 181 Cal. 652, 185 P. 976, 978, but an examination of the opinion in that case shows that the contract there sued upon was essentially different in its terms from the one here pleaded in that there the contract contained no express promise on the part of the vendor to repay the purchase price or to pay any other sum of money. In this respect the court said: "* * * the action in fact is not brought for a recovery of the purchase price, or any part thereof, but is strictly for damages for a breach of contract"; and later on the court said: "* * * it is plain in the present case that there is no express contract for the direct payment of money * * *."

[8] Defendant further contends that the complaint fails to allege a rescission of the contract and that consequently an attachment will not lie on the theory of an express promise for the repayment of the purchase price. It is an established rule, however, that a motion to discharge an attachment cannot serve as a demurrer if the defect in the complaint can be cured by an amendment (Force v. Hart, supra, citing Hathaway v. Davis, 33 Cal. 161; Hammond v. Starr, 79 Cal. 556, 21 P. 971; Kohler v. Agassiz, 99 Cal. 9, 33 P. 741); and in the present case, while it would appear that a rescission may have been imperfectly pleaded, it is quite evident that sufficient facts have been alleged to meet the requirements of section 1789 of the Civil Code which defines the remedies of a buyer for breach of warranty. The pertinent portions of that section provide as follows: "(1) Where there is a breach of warranty by the seller, the buyer may, at his election: * * * (d) Rescind the contract to sell or the sale and refuse to receive the goods, or if the goods have already been received, return them *or offer to return them to the seller* and recover the price or any part thereof which has been paid. * * * (3) Where the goods have been delivered to the buyer, he cannot rescind the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return *or to offer to return the goods to the seller* in substantially as good condition as they were in at the time the property was transferred to the buyer. * * * (4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning *or offering to return the goods.* If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, *or immediately after an offer to return the goods* in exchange for repayment of the price. (5) Where the buyer is entitled to rescind the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid * * *." (Italics ours.)

[9] Here the facts alleged show that one of the mills had already been returned to defendants, and that on or about September 20, 1941, plaintiff notified defendants that the "machines would not and could not do the aforesaid required work"; that on October 1, 1941, "on account of the total inability of the said machines to do the aforesaid required work * * * and * * * on account of the aforesaid breaches of defendant's assurances and warranty, plaintiff was forced to abandon any further attempts to make said machines do the required work * * * and was forced to purchase other machinery to do the aforesaid required work, *and so notified said defendant on said date of October 1, 1941* * * *." (Italics ours.) And while it does not appear from the allegations of the complaint that a formal notice of rescission was ever served upon defendant, it does sufficiently appear in our opinion from the other allegations that there was an offer to return the second mill. As said in the case of Mahony v. Standard Gas Engine Co., 187 Cal. 399, 202 P. 146, 149, "* * * plaintiff could not have done more, except, possibly, to have said, which would have added nothing to the efficiency of the rescission, 'I rescind the contract existing between us.'"

For the reasons hereinabove stated, the order dissolving the attachment is reversed.

PETERS, P. J., and WARD, J., concur.

61 Cal.App.2d 595

VERRY v. ECKEL, County Auditor.

Civ. 3241.

District Court of Appeal, Fourth District, California.

Dec. 3, 1943.

1. Counties ⚷69(1)

The provision in county ordinance directing that vacation earned by county employee in one year should be taken in the 12 months following that year would be construed as "directory" only, in view of fact that there was no provision that if vacation was not taken within those twelve months, right to it was forfeited. Const. art. 11, § 5.

See Words and Phrases, Permanent Edition, for all other definitions of "Directory Provision".

2. District and prosecuting attorneys ⚷3(5)

The provision in county ordinance directing that vacation earned by county employee in one year should be taken in the 12 months following that year did not preclude deputy district attorney, after he left service of county on January 2, 1943, from being compensated for vacation earned in 1941 but not taken. Const. art. 11, § 5.

3. District and prosecuting attorneys ⚷3(5)

Where deputy district attorney, after leaving service of county on January 2, 1943, sought compensation for vacation earned in 1941 but not taken, but made no application for vacation pay earned in 1942, question as to whether there was a cumulating of vacations contrary to prohibition of county ordinance was not involved. Const. art. 11, § 5.

"Cumulative" means addition; that which is superadded to another thing of the same character and not substituted for it.

See Words and Phrases, Permanent Edition, for all other definitions of "Cumulative".

◆

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Mandamus proceeding by Lloyd S. Verry against L. H. Eckel, Auditor of the County of Orange, State of California, to compel respondent to draw petitioner's warrant for vacation pay earned by petitioner while serving as deputy district attorney of Orange County. From a judgment in favor of the petitioner, the respondent appeals.

Affirmed.

Joel E. Ogle, Co. Counsel, of Santa Ana, for appellant.

Thos. L. McFadden, of Anaheim, and Martell E. Thompson, of Orange, for respondent.

MARKS, Justice.

This is an appeal from a judgment ordering L. H. Eckel, as Auditor of the County of Orange, to draw a warrant in favor of Lloyd S. Verry in the sum of $216.66 in settlement of a claim for vacation pay which he had earned but had not taken.

Verry was deputy district attorney of Orange County from twelve o'clock noon of January 2, 1939, to twelve o'clock noon on January 2, 1943. It is agreed that Verry had earned a vacation for the year ending on January 2, 1942, and another vacation for the year ending on January 2, 1943, under the provisions of Ordinance 430 of the County of Orange as amended by Ordinances 440 and 446, neither of which vacations had been taken.

Under date of December 31, 1942, Verry submitted the following resignation:

"I, the undersigned, do hereby submit my resignation as a Deputy District Attorney of Orange County, California, effective as of 12 noon, Saturday, January 2, 1943.

"As you will recall, I have heretofore made application to you for vacation leave as provided by law, but did not receive the same because of the increased burdens placed upon your office during the past year. Therefore, I hereby request that you grant to me the privileges provided in subdivision (b) of Section 8 of Ordinance 446, of the County of Orange, State of California."

The resignation was accepted and the district attorney prepared his payroll which carried pay for Verry for 15 working days, the legal annual vacation period fixed by the ordinance of the county. The county auditor refused to draw his warrant for the vacation pay and this action was brought to compel him to do so. Verry recovered judgment and this appeal followed.

The cause is before us on the judgment roll and a stipulation as to certain facts which was made at the opening of the argument here. From all that appears in the record it might be concluded that Verry, having worked during the year ending on January 2, 1943, without vacation, was asking for vacation pay for the vacation earned that year. However, it was stipulated by counsel at the argument that Verry was asking for vacation pay earned during the year ending on January 2, 1942, he having been refused a vacation during the year 1942 because of the press of business in the office; that the vacation earned during the year 1942, prior to his resignation, was not involved in this proceeding. We consider this stipulation as controlling and as clearing up any uncertainty in the record.

Ordinance Number 430 of the County of Orange was passed under powers granted by section 5 of Article XI of the Constitution. It created the office of deputy district attorney and fixed the salary of the encumbent. Subdivisions a and b of section 8 of the ordinance, as amended by ordinances 440 and 446, provide as follows:

"(a) Every person holding a position provided for by this Ordinance, the compensation for which is fixed by the month or longer period, shall be entitled to an annual vacation of 15 full working days (Saturdays considered one-half working day) for each year of service, dating from the date of commencement of said service, to be taken during the first 12 months immediately following the year of such service, to be taken as follows:

"The first vacation after appointment to such a position may be taken after such person shall have been in the service for a period of one full year during which he shall have actually worked not less than 200 days, except as otherwise provided in this Ordinance, and said vacation shall be taken following the completion of the continuous year's service which gives right to such vacation period, as herein provided, which vacation may not be cumulative from year to year. Said vacation shall be with full pay. Leave of absence for sickness or otherwise shall not be counted against said vacation or be deducted from the days of service required to entitle one to a vacation on the basis of one year's continuous service; Saturday considered one-half working day.

"(b) Any person employed by the month who is about to leave the service of the County voluntarily, who shall immediately prior to his resignation have been in the service of the County continuously for one year or more as herein defined, and who shall apply for such leave before such resignation shall become effective, shall be allowed vacation with full pay for 15 full working days for one year of continuous service performed by such person in the year preceding, dating from date of employment; Saturday considered one-half working day."

Section 359c of the Political Code provides that, unless otherwise provided by law, each state officer and employee shall be entitled to a vacation of 15 working days with pay for each year of continuous service. As far as material here, the effect of this section does not differ materially from that of subdivision a of section 8 of the county ordinance as amended, except that the ordinance contains the added provisions that vacations may not be cumulated from year to year.

Section 359d of the Political Code empowers the State Personnel Board to promulgate rules and regulations for all state officers and employees who are members of the Civil Service including provisions for accumulation of vacations.

Section 150 of the State Civil Service Act (Stats.1937, p. 2085) provides that the Civil Service Board may provide by rule for the regulation and accumulation of vacations. Section 36 of the same act requires the courts to take judicial notice of the rules promulgated by the board.

Rule 13 of the Rules of the State Personnel Board governing the State Civil Service covers the matter of vacations and permits the cumulation of earned vacations up to but not beyond thirty days.

Section 4327 of the Political Code provides for annual vacations for county officers and employees of not to exceed 15 full working days and prohibits cumulating vacations from year to year. Section 4056d of the same Code continued the provisions of section 4327 in effect until superseded by county ordinances. As it was superseded by ordinance 430, as amended, we must look to the provisions of that ordinance to determine the rights of the parties here.

We have been cited to no case arising under any similar county ordinance which touches on the question before us. There are two cases involving civil service employees which by analogy are helpful.

Edwin W. Pohle was a state civil service employee who had accumulated 24½ days vacation at the time he was separated from the service on July 1, 1937. He brought an action with the object, among other things, of compelling payment, after he left the service, for his unused accumulated vacation. In Pohle v. Christian, 21 Cal.2d 83, 130 P.2d 417, the Supreme Court held that he was entitled to his salary after he left the service for the period equalling his unused vacation. Clark v. State Personnel Board, 56 Cal.App.2d 499, 133 P.2d 11, is to the same effect. Because of the similarity of the state and county enactments governing earned vacations for 15 working days these cases would seem to settle the right of Verry to his pay for his vacation earned during the year ending January 2, 1943, assuming the question of accumulated vacations be not involved. Under the stipulation of counsel that question is not involved here.

Counsel for Eckel argues that because the ordinance provides that the vacation must "be taken during the first 12 months immediately following the year of such service" and further provides that the "vacation may not be cumulative from year to year" Verry can not be permitted in 1943 to receive vacation pay for the vacation earned in 1941 but not taken in 1942.

[1,2] In this connection it should be noted that the ordinance directs that a vacation earned in one year should be taken in the twelve months following that year. There is no provision that if the vacation is not taken within those twelve months the right to it is forfeited. Here it appears that Verry wanted to take the vacation earned in 1941, during 1942; that he made several requests to be allowed such vacation; that because of the press of work in the office his requests were not granted and he was denied his right to the vacation in 1942 which he had earned in 1941. Under such circumstances, and because of the further circumstances that the ordinance does not provide that where the employee does not take his vacation during the twelve months following the year in which it is earned the vacation shall be forfeited, we are constrained to hold that this provision of the ordinance is directory and that after he left the service of the county on January 2, 1943, he may be compensated for the vacation earned in 1941 but not taken.

[3] Counsel for Eckel argues that this conclusion has the effect of cumulating vacations contrary to the clear prohibition of the ordinance.

In Fawkes v. Farm Lands Inv. Co., 112 Cal.App. 374, 297 P. 47, 50, in construing the words "cumulative" and "accumulative" as applied to dividends it was said they "signify continuing growth in volume by periodical accretions". This definition was approved and adopted in Bank of America N. T. & S. Ass'n v. West End, etc., Co., 37 Cal.App.2d 685, 100 P.2d 318. In Mannington v. Hocking Valley Ry. Co., C.C., 183 F. 133, 154, it was said: " 'Cumulative,' as defined by the legal lexicographers, means 'additional; that which is superadded to another thing of the same character and not substituted for it.' " See, also, Lockwood v. General Abrasive Co., 210 App.Div. 141, 205 N.Y.S. 511, and Barclay v. Wabash Ry. Co., 2 Cir., 30 F.2d 260.

It is argued that the judgment will permit Verry to superimpose his vacation earned in 1941, but not taken in 1942, onto his vacation earned in 1942 so that in 1943 he will have a cumulative vacation or vacation pay for 30 working days which is contrary to the terms of the ordinance.

We do not regard this question as properly before us. While it does appear that Verry earned vacations in 1941 and in 1942, neither of which he had taken, it does not appear that he has asked or is asking for the vacation earned in 1942 or pay for it. Until he does, this question of cumulative vacation does not arise. If he should make a demand for vacation pay for the vacation earned in 1942, Eckel may then raise in defense the question of the prohibition against accumulating vacations and make the arguments he is now making here. Until there is a request for such additional vacation pay, pay for the vacation earned in 1941 cannot be cumulative for there is nothing to add it to nor superimpose it upon. Until the question of the vacation earned in 1942 arises anything we would say on the question of cumulative vacations or the right to vacation pay under subdivision b of section 8 of Ordinance 430, as amended, would be dicta.

The judgment is affirmed.

BARNARD, P.J., and GRIFFIN, J., concur.

61 Cal.App.2d 514

GARIBALDI et al. v. DALY CITY et al.

Civ. 12508.

District Court of Appeal, First District,
Division 2, California.
Nov. 30, 1943.

1. Municipal corporations 🔑523(4)

In determining whether taxpayers barred themselves from recovery of assessments levied by city by manner of their payment, court must look to the common law rule governing payments made under duress or compulsion. Gen.Laws 1937, Act 8209, §§ 8, 14(a).

2. Taxation 🔑542

At common law, money demanded in payment of illegal taxes, duress and coercion being present, can be paid under protest and recovered in action brought for that purpose.

3. Appeal and error 🔑781(1)

An appellate court will not determine a question which will not affect parties' status.

4. Appeal and error 🔑781(2)

Payments without protest of special assessments levied by city were not "involuntary" under threat to issue bonds under Improvement Bond Act providing that bonds by their issuance are conclusive evidence of regularity of proceedings, and hence appeal from judgment dismissing suit to set aside special assessments would be dismissed as "moot" on ground that payors could in no event recover the money paid. Gen.Laws 1937, Act 8209, §§ 8, 14 (a).

See Words and Phrases, Permanent Edition, for all other definitions of "Involuntary Payment" and "Moot Question".

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Suit by Frank Garibaldi and others against the City of Daly City and others to set aside a special assessment levied by named defendant. From an adverse judgment, plaintiffs appeal, and defendants move to dismiss the appeal of certain of the plaintiffs on the ground that the question on appeal as to them has become moot.

Motion granted, and appeal as to such plaintiffs dismissed.

A. J. Scampini and L. F. Mahan, both of San Francisco, for appellants.

Kirkbride & Wilson and F. E. Hoffmann, all of San Mateo, for respondents.

NOURSE, Presiding Justice.

Respondents have moved to dismiss the appeal of certain named appellants on the grounds that the question on appeal as to them has become moot. The judgment appealed from was one of dismissal in a suit to set aside a special assessment levied by respondent city. Between December 11, 1942, the date of the order sustaining defendants' demurrer, and January 11, 1943, the date of the entry of the judgment of dismissal, the named appellants paid the assessments levied to the banking firm of the contractor. These payments were not made under protest. However, the contractor sent a notice to the plaintiffs which stated that if they did not pay, bonds would issue against their property. The notice of appeal was not filed until February 2, 1943. Section 8 of the Improvement Bond Act of 1915 (Act 8209, Deering's Gen. Laws, p. 3770) provides that the bonds by their issuance would be conclusive evidence of the regularity of the proceedings prior thereto.

It is the respondents' position that, having paid the assessments voluntarily, the named appellants could not recover them and therefore, no matter what the result of the appeal, it will not affect their rights. On the other hand, the appellants contend that their payment was involuntary under the threat to issue bonds which would cast an increased burden on their property by reason of section 8 of the Improvement Bond Act of 1915, and therefore in the event the appeal is determined in their favor, they could recover their payments.

[1, 2] Section 14(a) of the Improvement Bond Act of 1915 provides that payments of the assessments may be made under protest in like manner as any other taxes of a municipal body; however, the section applies only after the warrants and assessment list, previously issued to the contractor, have been returned to the municipality for the issuance of bonds on the unpaid assessments. Accepting appellants' interpretation of section 8, the remedy provided for in section 14a would be inade-

quate. Therefore, in determining whether appellants have barred themselves from recovery by their manner of payment, we must look to the common law rule governing payments made under duress or compulsion. Spencer v. City of Los Angeles, 180 Cal. 103, 179 P. 163. The rule to be applied is stated in California Jurisprudence: "However, although there seems to be a question as to the necessity of a protest under such circumstances, it has been held in a case not coming within the purview of the statutory provision relating to payments under protest, that money demanded in payment of illegal taxes, the circumstances of duress and coercion being present, could be paid under protest and recovered in an action brought for that purpose." 24 Cal.Jur. 311.

[3, 4] While it is true that in California certain cases have held that payments made under duress or compulsion without a formal protest are recoverable, such cases are distinguishable from the one before us. All those which independent research has disclosed involve sets of facts in which a formal protest would have been unavailing and in which the collector was aware of the claimed invalidity of the tax collected. Brandt v. Riley, 139 Cal.App. 250, 253, 33 P.2d 845; Flynn v. City and County of San Francisco, 18 Cal.2d 210, 115 P.2d 3. On the facts before us, even if we assume that there was such duress or compulsion in section 8 of the Improvement Bond Act of 1915 that the rule involved in Phelan v. City and County of San Francisco, 120 Cal. 1, 5, 52 P. 38, would apply, we cannot agree with appellants' position that no protest was necessary. It should be noted that in that case even though a protest was made, a threatened sale by the tax collector was held to constitute insufficient duress and compulsion within the meaning of the rule stated. A protest serves not only to warn the recipient that he must be prepared to refund the money and must guide his acts accordingly, but also to make the recipient aware of the nature of the claimed illegality. Where, as in the cited cases, the collector is aware of the claimed illegality, either by other protests of similarly situated individuals or the forceful nature of the collection method, the collector can protect himself. Here the contractor was unaware that any appeal was contemplated from the judgment, the payors did not warn him that they were not satisfied by the judgment, and the judgment in his favor would have let him into a sense of security concerning the validity of the claim asserted. Therefore we hold that the named appellants would not be entitled to recover the money which they paid voluntarily without a protest. Whatever disposition we might make of the appeal as to the remaining appellants who have not paid their assessment, the rights of the named appellants are fixed. An appellate court will not determine a question which will have no effect upon the status of the parties. The question on appeal as to them has become moot. The appeal as to them must be dismissed. Morris v. Cole, 218 Cal. 676, 24 P.2d 785; Weiss v. City of Los Angeles, 190 Cal. 576, 213 P. 979.

The motion is granted and the appeal as to the named appellants is dismissed.

SPENCE, J., and DOOLING, Justice pro tem., concur.

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61 Cal.App.2d 578

WALMSLEY v. HOLCOMB.

Civ. 3225.

District Court of Appeal, Fourth District, California.

Dec. 3, 1943.

1. Frauds, statute of ⚷144

A sublessee, who took possession of leased property, farmed it with lessors' consent, and accepted benefits of crops, was estopped, in action for rent by lessors' assignee, from raising question whether there was a written assignment of lease from lessee to sublessee. Civ.Code, §§ 1589, 1698, 3521.

2. Landlord and tenant ⚷80½, 200(1)

Evidence sustained finding that sublessee held land under lease which required payment as rental of percentage of crop, and not as a share cropper, and hence sublessee was liable to lessors' assignee for percentage of proceeds of cotton notwithstanding sublessee received no net profit from the cotton. Civ.Code, §§ 1589, 3521.

3. Landlord and tenant ⚷57(1)

An assignment of lessors' rent claim against sublessee, not naming the assignee, but which was signed by lessors and delivered to assignee, being in rightful possession of assignee at time assignee's action against sublessee was filed, was prima facie evidence of assignee's right of ownership of the claim. Civ.Code, §§ 1052, 1458.

4. Landlord and tenant ⚷57(1)

That amount claimed against sublessee by lessors' assignee exceeded the amount found due by court did not affect validity of the assignment of rent. Code Civ.Proc. § 368.

5. Landlord and tenant ⚷190(2)

A sublessee could not escape liability for rent during alleged partial eviction, where sublessee remained in possession of all of the land leased and there had been no partial eviction from any substantial portion of leased premises so as to entitle sublessee to remain in possession of the whole, rent free.

◆

Appeal from Superior Court, of Riverside County; Wm. D. Dehy, Judge Assigned.

Action by Eleanor Walmsley against T. E. Holcomb to recover money as rent due by defendant as sublessee to plaintiff as lessors' assignee. From a judgment for plaintiff, defendant appeals.

Affirmed.

Wallace P. Rouse, of Indio, for appellant.

J. L. Richardson, of Riverside, for respondent.

GRIFFIN, Justice.

This is an action wherein plaintiff and respondent, as one of the owners of certain land described in the complaint, and as the assignee of George E. Kellar and Emma L. Kellar, seeks to recover certain money as rent for the described premises.

On February 1, 1935, George E. and Emma L. Kellar, lessors, entered into a five-year written lease, of approximately 70 acres of land in Riverside County, with one J. H. Hinkle, as lessee, "yielding and paying therefor the rent of one-fourth of all crops grown" thereon and "to pay the rent above stated for such further time as the lessee may hold the same". Lessor reserved the right to use the pumps and water thereon to irrigate 30 acres adjoining. The usual covenants respecting default in payment and permission of lessor to assignment of the lease followed.

Apparently the Kellars owned and leased to defendant additional acreage than that mentioned in the written lease. Hinkle took possession under the lease and farmed the land for the years 1935 and 1936. Defendant Holcomb was one of the farm hands who worked for Hinkle on the Kellar ranch. Sometime in the latter part of December, 1936, due to the fact that Hinkle was working several other ranches and could not farm the Kellar ranch, Hinkle asked defendant Holcomb to take over his lease for the balance of its term. This was orally agreed upon by Holcomb and Kellar. The oral agreement was fully executed. Holcomb moved onto the ranch and farmed it for the years 1937 and 1938, and then moved off of the premises.

The written lease provided that the rental was to be one-fourth of all crops grown on the lands therein described. During the year 1937 Holcomb planted 100 acres to cotton, 9 acres to alfalfa and 10 acres to corn. Holcomb had charge of and sold all the crops and paid the rent of one-fourth of the proceeds of each of the crops to the Kellars with the exception of the cotton and cottonseed grown that year. During 1937 he raised $4,679.40 worth of cotton and cottonseed on the land and sold it to the California Cotton Oil Corporation (hereinafter called the Oil Co.) During the year 1938 Holcomb planted 48 acres to cotton, 4 acres of milo maize and hygeria and continued to farm 9 acres of alfalfa. That year he paid rent of one-fifth of the return from the alfalfa, milo maize and hygeria, but did not pay any rent from the proceeds coming from the cotton and cottonseed. During that year he sold the cotton and cottonseed to the same corporation for a total of $3,321.85, making a total of $8,001.25 worth of cotton and cottonseed sold from the ranch during the two years involved. Plaintiff assignee claims that one-fourth of that amount, or $2,000.31, was due under the terms of the lease and that Holcomb did not pay any part thereof except the sum of $554.32, which was advanced by the Oil Co. on bills owed by Kellar; that after deducting that amount there was a balance of $1,445.-99 due as rent for the land under the terms of the lease.

On March 11, 1938, a written agreement was entered into between the Kellars and Holcomb to the effect that Kellar would reduce the crop rental from one-fourth to one-fifth, and that this was on condition that Holcomb pay Kellar the rental money which he owed him at that time. Prior to the commencement of this action the Kellars sold and assigned to plaintiff herein their claim against Holcomb for the money due for rent. Plaintiff filed this action which was tried before the court without a jury. After allowing defendant certain credits the court found generally in accordance with the above acts and rendered judgment in favor of plaintiff in the sum of $927.58, from which judgment this appeal is taken.

[1] Defendant sets up certain defenses to the cause of action, claiming first that he was not in possession of the property under the written lease herein described and was not bound by its terms by reason of the fact that there was no written assignment of the lease from Hinkle to him because under sec. 1698 of the Civil Code a contract in writing may be altered only by a contract in writing or by an executed oral agreement, and not otherwise. Plaintiff concedes that the evidence does not show that there was a written assignment of the lease made by Hinkle to Holcomb but, on the other hand, insists that the evidence establishes that there was an executed oral assignment of the lease and, therefore, the requirement of that section had been met.

There is no question but that the evidence clearly shows the defendant Holcomb assumed the obligations of the lease, took possession of the property, farmed it with the consent of Kellar, and that the lessee understood he was to farm the land in accordance with the terms of the written lease; that so far as the lessor and the lessee Holcomb were concerned, the oral agreement to that effect became fully executed. Furthermore, the evidence shows that there was a voluntary acceptance of the benefits of the transaction on the part of defendant. Under sec. 1589 of the Civil Code a voluntary acceptance of the benefit of a transaction is equivalent to a consent to all of the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting. At any rate, under the facts of this case, defendant should be estopped from raising the question as to whether there was a written assignment of the lease. The evidence shows that he accepted the benefits of the money coming from the crops, even to the extent of mortgaging the crops and using part of the money for his and his family's livelihood. Under sec. 3521 of the Civil Code "he who takes the benefit must bear the burden." See, also, Lopizich v. Salter, 45 Cal.App. 446, 187 P. 1075; and Saks v. Knapp Investment Co., 105 Cal.App. 280, 287 P. 375. We need to refer only to a portion of the testimony to support these conclusions.

George E. Kellar testified that in January, 1937, he conversed with Holcomb about the Hinkle lease; that Holcomb said: "Well, he was going to take over the balance of the term of the lease * * * and fulfill the contract on it * * * just take * * * Mr. Hinkle's place"; that "I said O.K."; that pursuant to that conversation Holcomb took possession of the property; that Hinkle said that he had promised to and did let Holcomb "take over the lease".

Holcomb testified that Hinkle, Kellar and himself had an agreement whereby he was to "start farming Mr. Kellar's ranch"; that he knew Hinkle had a lease; that they talked about his "taking it over"; that he understood the agreement, however, to be "a share crop agreement", i.e., an agreement to take one-fourth of the net profits or proceeds rather than a one-fourth crop rental; that Kellar agreed to fix the well so he could irrigate his crop; that in 1937 he planted about 100 acres and had to abandon 20 acres for lack of sufficient water; that in 1938 he planted only 48 acres of cotton; that on February 6, 1937, he executed a demand promissory note and gave as security a chattel and crop mortgage to the California Cotton Credit Company (hereinafter called the Credit Co.) on his farming equipment and crops to be raised, to finance his venture. The Kellars, as owners of the property, signed a waiver and consented that their lien or claim to the chattels or crops should be subject and inferior to the Cotton Co.'s rights under the mortgage.

The evidence shows that advances were made to Holcomb on the account by the Cotton Co. which included a family allowance of $50 per month for six months; cost of a tractor furnished Holcomb in the sum of $500; interest on the mortgage; title search cost; fertilizer furnished to Holcomb and also to Kellar; money advanced to workmen for repair of the well; an automobile trailer for Holcomb; and many more such items. The records of the Oil Co. show that the advances for that year exceeded the income from the sale of cotton.

Defendant testified that he did not pay to Kellar any amount received from the sale of cotton because he received no net profit therefrom and that under the claimed crop sharing agreement he was not obligated so to do.

[2] The trial court found to the contrary and determined that defendant was holding as a lessee in accordance with the terms of the written lease as modified and not as a share cropper, i.e., that defendant originally agreed to pay a one-fourth crop rental and such agreement was later modified so that he was then obligated to pay a one-fifth crop rental. The evidence fully supports such a finding. Walls v. Preston, 25 Cal. 59, 60; Harrelson v. Miller & Lux Inc., 182 Cal. 408, 188 P. 800; Morris v. Iden, 23 Cal.App. 388, 138 P. 120; In re Okahara, 191 Cal. 353, 216 P. 614; Clarke and Cain v. Cobb, 121 Cal. 595, 54 P. 74.

Defendant next argues that there was no valid assignment of Kellars' claim to plaintiff because the assignment did not mention plaintiff's name as assignee; that it was in a different amount from that claimed in the complaint or as found by the court, and did not refer to the written lease under which it was claimed the amount became due. We see little merit to this argument. The assignment is in the following language:

"For valuable consideration, I hereby sell, assign, transfer and convey all of my right, title and interest in and to that certain claim against J. E. Holcomb and his wife in the sum of $1283.53, with full power to sue for, collect and receive the same.

"George E. Kellar.
"Emma L. Kellar."

In respect to this assignment the witness George E. Kellar testified that he did assign all of his right, title and interest in any rentals due under the lease to plaintiff and that he and his wife signed the above-quoted assignment.

[3, 4] The assignment, not naming the assignee, but which was signed by the assignors and delivered to the assignee, being in rightful possession of her at the time the action was filed, was prima facie evidence of her right of ownership of the claim. Sec. 1458, Civ. Code; Sec. 1052, Civ. Code; Lucas v. Pico, 55 Cal. 126; Linder Hardware Co. v. Pacific Sugar Corp., 17 Cal.App. 81, 118 P. 785, 789; Curtin v. Kowalsky, 145 Cal. 431, 78 P. 962. The fact that the amount claimed in the assignment exceeded the amount found due by the court did not affect its validity. Sec. 368, C.C.P.

In McIntyre v. Hauser, 131 Cal. 11, 14, 63 P. 69, 70, the court said: "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary. If, from the entire transaction, it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment will be held to have taken place." See also, Goldman v. Murray, 164 Cal. 419, 422, 129 P. 462.

The evidence is sufficient in all respects to constitute a valid assignment under the law and to enable plaintiff to maintain this action.

[5] Defendant next contends that he was evicted from a portion of the premises here involved by failure of Kellar to install a new pump and to provide sufficient water for the irrigation of the crops planted by the defendant, and was therefore not liable for rents during such partial eviction, citing 15 Cal.Jur. pp. 681, 682, secs. 91, 92.

Although no such defense is pleaded in the answer, suffice it to say the defendant remained in possession of all of the land during the years 1937 and 1938. The trial court, in effect, found that under the evidence there had been no partial eviction from any substantial portion of the leased premises so as to entitle defendant to remain in possession of the whole, rent free. The case of Veysey v. Moriyama, 184 Cal. 802, 195 P. 662, 20 A.L.R. 1363, is a complete answer to this contention.

This sufficiently disposes of such points as require consideration.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

61 Cal.App.2d 463

MILANI et al. v. SUPERIOR COURT IN AND FOR ALAMEDA COUNTY.

Civ. 7028.

District Court of Appeal, Third District, California.

Nov. 23, 1943.

As Modified on Denial of Rehearing Dec. 22, 1943.

See 143 P.2d 935.

1. Guardian and ward ⚷8

Superior court of county wherein minor child had resided and had been domiciled for six years had jurisdiction to determine whether under all circumstances it appeared necessary or convenient to appoint a guardian of the person of such minor. Probate Code, § 1440.

2. Prohibition ⚷5(3)

Where superior court of county wherein minor child had resided and been domiciled for six years had appointed guardian for such minor child and had jurisdiction to do so, superior court of another county would be prohibited from proceeding to hear application for writ of habeas corpus to obtain custody of child from guardian so appointed. Probate Code, § 1440.

3. Habeas corpus ⚷48

Habeas corpus proceeding to obtain custody of minor child should have been filed in superior court of county where child was illegally detained if at all.

Original proceeding for writ of prohibition by Victor Milani and another to restrain the Superior Court of the State of California, in and for the County of Alameda from proceeding to hearing upon an application for a writ of habeas corpus.

Peremptory writ issued.

F. W. Halley and Leslie A. Cleary, both of Modesto, and Errol C. Gilkey, of Oakland, for petitioners.

Ralph E. Hoyt, Dist. Atty., R. Robert Hunter, Asst. Dist. Atty., and Stanley C. Smallwood and Karma Dudleigh, Deputy Dist. Attys., all of Oakland, for respondent.

Geo. F. Sharp, of Oakland, for Ann Wilson.

SCHOTTKY, Justice pro tem.

Petitioners seek a writ of prohibition to restrain the Superior Court of the County of Alameda from proceeding to a hearing upon an application for a writ of habeas corpus filed by the mother of a minor child to obtain custody of the child from petitioners herein.

The petition herein alleges in substance that on June 30, 1943, petitioners filed in the Superior Court of Stanislaus County a petition to have themselves appointed guardians of the person of Carmen Arias, a minor child of the age of six years, in which petition it was alleged in part: That said minor was a resident of Stanislaus County; that she had been in the care and custody of petitioners since she was eight months old; that Ann Wilson, the mother of said child, had abandoned her and was not a fit or proper person to have the care and custody of said minor child; that the whereabouts of the father of said child was unknown. The petition further alleges that a copy of said petition for appointment of guardians and a citation to appear at the hearing thereof and show cause why said petition should not be granted was served on said mother, Ann Wilson; and that the Superior Court of Stanislaus County on August 19, 1943, proceeded to hear said petition and thereafter made an order appointing petitioners guardians of said minor child, in which order the court found in part that said Ann Wilson, mother of said minor, had abandoned her when she was eleven months old and had left her with petitioners with the statement that she did not want said child; that said minor child had been in the care and custody of petitioners ever since, and had been supported and maintained by them; that said minor child was a resident of Stanislaus County and domiciled therein; that said Ann Wilson was not a fit and proper person to have the custody, care or guardianship of said minor. The petition herein further alleges that said Ann Wilson filed in the Superior Court of Stanislaus County a motion to dismiss said petition for letters of guardianship which said motion was denied by said court on September 7, 1942. The petition then alleges that said Ann Wilson on July 22, 1943, filed in the Superior Court of Alameda County the application for writ of habeas corpus hereinbefore referred to and that said Superior Court will proceed to hear said petition unless prohibited from so doing.

A copy of the application for habeas corpus appears in a supplemental answer filed by respondent, and such application recites in substance that Ann Wilson is the mother of said child, that said child is in the care of petitioners herein, that she is now able to provide for said child and that she has demanded that petitioners herein surrender said child to her but that they have refused to do so.

Respondent Superior Court, by the District Attorney of Alameda County, has filed a demurrer and answer to said petition for a writ of prohibition, but at the oral argument said counsel conceded that the petition correctly states the facts as to the proceedings in Stanislaus County; and the only point raised by respondent and argued by it is that in spite of those facts it has a right to pass upon the question of the validity of the proceedings in Stanislaus County and the jurisdiction of that court to appoint a guardian.

It may be well to observe at the outset that the application for a writ of habeas corpus filed in Alameda County merely asserts the right of the petitioner therein to the custody of said minor, and contains no allegation that said minor is "unlawfully imprisoned or restrained of her liberty." Therefore, said application for habeas corpus must, according to its allegations, and by the admission of respondent in its brief, be considered merely as a proceeding by which the mother of the child seeks to obtain custody of the child from the petitioners herein.

Section 1440 of the Probate Code provides in part: "When it appears necessary or convenient, the superior court of the county in which a minor resides or is temporarily domiciled, or in which a nonresident minor has estate, may appoint a guardian for his person and estate, or person or estate."

[1] It must be conceded upon the record here that Carmen Arias, the minor child here involved, had resided and was domiciled in Stanislaus County for six years prior to the appointment of the guardians. Therefore it must be held that the Superior Court of that county had the jurisdiction and power to determine whether under all the circumstances "it appears necessary or convenient" to appoint a guardian of the person of said minor. It is not disputed that a petition for the appointment of guardians was filed in Stanislaus County and that Ann Wilson, mother of said child, and the petitioner in the habeas corpus proceeding, was given timely notice of the hearing thereof, nor is it disputed that a hearing was held upon said petition for appointment of guardians and that upon such hearing the Superior Court of Stanislaus County found as set forth in the petition for prohibition herein. We have, then, a factual situation in which the mother of the child, after due notice that the petition for guardianship of the child was to be heard in the Superior Court of the County of Stanislaus, in which county the child was domiciled, and had been domiciled for several years, did not choose to appear and contest said petition, but thereafter sought, and seeks, by an application for a writ of habeas corpus filed in Alameda County, where said minor is not, and has not been, domiciled, to have the custody of said child restored to her.

[2] Respondent contends that the Superior Court of Alameda County has the right to proceed to hear the application for a writ of habeas corpus and decide therein whether or not the Superior Court of Stanislaus County had jurisdiction to appoint petitioners herein guardians of said minor, notwithstanding the fact that it clearly appears from the record here not only that the Superior Court of Stanislaus County did have jurisdiction but that said court found and decided that it did have jurisdiction. We are unable to agree with the contention of respondent because, in our opinion, such a holding would lead to absurd results and is not supported by either reason or authority.

The action of the Superior Court of Stanislaus County in appointing petitioners guardians of the minor was a judicial proceeding from which an appeal could have been taken. But where, as here, it is clear that the said Superior Court did have jurisdiction to appoint the guardians, the mother of the minor child cannot upon a proceeding in habeas corpus establish a right to the custody of the minor as against the guardians.

There is a striking similarity between this case and the case of Browne v. Superior Court, 16 Cal.2d 593, 107 P.2d 1. In that case a guardian of the person and estate of an incompetent person had been appointed in Santa Barbara County and the guardian of said incompetent aged woman kept and had her cared for in the Greer Home in San Francisco, his action in so doing having been approved by the Superior Court of Santa Barbara County in a hearing upon a petition requesting instructions. Thereafter another son of said incompetent person, on her behalf, filed in the Superior Court of the City and County of San Francisco an application for a writ of habeas corpus, alleging, in substance, that she was unlawfully confined in said Greer Home by said guardian, that she desired to return to Santa Barbara because the conditions and associations there were more conducive to her happiness and that the guardian refused to permit her to return to Santa Barbara. The guardian thereupon brought a proceeding in the Supreme Court to restrain the Superior Court of the City and County of San Francisco from hearing and deciding said application for a writ of habeas corpus. In granting a peremptory writ of prohibition the court said at pages 597, 598 and 599 of 16 Cal.2d, at page 3 of 107 P.2d:

"The chief contention of petitioner is that the Santa Barbara court has exclusive jurisdiction over the custody of the incompetent, and that the San Francisco court has no power to interfere with it. This is the familiar proposition that where several courts have concurrent jurisdiction over a certain type of proceeding, the first one to assume and exercise such jurisdiction in a particular case acquires an exclusive jurisdiction. Thereafter another court, though it might originally have taken jurisdiction, is wholly without power to interfere, and may be restrained by prohibition. See Gorman v. Superior Court, 23 Cal.App.2d 173, 72 P.2d 774. The rule is generally invoked where a proceeding is still pending; when it is completed and judgment has become final, jurisdiction has been exhausted and the rule has no application.

* * * * * *

"Under the law her guardian must choose her place of residence (Prob.Code, sec. 1500), and the Santa Barbara court has fully considered all matters pertaining thereto. These are all wholly within the jurisdiction of the Santa Barbara court, and are beyond the scope of any proceeding in habeas corpus. Ordinarily, the court in a habeas corpus proceeding of this kind can have but one issue to determine: Whether the applicant is being unlawfully deprived of liberty. If she is competent, she should be freed from all custody and may choose her own residence and mode of life. If she is incompetent, she is properly in the custody of her guardian and is not entitled to a discharge.

"It remains now to test the present proceeding by these principles. The application for the writ of habeas corpus contains allegations of illegal restraint of a competent person, which, standing alone, would doubtless give jurisdiction to the court to determine her competency and right to release from restraint. But there are statements in the pleadings and briefs which throw an entirely different light upon the proceeding. The petition for prohibition alleges that by the application for habeas corpus 'it is sought to free said ward from the custody of her guardian'. In the answer to the petition, filed by the attorneys who obtained the writ of habeas corpus, they 'Deny that by the application of Ella H. Browne for writ of habeas corpus it is sought to free said Ella H. Browne from the custody of her guardian.' And in one of their briefs, said counsel state: 'Her petition for habeas corpus in the San Francisco Superior Court seeks her removal to Santa Barbara.'

"Because of this confusion, counsel at the oral argument were questioned as to the real object of the application. At that time counsel for the applicant denied any intention of seeking the release of the ward from custody or having the guardian removed, and stated that the purpose was, first, 'to enable this ward to have a certain measure of freedom, using that term in the sense of a desire on her part to be permitted to return to Santa Barbara'; second, 'to remedy unreasonable restraint upon her personal liberties with respect to the improper, as we contend, censorship of her mail and also the denial to her of the right to have visitors come to her at the Greer Home, where she was in effect kept incommunicado by her guardian'. These statements constitute an abandonment of the only proper ground upon which the writ could issue. The action of the respondent court in issuing its writ of habeas corpus was undoubtedly based upon a misconception of the object of counsel who applied for it. The subsequent disclosures show that the matters sought to be determined, namely, the residence method of treatment of the ward, are exclusively within the jurisdiction of the Santa Barbara court, and outside the scope of the writ of habeas corpus. If these facts had been brought to its attention, the lower court might properly have dismissed the proceeding. It is equally proper for this court to grant prohibition to restrain it."

[3] We deem it unnecessary to cite any additional authority upon a proposition that to us seems to be free from doubt. We may add, however, that the application for a writ of habeas corpus did not state that the minor child was a resident of or domiciled in Stanislaus County, but stated nothing as to the residence of said child. If it had been called to the attention of the Superior Court of Alameda County that the child herself was a resident of and domiciled within Stanislaus County such court might have dismissed said proceeding because it should have been filed in the Superior Court of Stanislaus County, where the child was illegally detained, if at all. As is stated in 13 California Jurisprudence, page 261, section 37: "In the absence of court rule or statute upon the subject the rule was early announced that a person illegally restrained of his liberty has not the privilege of selecting from the judiciary of the whole state the individual to whom he prefers to make his application. The application must be made to the local judge unless for good cause shown, * * *."

In view of the foregoing, let a peremptory writ of prohibition issue, restraining respondent Superior Court from trial or determination of the issues raised by said application for habeas corpus.

ADAMS, P. J., and THOMPSON, J., concur.

61 Cal.App.2d 544

WESTPHAL et al. v. WESTPHAL et al.

Civ. 12515.

District Court of Appeal, First District, Division 2, California.

Dec. 2, 1943.

Rehearing Denied Dec. 31, 1943.

Hearing Denied Jan. 27, 1944.

1. Dismissal and nonsuit 🔑**60(2)**

A stipulation extending defendants' time to answer was not a stipulation that the time of trial might be extended within meaning of statute requiring action not brought to trial within five years to be dismissed except where parties have stipulated that time may be extended. Code Civ. Proc. § 583.

2. Dismissal and nonsuit 🔑**60(3)**

The time during which it is impossible to bring a case to trial because of the pendency of an appeal should be excluded in determining whether a case has been brought to trial within five years of the filing of the complaint as required by statute. Code Civ.Proc. § 583.

3. Parties 🔑**14**

The effect of amendment providing for joinder of parties plaintiff was to permit the joinder of plaintiffs in cases where the causes of action were otherwise completely severable so long as the named conditions are present. Code Civ.Proc. § 378.

4. Trial 🔑**3**

The provision for separate trials for several plaintiffs, under statute providing for joinder of parties plaintiff, is applicable only to the cases of joinder provided for thereunder and where but for those provisions plaintiffs would not have been permitted to join in one suit. Code Civ.Proc. § 378.

5. Trial 🔑**3**

That the Legislature provided for the authorization of separate trials as to several defendants, but made no similar general provision for separate trials as to plaintiffs is persuasive that no such general power was intended to be granted to the courts. Code Civ.Proc. §§ 378, 579.

6. Dismissal and nonsuit 🔑**60(3)**
Trusts 🔑**366(1)**

All parties interested in the trust were "necessary parties" to an action to impress a trust upon property of a deceased which had been distributed, and time during which an appeal was pending by some of the plaintiffs from an order dismissing the action as to them must be excluded in determining whether as to remaining plaintiffs case had been brought to trial within the five years provided by statute. Code Civ.Proc. §§ 378, 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Necessary Party".

7. Dismissal and nonsuit 🔑**60(3)**

Where some of the plaintiffs appealed from an order dismissing the action as to them and during the time such an appeal was pending it was legally impossible for all practical purposes for remaining plaintiffs to go to trial, including time consumed for that appeal in calculating time during which action might have been brought to trial by nonappealing plaintiffs was error. Code Civ.Proc. §§ 378, 583.

8. Appeal and error ⚷962
Dismissal and nonsuit ⚷73

A motion to dismiss an action, on ground that more than five years had elapsed since action was commenced, placed the motion on that ground alone and not on ground of want of diligence short of five years in prosecution of action, hence an appeal from order sustaining such motion was to the mandatory and not the discretionary power of the court. Code Civ.Proc. § 583.

9. Appeal and error ⚷882(3)

Respondents, having taken one position in the trial court, cannot adopt another on appeal and thus deprive appellants of their day in court on the new issue attempted to be raised.

10. Dismissal and nonsuit ⚷67, 73

The ground of a motion to dismiss an action must be stated in the notice and the court can only consider the grounds so stated. Civ.Code Proc. §§ 583, 1010.

11. Dismissal and nonsuit ⚷45

Civil procedure amendment, giving court discretionary power to dismiss an action for want of prosecution where plaintiff had failed for two years to bring action to trial, had the effect of suspending court's power to dismiss for any delay of less than two years. Civ.Code Proc. § 583.

◆

Appeal from Superior Court, Alameda County; T. W. Harris, Judge.

Action by Raymond C. Westphal and Adele B. Westphal and others against Theodore Westphal and others to impress a trust upon property distributed to defendants in the estate of John C. Westphal, deceased. From an order granting defendants' motion to dismiss the action as to the plaintiffs named on ground that more than five years had elapsed since action was filed, the plaintiffs named appeal.

Reversed.

Frank D. Parker and James H. Boyer, both of Oakland, and Treadwell & Laughlin, of San Francisco, for appellants.

Donahue, Richards & Hamlin, of Oakland, for respondents.

DOOLING, Justice pro tem.

This is an appeal by plaintiffs Raymond C. Westphal and Adele B. Westphal from a judgment dismissing the action as to them. The action was commenced by the filing of a complaint on August 31, 1937. Joined with the appellants as plaintiffs were ten other persons. On December 21, 1937, a demurrer was sustained as to the ten other plaintiffs and overruled as to the two plaintiffs who are appellants herein. On January 17, 1938, the ten other plaintiffs having failed to amend within the time allowed them therefor, judgment was entered against them. From this judgment said plaintiffs took an appeal which was not finally determined until the filing of a remittitur from the Supreme Court on June 27, 1942. Pending the appeal of the other plaintiffs from the adverse judgment against them, the two plaintiffs, appellants herein, on January 15, 1938, entered into a written stipulation with defendants by the terms of which defendants' time to answer their complaint was extended "to and including ten days after written notice from plaintiffs' undersigned counsel to defendants' undersigned counsel to answer."

No such written notice was ever given, but after the filing of the remittitur affirming the judgment against the ten other plaintiffs, and on February 11, 1943, defendants served on the two appellants herein and filed a notice of motion for an order dismissing the action. This motion was granted on March 18, 1943. It is from the order granting this motion that the present appeal is prosecuted.

The action was one to impress a trust upon property distributed to defendants in the estate of John C. Westphal, deceased. The nature of the action is quite fully set forth in the opinion of the Supreme Court in disposing of the appeal of the ten other plaintiffs (Westphal v. Westphal, 20 Cal.2d 393, 126 P.2d 105) and need not be again elaborated here, although it should be added that before the dismissal of the action as to them the appellants herein moved the court for leave to file an amended complaint designed to cure the insufficiencies of the complaint pointed out in Westphal v. Westphal, supra. The motion to dismiss was stated to be on the ground "that more than five years have elapsed since the action was commenced, and that said action has not been brought to trial and the parties have not stipulated in writing or otherwise that the time may be extended."

The principal question presented on this appeal is whether in the application of the second sentence of section 583, Code of Civil Procedure, to this case the time during which the appeal of the other ten plaintiffs was pending should be included or excluded in determining whether the case had been brought to trial within five years after the plaintiffs had filed their action. This provision of the Code of Civil Procedure provides that: "Any action * * * shall be dismissed * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended."

[1] The stipulation extending defendants' time to answer was not a stipulation that the time of trial might be extended within the meaning of this code provision. Elmhurst Packers v. Superior Court, 46 Cal.App.2d 648, 116 P.2d 487. From the time of the filing of the complaint on August 31, 1937, to the time the order dismissing the action was made on March 18, 1943, over five years elapsed, but during this period the other ten plaintiffs had an appeal from the judgment entered against them pending from March 8, 1938, until June 27, 1942. If this period is to be excluded in calculating the time within which the case must be brought to trial, the remaining time from the filing of the complaint to the dismissal of the action was less than one and one-half years.

[2] It is settled that the time during which it is impossible to bring a case to trial because of the pendency of an appeal should be excluded in determining whether a case has been brought to trial within five years of the filing of the complaint. Kinard v. Jordan, 175 Cal. 13, 164 P. 894; Christin v. Superior Court, 9 Cal.2d 526, 71 P.2d 205, 112 A.L.R. 1153. The basic dispute between the parties on this appeal is whether the pendency of the appeal of the other plaintiffs made it impossible (Kinard v. Jordan, supra) or "for all practical purposes" impossible (Christin v. Superior Court, supra, 9 Cal.2d at page 533, 71 P.2d at page 208, 112 A.L.R. 1153) for the appellants herein to proceed to trial while that appeal was pending.

Respondents, while admitting that they can find no case in point, argue that appellants could have moved the court to grant them a separate trial from the other plaintiffs and that the court in the exercise of its discretion might have granted such motion and allowed these plaintiffs to proceed to trial while the appeal of their coplaintiffs was pending. It is significant that respondents have failed to cite a single case in which there has been a severance of plaintiffs for the purpose of trial. Such independent investigation as we have made leads us to the conclusion that severance of plaintiffs for trial, as distinguished from severance of defendants, is almost, if not quite, unknown to our system of jurisprudence. (See for example 64 C.J. p. 37, sec. 8; 30 C.J.S., Equity, p. 882, § 486; 26 R.C.L. p. 1012, sec. 3, all of which treat of separate trials for defendants, but contain no mention of separate trials for plaintiffs.)

While not mentioned in the briefs, section 378, Code of Civil Procedure, as amended in 1927, after providing for a joinder of parties plaintiff "who have an interest in the subject of the action or in whom any right to relief in respect to or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally or in the alternative, where if such persons brought separate actions any question of law or fact would arise which are common to all the parties to the action", makes the further provision "that if upon the application of any party it shall appear that such joinder may embarrass or delay the trial of the action, the court may order separate trials."

[3, 4] The effect of this amendment was to permit the joinder of plaintiffs in cases where the causes of action were otherwise completely severable so long as the named conditions are present. Peters v. Bigelow, 137 Cal.App. 135, 140, 30 P.2d 450; Colla v. Carmichael U-Drive Autos, Inc., 111 Cal. App. (Supp.) 784, 786, 787, 294 P. 378; 47 C.J. 59. The provision for separate trials is expressly limited to cases where "it shall appear that such joinder (i.e., the joinder provided for in the section itself) may embarrass or delay the trial of the action." It would seem to follow that the provision of sec. 378, Code of Civil Procedure, for separate trials for several plaintiffs is applicable only to the cases of joinder provided for in section 378, and where but for those provisions the plaintiffs would not have been permitted to join in one action. The reason for this provision for severance of plaintiffs for the purpose of trial in the cases of joinder of plaintiffs for the first time permitted by the amendment of section 378, seems obvious: The

trial of several causes of action "arising out of the same transaction or series of transactions" and presenting a common "question of law or fact" might in many cases present a multitude of questions of law and fact germane or relevant to one plaintiff's cause and not to any other. This being so the provision for the discretionary power to grant separate trials as to the several plaintiffs whose diverse causes of action might be so joined was a reasonable safeguard.

[5] Apart from this provision in section 378, Code of Civil Procedure, there is no express statutory provision authorizing our courts to grant separate trials among plaintiffs. On the other hand section 579 Code of Civil Procedure, enacted in 1872, has been construed as a statutory authorization for the granting of separate trials as to several defendants. Bell v. Adams, 150 Cal. 772, 90 P. 118; Bell v. Staacke, 159 Cal. 193, 115 P. 221. The failure of the legislature to make any similar general provision for separate trials as to plaintiffs is persuasive that no such general power was intended to be granted to our courts. 23 Cal.Jur. p. 740, sec. 118.

[6] The several plaintiffs were necessary parties to the action under the settled equity practice requiring all of the cestuis que trustent to be joined as parties in an action against the trustee to establish the existence of the trust. McBrown v. Dalton, 70 Cal. 89, 11 P. 583; O'Connor v. Irvine, 74 Cal. 435, 16 P. 236; Mitau v. Roddan, 149 Cal. 1, 84 P. 145, 6 L.R.A.,N.S., 275; Perry on Trusts, 7th Ed., Vol. II, secs. 881, 882, p. 1501 et seq. So long as their appeal was pending the other ten plaintiffs remained parties to the action and in case of a reversal of the judgment entered against them would have been entitled to proceed to trial, with their co-plaintiffs, appellants herein. While necessary, they were not indispensable parties. London, etc., Bank v. Smith, 101 Cal. 415, 35 P. 1027; Bank of California v. Superior Court, 16 Cal.2d 516, 106 P.2d 879. In other words, they were required to be joined as parties unless it was shown "either that the court must wholly deny the plaintiff the equitable relief to which he may be entitled, or that the relief must be granted without making other persons parties." Story's Equity Pleadings, 10th Ed., sec. 96, pp. 100, 101. Cf. 30 C.J.S. Equity, p. 585, § 147. With necessary parties plaintiff before the court whose rights against the defendants had not been finally determined, we have been furnished no authority and have found none, which would authorize the court to order the trial to proceed separately as to the plaintiffs whose appeal is here presented.

[7] Without expressly deciding that it was entirely beyond the power of the trial court to grant separate trials to the appellants herein while their co-plaintiffs' appeal was pending, that power was at least extremely doubtful and under the circumstances we are satisfied that it would have been practically futile for these plaintiffs to move the court for a separate trial. We conclude that, if not legally impossible, "for all practical purposes, going to trial would be impossible" (Christin v. Superior Court, supra, 9 Cal.2d at page 533, 71 P.2d at page 208, 112 A.L.R. 1153) for these appealing plaintiffs during the pendency of their co-plaintiffs' appeal, and that the trial court erred in including the time consumed by that appeal in calculating the time during which the action might have been brought to trial after it was filed.

Respondents' further argument that the dismissal may be affirmed as an exercise of the trial court's discretionary power to dismiss for lack of diligence in the prosecution of their case is open to at least two answers.

[8-10] 1. The ground of the motion as stated in the notice of motion, quoted above, was "that more than five years have elapsed since the action was commenced" etc. This clearly placed the motion on that ground alone, and not on the ground of want of diligence short of five years in the prosecution of the action. The appeal was to the mandatory, and not to the discretionary, power of the court under section 583, Code of Civil Procedure. Respondents having taken one position in the trial court, cannot adopt another on appeal and thus deprive appellants of their day in court on the new issue attempted to be raised. The grounds of the motion must be stated in the notice (sec. 1010, Code of Civil Procedure) and the court can only consider the grounds so stated. Doehla v. Phillips, 151 Cal. 488, 496, 91 P. 330; W. H. Marston Co. v. Kochritz, 80 Cal.App. 352, 359, 251 P. 959; O'Malley v. Carrick, 60 Cal.App. 48, 212 P. 45. The propriety of this rule is well exemplified in this case, for many facts might be urged to excuse a delay of less than five years in the prosecution of an ac-

tion which would not be open to a plaintiff who had delayed for over five years. 9 Cal.Jur. 537, 540, 542.

[11] 2. Since the amendment of section 583, Code of Civil Procedure, to give discretionary power to the trial court to dismiss for want of prosecution "whenever plaintiff has failed for two years after action is filed to bring such action to trial" instead of "for two years after answer filed" as theretofore, the court has no power to dismiss for any delay of less than two years "after action is filed," since the effect of that amendment was to suspend the power of the court to dismiss for want of prosecution short of the two year period after the filing of the action. Hibernia Sav. & Loan Soc. v. Lauffer, 41 Cal.App.2d 725, 729, 107 P.2d 494; Romero v. Snyder, 167 Cal. 216, 219, 220, 138 P. 1002. Excluding the time during which the appeal of their co-plaintiffs was pending less than two years elapsed between the filing of the action and its dismissal.

The judgment appealed from is reversed.

NOURSE, Presiding Justice, and SPENCE, J., concur.

61 Cal.App.2d 585

ZIMMERMANN v. TIDE WATER ASSOCIATED OIL CO. et al.

Civ. 3240.

District Court of Appeal, Fourth District, California.

Dec. 3, 1943.

1. Corporations 🔑629

Complaint in action by minority stockholder to compel distribution in kind on dissolution of corporation alleging fixing of different values and different appraisements on property of corporation, although not directly alleging that amount offered for stock was less than actual value of interest in corporate assets, was sufficient as against general demurrer.

2. Corporations 🔑629

Plan of distribution of assets of corporation on dissolution whereby minority stockholders were to be paid cash value of holdings and remaining assets transferred to majority stockholder was void, and minority stockholder was entitled to distribution in kind or to be treated exactly like majority stockholder.

3. Corporations 🔑629

Complaint in action by minority stockholder to compel distribution in kind on dissolution of corporation setting up plan of distribution by paying cash value for holdings of minority stockholders and transfer of assets to majority stockholder with refusal by plaintiff to accept offer of amount determined as fair cash value of stock was sufficient as against charge of laches based on claim that minority stockholder allowed plan to be completed without objection on his part. Civ.Code, § 401c.

Appeal from Superior Court, Orange County; G. K. Scovel, Judge.

Action by George A. Zimmermann against the Tide Water Associated Oil Company and another to compel distribution in kind on the dissolution of a corporation. Judgment for defendants, and plaintiff appeals.

Reversed, with directions.

Ambrose Gherini, Arthur B. Dunne, and Dunne & Dunne, all of San Francisco, for appellant.

Robert M. Searls, Clifford J. MacMillan, and W. F. Kiessig, all of San Francisco, for respondents.

BARNARD, Presiding Justice.

This is an action to compel distribution in kind on the dissolution of a corporation. For convenience, the defendants will be referred to, respectively, as Tide Water and West Coast. West Coast owned land in Orange County on which were some producing oil wells. At all times in question it had no issued common stock and its entire capital stock consisted of 10,408 shares of preferred stock with a par value of $60 per share. Tide Water owned 8,434 shares of this stock and 150 shares were owned by the plaintiff.

On September 30, 1940, Tide Water and West Coast entered into a written agreement which recited that Tide Water owned about 81% of the preferred capital stock of West Coast; that as of July 31, 1940, West Coast had assets consisting principally of oil properties, equipment, cash and accounts receivable of a total book value of $742,053.34, based upon cost and exclusive of certain "appreciation of operated oil properties", and had liabilities, exclusive of capital stock, of $14,458.29; that as of said date the depreciated book value of the oil properties and equipment based upon cost amounted to $190,926.92 and based upon cost plus certain "appreciation" amounting to $297,809.51; that on August 1, 1940, said properties and equipment were appraised by a certain independent petroleum engineer at $260,394; and that on October 1, 1939, they were appraised by another independent engineer at $230,000. It was then recited that in order to effect a distribution of West Coast's property, in complete liquidation of West Coast, the following plan was adopted: West Coast was to convert into cash all of its assets other than its oil property and equipment and pay all its known debts other than capital stock liability; West Coast should then transfer and distribute all of its property and assets by paying to its stockholders, other than Tide Water, the cash value of their shares, taking oil property and equipment at $260,394 less depreciation after August 1, 1940, and by turning over to Tide Water all of the oil property and equipment plus any amount of cash necessary to make up its share, taking the oil property and equipment at the same value. It was then provided that West Coast should be dissolved and that liquidation, distribution, transfer and dissolution should be completed on or before December 31, 1943.

On October 31, 1940, the directors of West Coast adopted a resolution declaring that it was for the best interest of the stockholders that it be completely liquidated, approving this plan of liquidation, directing that for the purpose of carrying out the plan its assets, other than oil properties and equipment, be turned into cash; that stockholders, other than Tide Water, be paid cash in complete cancellation of their shares of stock; and that its oil properties and equipment be transferred to Tide Water with any balance of cash necessary to make up its share; authorizing its officers to do these things and sign any necessary conveyances, and calling a meeting of the stockholders for November 15, 1940, for the purpose of ratifying and confirming the action taken by the board of directors in this regard, and for the further purpose of "considering, and if deemed advisable authorizing, the voluntary winding-up and dissolution of this Company." The secretary was then directed to mail to each of the stockholders a notice of this meeting, with a copy of the plan of liquidation, a copy of the resolution adopted by the directors, and copies of the appraisements above referred to.

On November 15, 1940, the stockholders adopted resolutions directing its officers to file a certificate of dissolution, approving the plan referred to, authorizing the conveyance to Tide Water of all West Coast's oil properties and equipment in pursuance to this plan, and further providing that should the holders of any of the shares of stock refuse to accept their distributive shares "in cash or property" the company should deposit such distributive shares in a certain bank for the benefit of such persons.

The plaintiff did not accept the amount offered him for his stock and brought this action on November 24, 1941. In addition to the matters above stated the complaint alleged, among other things, that all of West Coast's preferred stock was of the same class and all of said shares had the same rights and privileges; that under West Coast's articles of incorporation and the issued stock certificates all of the holders were entitled to participate equally in the earnings and assets, whether on dissolution or otherwise, in proportion to the shares held; that at all times material the majority of the directors of West Coast were elected by Tide Water as majority stockholder of West Coast and were officers and employees of Tide Water; that in doing the things in question these directors acted as the agents of Tide Water and for its benefit; that with respect to the matters here in question Tide Water controlled West Coast and caused these things to be done for the interest of Tide Water and to the exclusion of the other stockholders of West Coast; that the assets of West Coast consisted mainly of oil properties with producing wells, and the value thereof was and is uncertain; that the values referred to in the plan of liquidation were stated by engineers employed by Tide Water and the plaintiff has in no way consented to or acquiesced in any matters stated in said plan; that at the meeting of the stockholders on

November 15, 1940, 9,147 shares of the issued stock were voted in favor of said dissolution, of which 8,434 were owned by Tide Water; that none of plaintiff's shares were voted in favor of any of said resolutions and the plaintiff has at no time consented to or acquiesced in the said plan of liquidation or any of said resolutions or in any action taken in pursuance thereof; that on November 15, 1940, the president and secretary of West Coast executed and filed a certificate of election to wind up and dissolve West Coast; that thereafter purporting to act in pursuance of said plan of liquidation West Coast offered to its stockholders, other than Tide Water, $75.22744 per share in liquidation and cancellation of said shares; that this was a figure fixed by Tide Water; that West Coast purported to dispose of its assets other than oil properties and equipment for cash with which to make such payments in part; that plaintiff is informed and believes that said assets were not sold for cash but were turned over to Tide Water which furnished such money as was necessary to make payment in cash to other stockholders of West Coast; that West Coast purported to transfer all of its remaining assets, including oil properties, land and equipment, to Tide Water, which still holds them; that plaintiff has at all times refused and still refuses to consent to any of the foregoing matters and has not acquiesced therein; that plaintiff has received no cash or other thing of value for his stock in West Coast and is still the owner thereof; that he demands that there be distributed to him his pro rata share of all of the assets of West Coast, including his interest in the oil properties, land and equipment; that West Coast was at all times material solvent, with adequate working capital, and able to continue to operate its properties at a profit to itself and its shareholders; that the purported liquidation was not for the purpose of liquidating said properties but was for the purpose of transferring them to Tide Water for its sole benefit, to the exclusion of the other stockholders of West Coast, and for the purpose of attempting to exclude said stockholders by forcing them to sell their interests for cash at a price fixed by Tide Water; that prior to the commencement of this action plaintiff had demanded of both defendants that there be transferred and conveyed to him his ratable interest in all of the assets of West Coast; and that this demand has been refused and the defendants refuse to distribute anything to him except cash in the sum of $75.22744 per share. The plaintiff then offered to do whatever equity should be required of him by the court and prayed that defendants be required to transfer to him his ratable proportion of all of the assets of West Coast or for such other and further relief as might be proper.

General demurrers were filed in which it was set up that the complaint does not state facts sufficient to constitute any cause of action, that it affirmatively appears from the complaint that the plaintiff is barred by laches from claiming the relief sought or any relief, and that it affirmatively appears from the complaint that the plaintiff did not oppose the plan of liquidation now complained of but has silently acquiesced therein until the defendants have changed their position, and for that reason the plaintiff is estopped from claiming any relief. In a written opinion the trial judge held that the plaintiff was guilty of laches. He then entered an order that the demurrers be sustained without leave to amend unless the plaintiff, by amendment or other proper proceeding, should "request the Court to ascertain and award judgment against said defendants for the fair cash value of plaintiff's interest in the corporate assets transferred upon dissolution" to Tide Water, such amendment or supplemental petition to be filed within 30 days. The plaintiff declined to so amend, and the court entered a judgment sustaining the demurrers without leave to amend and decreeing that the plaintiff take nothing against either defendant. From this judgment the plaintiff has appealed.

[1] The appellant first contends that he was entitled to some relief in any event, that he was entitled at least to the amount which the respondents admittedly were willing to pay, that even on a hearing to ascertain the true value of the stock he might have received more than that amount, and that the court could not compel him to abandon his main contention that he was entitled to share in a distribution in kind by requiring him to request the court to award judgment for the fair cash value of his interest in West Coast's assets. This contention should be upheld for two reasons. While the complaint does not directly allege that the amount offered the appellant was less than the actual value of his interest in the corporate assets we think it was sufficient, as against a general demur-

rer, to raise that as one of the issues to be tried, without the necessity of any amendment in that regard. The action was equitable in nature. The appellant while seeking for distribution in kind also prayed for such other and different relief as might be proper. The complaint not only alleged different values and different appraisements for the oil properties as having been fixed by others, but alleged that the value of these oil lands was speculative and uncertain. It also contained many allegations relating to the control of West Coast by the officers and agents of Tide Water, the acts of these agents for the benefit of Tide Water and against the best interests of West Coast stockholders, and the fixing of the value of the assets by agents of Tide Water. Taken altogether, we think these allegations were sufficient, as against a general demurrer, to present the issue as to whether the valuation alleged to have been placed upon appellant's stock by the agents of Tide Water was a fair one. Under the facts alleged the appellant was, to say the least, entitled to a hearing as to the fairness of the valuations thus fixed, and to have this without being compelled to waive any other issue. In the second place, the order sustaining the demurrer required the appellant to "request the court to ascertain and award judgment against said defendants for the fair cash value of plaintiff's interest in the corporate assets" as an alternative to have the demurrer sustained. If such a judgment had been requested the court would naturally have acted upon the request and this clearly required the appellant to abandon his main contention, which he could not be compelled to do unless it can be held that he had no right to a distribution in kind or, more exactly, to receive the same treatment as that accorded to the majority stockholder.

[2] The appellant's main contention is that under our statutes and decisions the plan of distribution here adopted was void and that he was entitled to distribution in kind or to be treated exactly like the majority stockholder. We so held in Re San Joaquin L. & P. Corp., 52 Cal.App.2d 814, 127 P.2d 29, after reviewing the pertinent statutes. The respondents contend that our decision in that case is not controlling here because our holding therein, that on voluntary dissolution a corporation may not carry out a plan of distribution whereby its plants and business properties are distributed to a majority stockholder while its minority stockholders are compelled to take the cash value of their holdings, was not necessary to the decision in that case. We are unable to agree with this contention. The holding in question was made in response to a point directly raised and was based upon a review and analysis of the statutes relating to the voluntary dissolution of a corporation. The respondents again argue that such a plan of distribution is permitted by these statutes, and that it is desirable under modern conditions to permit such a plan of distribution. The question as to the desirability of permitting distribution on voluntary dissolution of a corporation by transferring the main assets to certain stockholders and compelling minority stockholders to accept cash for their interests is not only debatable but it is one for the Legislature to decide. This it has done and provisions which authorize such a procedure have been omitted from our statutes. There is good reason to believe that this was intentionally done. We adhere to the views expressed in the San Joaquin case insofar as this issue is concerned.

The new question now raised is whether it can be here held that the appellant has lost his right to equal treatment with the majority stockholder in that he is barred by laches from claiming the relief sought, or any relief, and in that he is estopped since it affirmatively appears from the complaint that he has silently acquiesced in this plan of liquidation until the respondents have materially changed their position.

[3] No third parties are here involved. Whether a mere lapse of time and failure to act would constitute laches in such a case might present a close question, but it is one which should be decided only when all of the facts are before the court. The plan here in question contemplated that there would be stockholders who would not accept the amount offered, as it provided that in such cases the amounts should be deposited in a bank and held until they were accepted. Not only was this situation thus anticipated, but the respondents admit that they were in no way misled by the acts of the appellant. The respondents further argue that we suggested in the San Joaquin case that the court might proceed under its equity powers to pay cash to certain stockholders as suggested in Jones v. Missouri-Edison Elec. Co., 8 Cir., 144 F. 765, and that this is exactly what the court here proposed to do if the appellant would amend his complaint to that end. However, while

we pointed this out in the San Joaquin case we said it came under the broad equity powers of the court where the rights of third parties were involved and where no other equitable solution was possible, and we there said [52 Cal.App.2d 814, 127 P.2d 37]: "Any possible application of the rule suggested in that case is a matter for consideration in the trial court, after the full facts have been developed." Many matters were here presented which called for a hearing and a full disclosure of the facts and which should not have been determined upon demurrer.

Assuming, but not holding, that laches and silent acquiescence might under some circumstances be sufficient to constitute a defense to appellant's main contention that this plan was void a further consideration is that the facts necessary to show such laches and acquiescence do not appear in the complaint. The resolution adopted by the directors of West Coast on October 31, 1940, which, among other things, called a special meeting of the stockholders for November 15, 1940, directed the secretary to send a notice of this meeting to all stockholders with copies of the plan and of various other papers. While it is not alleged in the complaint that the appellant received such a notice the respondents argue that it must be assumed that he did. If this be assumed, the copy of the plan which he would have received stated that the distribution and transfer should occur on or before December 31, 1943, more than three years later. This might well have indicated to the appellant that he had considerable time in which to act, and he brought this action within one year. It neither appears when the transfer of these assets to Tide Water took place nor that the appellant knew of this transfer any considerable time before this action was filed.

Moreover, one of the announced purposes of the meeting called for November 15, 1940, was to consider and act upon the advisability of a voluntary winding-up and dissolution of the corporation. After considering that matter the stockholders might well have determined against the advisability of such a dissolution. If we assume that the appellant had notice of the meeting called for that purpose, among others, it does not appear that he was present or that he was promptly informed as to what action was taken at that meeting, or when he acquired any such knowledge except that he knew it when this complaint was filed. For all that appears he may have first learned of the action taken at this meeting shortly before this suit was brought. Whether or not notice of such action was required under section 401c of the Civil Code the appellant's knowledge of the action taken with respect to the proposed transfer and dissolution would have an important bearing on the claim of laches and acquiescence on his part.

Again, it is alleged in the complaint that West Coast offered its stockholders, aside from Tide Water, $75.22744 per share and it is further alleged that the appellant refused this offer, has taken nothing for his stock, and still owns it. It is not alleged when this offer was made or when it was refused. From the nature of the plan it would seem that this must have occurred before the transfer to Tide Water was made. On its face, this would seem to have been a sufficient indication of appellant's objection as against a charge of laches based upon the claim that he had allowed the transfer to be completed without any objection upon his part.

Many matters appear which could not properly be passed upon on demurrer and which call for a hearing and a development of the full facts, and it cannot be said that the complaint is so deficient as to state no cause of action, or that the appellant is entitled to no relief. It follows that the demurrers were improperly sustained.

The judgment is reversed, with directions to overrule the demurrers and permit answers to be filed.

MARKS and GRIFFIN, JJ., concur.

61 Cal.App.2d 565

In re MUNFREY'S ESTATE.

SWAN et al. v. SWAN et al.

Civ. 12545.

District Court of Appeal, First District, Division 1, California.

Dec. 3, 1943.

Rehearing Denied Dec. 31, 1943.

See 144 P.2d 370.

1. Wills ⟹229

A beneficiary under earlier will which would be entitled to probate if contested will is declared invalid is an "interested person" entitled under statute to contest later will. Probate Code, §§ 370, 380.

See Words and Phrases, Permanent Edition, for all other definitions of "Interested Person".

2. Wills ⟹229

Production of earlier will and offer of it for probate was not a condition to right of beneficiaries under such will to contest validity of a later will. Probate Code, §§ 370, 380.

3. Pleadings ⟹214(1)

A demurrer admits all of the allegations of petition.

4. Wills ⟹278

Failure to produce earlier will under which contestants allegedly were beneficiaries and offer it for probate did not warrant dismissal of will contest on demurrer, though, if allegations concerning earlier will are denied, contestants will be required to produce at trial evidence satisfactory to probate judge of the existence, terms and validity of earlier will and their interests thereunder. Probate Code, §§ 370, 380.

5. Wills ⟹278

Trial court did not err in sustaining special demurrer on ground that petition seeking to revoke probate of a will was uncertain in various particulars. Probate Code, §§ 370, 380.

6. Wills ⟹278

Allegation in petition to revoke probate of a will that decedent made substantial provisions for contestants in an earlier will was in the nature of a conclusion of the pleader and not an allegation of fact and was subject to special demurrer. Probate Code, §§ 370, 380.

7. Wills ⟹278

Though petition to revoke probate of will was vulnerable to special demurrer on ground of uncertainty, sustaining such demurrer without leave to amend was error.

8. Appeal and error ⟹236(2)

Error in refusing to permit amendment of petition in sustaining special demurrer thereto on ground of uncertainty could be attacked on appeal, though leave to amend was not specifically requested. Code Civ. Proc. § 472c.

9. Wills ⟹278

A petition contesting validity of a will already admitted to probate may be amended after expiration of six months' period allowed for commencement of will contest after probate, provided no new ground of contest is stated by the amendment. Probate Code, §§ 370, 380.

◆

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

Proceeding in the matter of the estate of Mary Ann Munfrey, also known as Mary A. Munfrey, also known as Mary Munfrey, deceased, wherein Donald Perry Swan, a minor, by and through Eleanor P. Swan, as his guardian ad litem, and Lesla Claire Swan filed a petition attacking the validity of decedent's will and asking that its probate be revoked. To this petition Charles Leslie Swan and B. R. Fitch, as executors, and Charles Leslie Swan and another, devisees and legatees and heirs at law, interposed a general and special demurrer. The demurrers were sustained without leave to amend, and, from the judgment for respondents, petitioners appeal.

Judgment reversed, with directions.

G. V. Weikert, of Los Angeles, for appellants.

Vernon F. Gant, of Modesto, for respondents.

DOOLING, Justice pro tem.

Mary Ann Munfrey died on April 12, 1942. On May 4, 1942, the court admitted to probate as the last will of decedent a document dated March 9, 1939. On October 13, 1942, appellants filed a petition attacking the validity of this will on the grounds of want of testamentary capacity and undue influence and praying that its probate be revoked, pursuant to § 380, Probate Code. To this petition respondents interposed a general and special demurrer which the court sustained on January 20, 1943, without leave to amend. From the judgment for respondents which followed, this appeal is taken.

Appellants are grandchildren of decedent, and their father, decedent's son, is living. They are, therefore, not heirs of decedent. To show the necessary interest to contest the will which had been admitted to probate their petition alleged: "That said decedent made substantial provision for each of said petitioners, as devisees and legatees, in her last will and testament, which was duly executed by her in the manner and form required by law for the execution of a will; that the exact date of the execution of said last will and testament is unknown to said petitioners, but the same was executed prior to the alleged execution of said instrument and purported will bearing date the 9th day of March, 1939, and was in existence at the time of said decedent's death."

The alleged last will referred to in this allegation was not offered for probate by the contestants. Indeed the allegation that the exact date of its execution is unknown to them implies that it was not in their possession.

[1] The primary point relied upon by respondents for an affirmance is that the contestants may not rely upon an earlier will under which they are beneficiaries to establish their interest to contest a later will, without producing the earlier will and offering it for probate. The Probate Code makes no such provision in express terms, providing only that "any interested person" may contest a will (§§ 370 and 380, Prob.Code), and it is settled that a beneficiary under an earlier will which would be entitled to probate if the contested will is declared invalid is an interested person within the meaning of these sections. 26 Cal.Jur. p. 1082.

The point was squarely ruled against respondents' position in Estate of Phillips, 202 Cal. 490 at page 498, 261 P. 709, at page 712, where the Supreme Court, speaking through Mr. Justice Shenk, said: "The will of 1914 was not produced, and no attempt was made to establish it as a lost or destroyed will. The written opposition, however, alleged the interest of the contestant as a beneficiary of a substantial portion of the estate under the will of 1914. * * * There was no denial of the allegation of the written opposition that the contestant was a beneficiary under that will. The interest of the contestant must therefore be deemed to have been admitted by proponent by her failure to deny the allegation of interest, and the finding of the court to the effect that the contestant lacked sufficient interest to contest the will of 1922 is without support in the evidence."

While not so closely in point, Ruth v. Krone, 10 Cal.App. 770 at pages 781, 782, 103 P. 960, at page 965, suggests the same rule.

Respondents rely on certain language in Estate of Visaxis, 95 Cal.App. 617, found at page 620, 273 P. at page 165, wherein the court calls attention to the fact that in Estate of Langley, 140 Cal. 126, 73 P. 824, the earlier will had been offered for probate and that in the Visaxis case itself the earlier will was offered and admitted to probate by the same judgment that sustained the contest and revoked the probate of the later will. From this, respondents argue that the earlier will must be offered for probate as a part of the contest. It was not so held in either the Visaxis or the Langley case, nor in any other case cited by respondents. Indeed the question was not even presented to the court in either of those cases. Estate of Langley, supra, seems against, rather than in favor of, respondents on this point, for the court held in that case that it was sufficient for the contestants to "make a prima facie case of the right of respondents to appear as contestants herein." 140 Cal. at pages 130, 131, 73 P. at page 826.

[2-4] The matter having been directly involved and decided in Estate of Phillips, supra, we are content to hold in accordance with that opinion that the will relied upon by the contestants to establish their interest need not be produced by them and offered for probate as a condition to their right to contest the validity of the later will. It seems hardly necessary to point out that the demurrer admits all of the allegations of the petition and in this respect the case before us is on all fours with Estate of Phillips, supra, wherein the allegations showing interest under the earlier will were admitted by the failure to deny them in the answer. The rule adopted in the Phillips case is designed to do justice, since any other rule would defeat the rights of the beneficiaries under an earlier

will in every case where the will was secreted or wrongfully withheld from them. Of course, upon a trial, the contestants would have to produce evidence satisfactory to the probate judge of the existence, terms and validity of the earlier will and their interest thereunder, if the allegations of their petition concerning the earlier will were denied. Estate of Wickersham, 153 Cal. 603, 612, 96 P. 311; Estate of Land, 166 Cal. 538, 540, 137 P. 246. But on such trial they would have the benefit of the process of the court to summon all necessary witnesses and to compel the production of the earlier will if it was still in existence, and they would have the further right to examine the respondents under § 2055, Code Civ.Proc. It is, therefore, readily possible that the contestants could prove their interest under an earlier will upon the trial of the contest although it would be impossible for them to produce the earlier will and offer it for probate at the time their contest was filed.

[5-9] The petition herein is not in every respect a model of pleading. It was attacked by special demurrer for uncertainty in various particulars and we are not prepared to hold that the trial court erred in sustaining the demurrer on some of these grounds. We need only point out in this connection the allegation that decedent made "substantial provision" for contestants in the earlier will, which is in the nature of a conclusion of the pleader rather than an allegation of fact, and to which a specification of uncertainty was directed. The demurrer, however, was sustained without leave to amend and in this respect the trial court erred. The rule formerly prevailing that the denial of leave to amend could only be attacked on appeal where leave to amend was specifically requested has been changed both by Code amendment and judicial decision. § 472c, Code Civ.Proc.; Wennerholm v. Stanford Univ. Sch. of Med., 20 Cal.2d 713, 128 P.2d 522, 141 A.L.R. 1358. It is true that at the time the demurrer was sustained the six months' period within which a contest after probate could be commenced had expired, but a petition contesting the validity of a will may be amended after the time for filing a contest has elapsed so long as no new ground of contest is stated by the amendment. Estate of Russell, 189 Cal. 759, 774, 775, 210 P. 249; In re Wilson, 117 Cal. 262, 268, 49 P. 172, 711.

The judgment appealed from is reversed, with directions to the trial court to grant contestants a reasonable time to amend their petition.

PETERS, P. J., and WARD, J., concur.

23 Cal.2d 215

NATIONAL AUTOMOBILE INS. CO. et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 18724.

Supreme Court of California.
Nov. 23, 1943.

Rehearing Denied Dec. 20, 1943.

1. Workmen's compensation 🔑1939

Industrial Accident Commission's finding that defendant was decedent's general employer cannot be disturbed if supported by substantial evidence. St.1937, p. 265, § 3201 et seq. and § 5903.

2. Workmen's compensation 🔑1432

Evidence that lessor of truck actually selected driver, retaining right to discharge him and exercising general supervision over method of handling truck which was kept on lessor's premises at night, sustained Industrial Accident Commission's finding that lessor was driver's "general employer" within Compensation Act, though lease gave lessee exclusive control and use of truck and provided that lessee should employ and pay drivers and carry workmen's compensation or other insurance and driver was subject to lessee's directions and performing services for lessee when killed. St.1937, p. 265, § 3201 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "General Employer".

3. Workmen's compensation 🔑208

Where both general and special employer exercise some measure of control over workman or have the right to control as distinguished from exercise of such right, both are liable under Workmen's Compensation Act. St.1937, p. 265, § 3201 et seq.

4. Workmen's compensation 🔑235

It is the right or potential power of control over an employee, rather than the actual exercise of such control, which is important in determining one's status as an employer under the Workmen's Compensation Act. St.1937, p. 265, § 3201 et seq.

5. Workmen's compensation 🔑208, 1707

A general and special employer relationship exists, within Workmen's Compensation Act, if there exists in each, regardless of whether exercised, some power, not necessarily complete, of direction and control, and whether such power exists is a question of fact. St.1937, p. 265, § 3201 et seq.

6. Workmen's compensation 🔑235

The power to discharge is a significant factor in determining one's status as an employer within Workmen's Compensation Act. St. 1937, p. 265, § 3201 et seq.

7. Workmen's compensation 🔑208

Where a master hires out a servant to operate an instrumentality together with the use of the instrumentality, and retains power to discharge servant though hirer directs servant where to go and what to do in performance of the work, the servant remains in general employment of the master in so far as concerns the manner and method of operating the instrumentality, and master remains his general employer subject to provisions of Compensation Act. St.1937, p. 265, § 3201 et seq.

8. Workmen's compensation 🔑210

Where truck driver was actually in general employ of lessor and special employ of lessee of truck, the fact that lessor and lessee attempted by leave to allocate as between themselves responsibility under Workmen's Compensation Act and liability to third persons for driver's negligence did not affect the rights of driver's dependents under Compensation Act to proceed against either lessor or lessee or both. St.1937, p. 265, § 3201 et seq.

◆

In Bank.

Proceeding under the Workmen's Compensation Act by the dependents of George Ivy, deceased, claimants, against Miller Oil Products, alleged employer, National Automobile Insurance Company, insurance carrier, and others to recover compensation benefits for the death of George Ivy, deceased, employee. The Industrial Accident Commission awarded compensation to claimants, and the insurance carrier and others bring proceedings to review the award.

Award affirmed.

Prior opinion, 135 P.2d 27.

C. W. Bowers, of Los Angeles, for petitioners.

Everett A. Corten and Dan Murphy, Jr., both of San Francisco, for respondents.

SHENK, Justice.

This is a proceeding to review an award of the Industrial Accident Commission.

George Ivy met his death while employed to drive an oil truck and trailer which was sublet by Miller Oil Products to Pathfinder Petroleum Company. Ivy's widow and minor son applied for death benefits against both concerns. The commission found that both were employers, that both were subject to the Workmen's Compensation Act, St.1937, p. 265, § 3201 et seq., and that they were jointly liable. An appropriate award was made in favor of the surviving dependents against Miller Oil Products as general employer, and Pathfinder Petroleum Company as special employer. The insurance carriers were held jointly liable for payment of the award and the employers were dismissed. National Automobile Insurance Company, carrier for Miller Oil Products, seeks to annul the order affecting its liability.

[1] It is conceded that Ivy met his death in the course of his employment and from causes arising out of the employment; that his widow and minor son are entitled to any benefits awarded; and that Pathfinder Petroleum Company was an employer. The sole question presented is the sufficiency of the evidence to justify the finding and conclusion of the commission that Miller Oil Products was the general employer. If such evidence is in the record the conclusion that the petitioner is liable may not be disturbed. Sec. 67(c), Workmen's Compensation Act, now section 5953, Labor Code. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 704, 151 P. 398; F. W. Woolworth Co. v. Industrial Acc. Comm., 17 Cal.2d 634, 111 P.2d 313.

The record shows the following: Miller Oil Products is a co-partnership, consisting of two Miller brothers, engaged in the business of distributing oil products. It operates from Whittier, California. It owned some and leased other oil trucks which it used in its own business and also leased to others. Pathfinder Petroleum Company conducted an oil refinery in Los Angeles. It owned no trucks or other distributing system. On March 15, 1942, it entered into a written agreement with Miller Oil Products to lease from the latter certain oil trucks at stated rates per mile. Section 4 of the lease agreement provided: "Lessee during the time Lessee shall use the leased equipment pursuant to the terms of this lease, shall have the sole and exclusive control and use of the said leased equipment to the same effect as if Lessee were the owner thereof. Lessee shall employ and pay the wages of the drivers of the said equipment. Lessee agrees to employ and to permit said equipment to be operated only by competent and careful drivers duly licensed as required by law, and that Lessee shall in connection with such employment of such drivers carry all necessary and required workmen's compensation insurance or other insurance and shall comply with all laws, rules and regulations relating to the employment of truck drivers." The lease was in effect on the dates hereinafter mentioned.

On May 9, 1942, Miller Oil Products received a request from the Pathfinder Company for the use of a certain large utility truck with a semi-trailer which Miller Oil Products had leased from another concern; and that a competent driver be sent with the truck. The decedent, George Ivy, who had applied to Miller Oil Products for work, was selected by one of the Millers as the driver of the truck. Mr. Miller directed another employee to accompany Ivy on his first trip with the utility truck and report his judgment on Ivy's ability to handle it. On May 11th Ivy made his first trip for the Pathfinder Company accompanied by the other driver who reported to Mr. Miller that in his judgment Ivy was competent to operate the truck. Ivy continued in charge of the truck, hauling products for the Pathfinder Company until May 13th, when he met with the accident that resulted in his death.

Under its lease agreement with the owner of the truck and trailer, Miller Oil Products was obligated to see that there was a competent driver in charge of the truck at all times. Mr. Miller told Ivy that "before we would keep him on permanent on the truck we would send one of our drivers along with him for a trip." One of Miller's drivers was sent with Ivy on his first trip "to see that he could properly operate the truck in the protection of our interest"; also to identify him at the Pathfinder refinery as a new man. The employee who accompanied Ivy was paid by Miller Oil Products. On the nights of May 11th and 12th, during the three days' operation by Ivy, the truck was kept at the Miller yard, having been driven there in the evening by Ivy, and dispatched from there in the morning. Ivy reported his daily delivery tickets to Miller Oil Products which in turn forwarded them to the Pathfinder Company. Miller Oil Products took the speedometer readings from the truck. Periodically a mileage and payroll report was made to Pathfinder Company by Miller Oil Products and the former drew separate checks, one to Miller Oil Products for the amount due for mileage, and individual checks to the drivers in the amounts shown on the payroll. The checks were forwarded to Miller Oil Products who distributed them.

It also appeared that Miller Oil Products had nine drivers operating trucks and that it used them interchangeably in its own operations and on trucks leased to others. While engaged in their employment some of those drivers, not including Ivy, wore shirts with the lettering "Miller Oil Products" inscribed on them. Miller Oil Products did not direct where the hauls were to be made for the Pathfinder Company. In some instances, however, Miller trucks were leased by the Pathfinder Company to haul products from the Miller premises to the Pathfinder refinery.

[2] That the driver of the leased truck was subject to the direction of the Pathfinder Company as to the hauls to be made; that at the time of the accident Ivy was performing services for that company; that his wages were paid by it; and that under the lease the Pathfinder Company was to be considered the sole owner of the truck and the employer of the driver, are not to be deemed the exclusive controlling elements in determining liability to an employee subject to the Workmen's Compensation Act. In this case the presence of the factors named by the petitioner does not conclusively demonstrate that the Pathfinder Company had complete and unqualified control of the driver. On the contrary it is apparent that Miller Oil Products exercised such supervision and control that it could substitute another driver on the truck at any time it deemed it necessary or desirable in its own interest, and that it could discharge the driver of any truck whenever it deemed him incompetent. The evidence supports the conclusion that Miller Oil Products retained the right to employ or discharge, and to exercise a measure of control over, the driver selected by it to operate the truck here involved. This control becomes more apparent because of the obligation and responsibility placed upon Miller Oil Products under its contract of lease with the owner of that truck.

[3-5] It is the rule in this state that where both the general and the special employer exert some measure of control both are liable. Department of Water and Power v. Industrial Acc. Comm., 220 Cal. 638, 32 P.2d 354. Indeed, it is only necessary that there be present the right to control, as distinguished from the exercise of the right. The rule is stated in Campbell, Workmen's Compensation (1935) volume I, page 408, section 453, as follows: "Where the original or general employer sends the employee to do work for a third person, the latter remains the servant of the employer sending him, so long as the power of control is retained." Therefore it is not only the actual exercise of control, but the right or potential power of control which is important in determining the status of one as an employer. Federal Mutual Liability Ins. Co. v. Industrial Acc. Comm., 190 Cal. 97, 210 P. 628; Press Pub. Co. v. Industrial Acc. Comm., 190 Cal. 114, 210 P. 820. The recent case of Guarantee Ins. Co. v. Industrial Acc. Comm., 22 Cal.2d 516, 139 P.2d 905, recognized and applied the rule that the right to control, whether or not exercised, is determinative; that a general and special employer relationship is present if there exists in each some power, not necessarily complete, of direction and control, and that whether there is such power of control is a question of fact.

[6, 7] Numerous factors enter into a consideration of what constitutes the right to control. The retention of the power to hire and discharge will in some instances be sufficient to impose liability upon the original or general employer. Employers' Liability Assur. Corp. v. Industrial Acc. Comm., 179 Cal. 432, 177 P. 273; Federal Mutual Liability Ins. Co. v. Industrial Acc. Comm., supra; Press Pub. Co. v. Industrial Acc. Comm., supra; Drillon v. Industrial Acc. Comm., 17 Cal.2d 346, 110 P.2d 64; see also Billig v. Southern Pacific Co., 189 Cal. 477, 209 P. 241. As stated in the Press Publishing Company case at pages 119, 120 of 190 Cal., 210 P. 820, the power of the employer to terminate the employment at any time is a strong circumstance tending to show the subservience of the employee, since it is incompatible with the full control of the work by another. In the Drillon case it was said that the power

to discharge is a significant factor in fixing the status of employer; that the test is whether the right or authority to discharge existed and not whether the employer could have exercised it if the employee was physically out of reach. In Billig v. Southern Pacific Co., supra, it was determined to be the rule in this state that when a master hires out a servant to operate an instrumentality, together with the use of the instrumentality, he does not necessarily cease to be the employer of the servant where he has not relinquished the power to discharge him; that in such case the legal effect is that, though the hirer directs the servant where to go and what to do in the performance of the work, the servant remains in the general employment of the master in so far as concerns the manner and method of operating the instrumentality. It is true that in the Billig case the rule was applied for the purpose of placing the blame for negligence in the operation of the instrumentality. The liberal interpretation enjoined by the provisions of the Workmen's Compensation Act, however, requires that the same rule should apply to determine whether the original employer of the servant and the owner of the instrumentality is an employer subject to the provisions of the act. Employers' Liability Assur. Corp. v. Industrial Acc. Comm., supra.

Although in the present case there was a provision in the lease that the lessee should employ the drivers of equipment leased by it, in actual practice the lessor reserved the right to hire and discharge the driver of this particular truck. In its own interest the lessor exhibited a special concern for and exercised a general supervision over the method of handling the truck, which apparently required special skill in operation. It was kept at the yard of the lessor at night and was dispatched from there in the morning. From the conduct of the parties it is obvious that section 4 of the lease was intended to allocate, as between the lessor and lessee, responsibility under the Workmen's Compensation Act, and liability for negligence of the driver toward third persons under the doctrine of respondeat superior.

[8] In determining the right to death benefits under the act it is immaterial that the parties to the lease had entered into an agreement that the one or the other should be solely liable. See Hartford Accident & Indemnity Co. v. Industrial Acc. Comm., 8 Cal.2d 589, 67 P.2d 105. Such an agreement may not affect the claimants' rights under the act to proceed against either or both the general and special employer. American Motorists Ins. Co. v. Industrial Acc. Comm., 8 Cal.2d 585, 67 P.2d 103; Employers' Liability Assur. Corp. v. Industrial Acc. Comm., supra; Famous Players, etc., Corp. v. Industrial Acc. Comm., 194 Cal. 134, 228 P. 5, 34 A.L.R. 765; Diamond Drill Contracting Co. v. Industrial Acc. Comm., 199 Cal. 694, 250 P. 862.

It follows that the commission did not exceed its powers in determining that Miller Oil Products was the general employer of George Ivy at the time involved, and in holding the petitioner liable for the payment of the award to his dependents.

The award is affirmed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

61 Cal.App.2d 721

COMMERCIAL DISCOUNT CO. v. BANK OF AMERICA NAT. TRUST & SAVINGS ASS'N et al.

Civ. 2996.

District Court of Appeal, Fourth District, California.

Dec. 10, 1943.

1. Banks and banking 🔑154(8)

Where finance company had been flooring automobiles for dealer under trust agreement, evidence sustained finding that special account of dealer in bank was a trust fund for finance company and was not subject to banker's lien.

2. Interest 🔑12

Where bank, claiming banker's lien, improperly withheld money, the bank was liable for interest from date money was improperly withheld.

3. Election of remedies 🔑12

Where finance company, asserting that automobile dealer's special bank account was trust fund for its benefit, brought action to recover amount which bank had withheld under asserted banker's lien, and finance company agreed that all legitimate debts of dealer's business should be paid out of selling price thereof, in view of adjudication rejecting asserted banker's lien, there was no such election of remedy as precluded bank from collecting debt out of the selling price of dealer's business.

4. Assignments for benefit of creditors 🔑172

Where finance company had knowledge of automobile dealer's indebtedness to bank at time company entered into agreement that all legitimate debts of dealer's business should be paid out of selling price thereof, to be placed in escrow for that purpose, with balance payable to the company, the bank was one of beneficiaries of contract, and was entitled to compel the company to live up to the contract.

5. Assignments for benefit of creditors 🔑195

Where finance company entered into written agreement that all legitimate debts of automobile dealer's business should be paid out of selling price thereof to be placed in escrow for that purpose, and agreement also provided that company should approve all claims prior to payment, the company could not take advantage of its failure or refusal to approve legitimate debt of business and thereby defeat creditor's right.

6. Assignments for benefit of creditors 🔑171

Where finance company entered into written agreement that all legitimate debts of automobile dealer's business should be paid out of selling price thereof to be placed in escrow, and that balance should be paid to the company, the company's rights were governed by the contract and not by dealer's instructions to the escrow agent.

7. Assignments for benefit of creditors 🔑195

Where finance company entered into written agreement that all legitimate debts of automobile dealer's business should be paid out of selling price thereof to be placed in escrow, that balance should be paid to finance company, and that company should approve all claims prior to payment, even though company did not specifically approve bank's legitimate claim, company could not claim advantages of the contract without accepting the burdens.

8. Assignments for benefit of creditors 🔑195

Where finance company entered into written agreement that all legitimate debts of automobile dealer's business should be paid out of selling price thereof to be placed in escrow, that balance should be paid to finance company, and that company should approve all claims prior to payment, the company sufficiently approved bank's claim when, with full knowledge of its existence and amount, it entered into the agreement.

9. Assignments for benefit of creditors 🔑195

Where finance company entered into written agreement that all legitimate debts of automobile dealer's business should be paid out of selling price thereof to be placed in escrow, and that balance should be paid to finance company, the company which had received balance of the fund was properly required to pay amount of social security taxes due up to time business was sold.

10. Assignments for benefit of creditors 🔑195

Where finance company entered into written agreement that all legitimate debts of automobile dealer's business should be paid out of selling price thereof to be placed in escrow, and that balance should be paid to finance company, evidence was sufficient to show a waiver of any requirement for presentation of bills for social security taxes or for specific approval thereof by finance company before the escrow was closed.

11. Assignments for benefit of creditors 🔑195

Under finance company's agreement that all legitimate debts of automobile dealer's business should be paid out of selling price thereof to be placed in escrow, and that balance should be paid to finance company, where company received over $9,000 from the escrow which it would not have received, at least in its entirety, but for new agreement regarding closing of escrow and subsequent payment of social security taxes, there was sufficient consideration for the new agreement.

Appeal from Superior Court, San Bernardino County; Benjamin F. Warmer, Judge.

Action by the Commercial Discount Company against the Bank of America National Trust & Savings Association to recover money, wherein the defendant filed a cross-complaint against the plaintiff and O. L. Cowen who filed a cross-complaint against the plaintiff and the defendant. From the judgment, all parties appeal.

Judgment affirmed in part, modified in part, and reversed in part, with directions.

Rowland M. Butler and Chapman & Chapman, all of Los Angeles, for Commercial Discount Co.

Louis Ferrari, of San Francisco, Edmund Nelson and G. L. Berrey, both of Los Angeles, for Bank of America Nat. Trust & Savings Ass'n.

BARNARD, Presiding Justice.

O. L. Cowen was a Ford dealer at San Bernardino. The Commercial Discount Company had been flooring cars for him under trust agreements. He also owed the Bank of America some $6,000 which is admitted to have been a debt arising out of this business. He had two accounts in this bank, one a general account and the other designated as "O. L. Cowen, Special Account." For brevity, the Commercial Discount Company will be referred to as the company and the Bank of America as the bank.

On January 20, 1937, the bank, under a claim of banker's lien, took all of the general account and $3,347.67 from the special account to cover the balance due to it. Later the same day, the company presented to the bank a check in its favor drawn by Cowen on the special account and payment thereof was refused. On January 22, 1937, the company brought this action against the bank to recover the amount withheld from the special account, the complaint alleging conversion, with a second count for money had and received. It was and is the company's contention that this special account was a trust fund for its benefit created in connection with its flooring contracts and other agreements with Cowen.

On March 15, 1937, the company entered into a written agreement with Cowen which recited that he owed it about $53,000, referred to various things held by the company as security, and stated that he contemplated selling his business within ten days. It was then provided that he might sell the business if he entered into an escrow therefor within ten days; that the sale should be for cash and for not less than $25,000; that the escrow should be subject to the approval of the company; and that the escrow should provide that claims against Cowen were limited to obligations of the business and not his personal debts. It was then provided that the company "shall" approve all claims prior to payment of the same, that the company "will approve all legitimate, substantiated or legal claims appertaining to the business"; and that the company should file a claim for the balance of the escrow funds after the approved obligations of the business were paid. The agreement then contained elaborate provisions for the operation of the business by Cowen during the period of the escrow, including a limitation on the debts that he might incur without the company's consent, and provided that the term of the escrow should not exceed thirty days.

Cowen sold the business to one Garner and on March 24, 1937, an escrow was started in the bank. Garner placed in escrow $26,000 with instructions to pay the same to Cowen or his order when there could be delivered to him a bill of sale and certain other papers. Cowen put in separate instructions, signed by him alone, directing the bank to pay from the $26,000 the claims of all creditors, other than the company, who should on or before March 24, 1937, present or file claims against him which had been approved in writing by him and the company. The bank was then directed to pay a certain sales tax to the board of equalization, and to pay the balance to the company. Both instructions were directed to the bank generally and not to any department. On April 1, 1937, the bank, being uncertain whether its offset from the special account was good in view of this action which had been brought by the company to recover that amount, notified its trust officer to hold $3,347.67 out of the escrow funds unless the company should dismiss this action. On April 8, 1937, the escrow was closed and the bank remitted to the company about $9,000, being the balance of the escrow funds except for $3,347.67 which it withheld to await the result of the litigation.

On May 17, 1937, the bank filed an answer and cross-complaint in this action, joining Cowen as a cross-defendant. It alleged the facts in general as above outlined, that it did not know whether its offset against the special account was good or whether it was entitled to apply the amount withheld from the escrow funds to its debt, and prayed for a declaration of its rights and such other and further relief as might be proper. Thereafter, Cowen filed a cross-complaint against the company and the bank asking that the amount of certain social security taxes due to the California Employment Commission be paid from the escrow funds as one of the debts of the business. Answers to the cross-complaints were filed. At the trial it was stipulated that another action, which had been brought in behalf of the state to collect the social security taxes, be consolidated with this action to the extent of and for the purpose of determining the amount due.

The court made findings and entered a judgment adjudging and decreeing: 1. That the company recover from the bank $3,347.67, with interest from January 20, 1937, covering the amount withheld from the special account; 2. That the company also recover from the bank $3,347.67, with interest, covering the amount withheld from the escrow funds; 3. That it had been agreed between the company and Cowen that the amount of the state social security tax then due should be paid out of the selling price of the business and through the escrow, that these parties omitted to cause these payments to be made through inadvertence and mutual mistake, and that the company pay said tax liability amounting to $2,500.79 to California Employment Commission "out of the balance of funds to be paid to said plaintiff under the provisions of Paragraph 2 of this judgment"; 4. That the bank have judgment against Cowen for $3,347.67, with interest. The bank has appealed from that part of the judgment which is against it, the company has appealed from that part of the judgment ordering it to pay the amount of the social security tax to the California Employment Commission, and Cowen has appealed from the judgment against him. Appellant Cowen has filed no brief.

[1] On its appeal the bank first attacks Paragraph 1 of the judgment to the effect that it may not retain the amount withheld from the special account under a claim of banker's lien. The main contention in this connection is that the evidence is not sufficient to sustain the court's finding that this was a trust fund for the benefit of the company. The evidence on this point is conflicting and while it would have supported a contrary finding it must be held that it is sufficient to support the finding made.

[2] At the oral argument counsel for the bank for the first time raised the point that in the event it is held that it was not entitled under its banker's lien to withhold $3,347.67 from the special account and apply this upon Cowen's debt, it should be held that the company was not entitled to interest on that amount, and that the provision for interest in Paragraph 1 of the judgment should be eliminated. We are unable to agree with this contention. The bank has held this money since January 20, 1937, and if, as found by the court, it was not entitled to withhold the same no good reason appears why the usual rule with respect to interest should not apply.

The bank next contends, as an alternative to its first point, it was entitled to payment of its debt out of the escrow funds, and that the court erred in Paragraph 2 of the judgment in ordering it to also pay to the company a similar amount withheld by it from those funds.

It is conceded that the debt of Cowen to the bank grew out of this automobile business and the court so found. While the bank does not claim both of the amounts withheld, its contention is that it is entitled to keep one of these amounts as payment for that debt. When it withheld the first of these amounts under a claim of banker's lien the company brought this action to recover the same. Thereafter, the escrow funds came into the hands of the bank pursuant to an agreement that all of Cowen's business debts should be paid therefrom before the balance should go to the company. While this situation was existing, and while it still retained that part of the escrow funds, the bank filed a cross-complaint in this action, laid the entire situation before the court and asked for a declaration of its rights and for equitable relief. The company did not sign the escrow instructions and its claim to any of the escrow funds is based entirely upon its contract of March 15, 1937, with Cowen. In that contract the company agreed to approve all debts arising from the business and that these debts should be paid out of the selling price of the business to be placed in escrow, and that it would file a claim only for the balance after these debts were paid. No sufficient reason is pointed out why the company should not be required to live up to that contract.

[3, 4] The company now claims that in making this contract both it and Cowen assumed that the bank's debt had been paid by the withholding of that amount from the special account under a banker's lien. The company, at least, could hardly have assumed this as it was then maintaining this action to recover that amount as improperly held, and it has continued to press that claim until it has secured a judgment for a return of that amount. The company

also argues that the bank elected its remedy by offsetting the special account and that it could take no other steps to collect this amount. Under the circumstances of this case this was not such an election as precluded the bank from pursuing another remedy for the collection of its debt. Dickinson v. Electric Corp., 10 Cal.App.2d 207, 51 P. 2d 205; Agar v. Winslow, 123 Cal. 587, 56 P. 422, 69 Am.St.Rep. 84; Crittenden v. St. Hill, 34 Cal.App. 107, 166 P. 1016. Not only did one of these remedies not exist here, as found by the court, but the two remedies were not so inconsistent as to call for the application of the rule relied upon. A further consideration here is that the company entered into a written agreement that all legitimate debts of this business should be paid out of the selling price thereof to be placed in escrow for that purpose. The bank was one of the beneficiaries of that contract. At the time it entered into that contract the company knew of the existence of this debt, its knowledge coming from two sources as shown by the evidence, and it was then maintaining an action to recover the amount improperly withheld from the special account, with the knowledge that this would leave the debt unpaid.

[5-8] The company further contends that the bank's debt was not within the provisions of the contract of March 15, 1937, and that it did not comply with the escrow instructions in that its claim was not filed on time and was not approved by the company and Cowen. This part of the judgment against the bank is based upon the court's findings to the effect: 1, that the bank's debt was not within the contract of March 15, as that agreement covered only debts to be paid under the escrow instructions, and 2, that the bank's claim was not filed within the time named in the escrow instructions and was not approved by the company. The first of these findings is in no way sustained by the evidence. The contract did not provide that it was to cover only debts to be paid under the escrow instructions. It provided that there should be an escrow in connection with the sale of the business which should provide that claims against Cowen were limited to obligations of this business to the exclusion of Cowen's personal debts. It also provided that the company should approve all claims prior to payment but with the further specific agreement that the company would approve all legitimate claims pertaining to the business. The company clearly agreed that all legitimate debts of this business, including any such debt to the bank, should be paid from the escrow. It knew that by filing this action it had prevented another payment of the bank's claim, at least for the time being. The company cannot take advantage of its own failure or refusal to approve this legitimate debt of the business. The contract contained no limitation as to the time within which bills could be presented except a general provision that the escrow should be closed within thirty days after it was started. Cowen inserted in his escrow instructions a provision authorizing the bank to pay claims of creditors presented on or before March 24, 1937, the very day the escrow was opened. Not only was this an unreasonable limitation of time, one which Cowen was not entitled to make under the contract, and one which was not observed in connection with other claims against this business, but the company's rights are governed by the terms of its contract of March 15 and not by unauthorized changes made by Cowen. Moreover, the escrow instructions were directed to the bank generally and not to any department. The bank not only handled the escrow but then had its own claim in its possession and a formal presentation of the claim to itself would have been an idle act and was unnecessary under these circumstances. In fact, the company, in arguing that "the requirement of the escrow instructions for approval of claims was strictly followed," in another connection and for another purpose, insists that the bank's claim must be considered as having been actually filed. While it may be true that the company did not specifically approve the bank's claim it had agreed to do so, and it cannot claim the advantages of this contract without accepting the burdens as well. As a practical matter, the company sufficiently approved the bank's claim when, with full knowledge of its existence and amount, it agreed in writing that all legitimate debts of the business should be paid from the proceeds of the sale.

On its appeal from Paragraph 3 of the judgment, requiring it to pay the amount of social security tax due up to the time this business was sold, the company argues that the terms of the contract of March 15, 1937, were unambiguous and did not require it to pay this tax, that oral evidence was inadmissible to prove the intention of the parties in this regard, and that the evidence is not sufficient to support the finding that the parties intended to provide for the payment of this tax as one of the debts of the business and by mutual mistake neglected to so provide in the escrow instructions. It is also argued that this part of the judgment is erroneous since it appears that the company had not approved this claim and since it was not presented before the escrow was closed.

[9-11] While this point presents some close questions from a strictly legal point of view they cannot be held controlling in the equity proceeding into which this developed. Through their knowledge of the business the parties to the contract must have known of the general liability for such a tax, and the company's attention was definitely called to such liability since Cowen's statement of his assets and debts was before them when the contract was made. While the parties recognized that this statement had not been brought down to date, that statement sets forth a smaller sum as representing this tax liability at the time it was drawn up, and, without requiring a more complete statement, the company signed the agreement which, in effect, provided that all legitimate debts of the business should be paid out of the proceeds of the sale before the balance should be applied upon the debt to the company. Under its written agreement the company not only agreed that the tax claim should be paid as one of the debts of the business but it agreed to approve the same, and it should not now be allowed to rely on its neglect or refusal to do what it agreed to do. While this claim was not presented before the escrow was closed Cowen testified that a few days after the escrow was opened he told the company that all of the accounts were in with the exception of the "Social Security and the State tax", that he could not get those in in time to close the escrow, and that the company's agents told him that there was no need to hold the escrow open for that purpose, to go ahead and close the escrow and that those accounts would be paid. The court had the right to accept this testimony as true although it was denied by the company's agents, and this is sufficient to show a waiver of any requirement for a presentation of these bills or for a specific approval thereof before the escrow was closed. The company received over $9,000 from the escrow which it would not have received, at least in its entirety, but for this new agreement, which discloses a sufficient consideration. The evidence is sufficient to support the essential findings to the effect that the company agreed to pay this tax out of the proceeds of this sale and that this has not been done. Certain other findings are surplusage and whether or not they are fully supported by the evidence is immaterial. There was no mistake in the contract by which the company clearly and definitely agreed to pay this obligation out of the proceeds of the sale. The only possible mistake was one by Cowen in giving incomplete instructions with respect to the escrow. However, both the company's rights and obligations arise from and rest upon the contract itself rather than on the escrow instructions which it did not give or sign, and the company waived any strict compliance with the instructions insofar as this item is concerned.

While the first part of Paragraph 3 of the judgment requiring the company to pay the amount of this tax to the Employment Commission is correct the latter portion thereof, which directs the company to pay this amount "out of the balance of funds to be paid to said plaintiff under the provisions of Paragraph 2 of this Judgment", is erroneous since the court erred in Paragraph 2 in ordering the amount withheld from the balance of the escrow funds to be paid to the company by the bank. The quoted portion of Paragraph 2 of the judgment should, therefore, be stricken.

Since the bank is entitled to keep the $3,347.67 withheld by it from the escrow funds in payment of its claim against Cowen and since that debt is thereby discharged, Paragraph 4 of the judgment, which covers this debt and is in favor of the bank as against Cowen, is erroneous and should be stricken.

For the reasons given, Paragraph 1 of the judgment is affirmed. Paragraph 2 of the judgment is reversed, with directions to the trial court to amend that portion of the judgment by providing that the appellant bank may retain the sum of $3,347.67 which it withheld from the escrow funds and apply the same in payment of Cowen's obligation to the bank. Paragraph 3 of the judgment is modified by striking out the last clause thereof which reads: "out of the balance of funds to be paid to said plaintiff under the provisions of Paragraph 2 of this Judgment", and, as so modified, is affirmed. The judgment is further modified by striking therefrom the whole of Paragraph 4. The appellant bank to recover from the company its costs on this appeal.

MARKS and GRIFFIN, JJ., concur.

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61 Cal.App.2d 551

ODA v. ELK GROVE UNION GRAMMAR SCHOOL DIST.

Civ. 6953.

District Court of Appeal, Third District, California.

Dec. 2, 1943.

Rehearing Denied Dec. 30, 1943.

Hearing Denied Jan. 27, 1944.

1. Schools and school districts 🔑115

Where plaintiff's right to maintain action against school district for injuries sustained as a result of alleged negligence of school bus driver existed only by virtue of statute, and the Legislature was authorized to provide as a condition precedent to a judgment against district, as was done in the School Code, that a verified written claim be presented to district. School Code, § 2.801.

2. Schools and school districts 🔑115

Under statute relating to claims against school districts, an unverified claim against such district for injuries sustained as the result of alleged negligence of a school bus driver was insufficient, irrespective of fact that all matters necessary to a proper investigation of the claim were supplied. School Code, § 2.801.

3. Schools and school districts 🔑115

The statutory requirement that a verified written claim be filed with a school district as a condition precedent to a judgment against such district for injuries arising from its negligence is mandatory. School Code, § 2.801.

4. Statutes 🔑227

Where performance of statutory requirements is mandatory, there can be no "substantial compliance" with the statute, except in accordance with the particular provisions.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Compliance".

5. Schools and school districts 🔑20

Required liberality of construction of the School Code does not justify a disregard of the plain terms of a section thereof. School Code, § 3.

6. Schools and school districts 🔑115

Under section of the School Code requiring liberality of construction thereof, section relating to claims against school districts was not construable as calling for an unverified claim only. School Code, §§ 3, 2.801.

◆

Appeal from Superior Court, Sacramento County; Dal M. Lemmon, Judge.

Action by Tommy Oda, by M. J. Dillman, Jr., the guardian of his person and estate, against Elk Grove Union Grammar School District for damages allegedly sustained as a result of the negligence of a driver of a school bus. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Robert H. Schwab, of Sacramento, for appellant.

Gerald M. Desmond, of Sacramento, for respondent.

THOMPSON, Justice.

This suit was instituted by plaintiff, a minor, through his duly appointed guardian against defendant school district, to recover damages to plaintiff as a result of the alleged negligence of a driver of a school bus owned by defendant district.

The defendant made a motion for nonsuit after the introduction of certain evidence, both oral and documentary. After a hearing thereof the trial court entered an order granting the motion for non-suit, and thereafter a judgment of dismissal was entered. The motion for nonsuit was granted and the judgment of dismissal entered on the ground that the claim filed by plaintiff with the school district pursuant to Section 2.801 of the School Code was fatally defective, in that it was not a verified claim as required by law.

It was stipulated between the parties subsequent to the entry of judgment that the only question to be determined was that of substantial compliance with Section 2.801 of the School Code. Plaintiff has confined his argument on the present appeal to the sole question as to whether the foregoing section of the School Code has not been substantially complied with even though there was a failure to verify the claim filed with the school district.

Plaintiff contends that since the claim required by the provisions of Section 2.801 sufficiently apprised the school district of all matters necessary for a proper investigation concerning the merits thereof, the purpose for the requirement of such a claim has been fulfilled and that no further benefit could have been derived by its having been verified. In support of his argument that it should be deemed that the filing of the unverified claim with the school district nevertheless constituted a substantial compliance with the pertinent code provision, the plaintiff points to the language employed in section 3 of Preliminary Provisions of the School Code. This language is as follows: "The Code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice."

It is urged by plaintiff that the effect given to the provisions of Section 2.801 by the trial court resulted in a strict construction of the terms thereof rather than a liberal one such as is enjoined upon the courts by the application of the mandate contained in the language of section 3 above mentioned.

The language of Section 2.801 of the School Code is as follows: "Injuries arising out of negligence: Time for filing claim: Contents of claim. Boards of school trustees, high school boards, junior college boards and boards of education are liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers or employees; *provided, however, that a verified claim for damages shall have been presented in writing and filed with the secretary or clerk of the school district within ninety (90) days after such accident has occurred.* Such claim shall specify the name and address of the claimant, the date and place of the accident and the extent of the injuries or damages received." (Italics ours)

[1] Plaintiff's right to maintain an action against defendant school district authorized by Section 2.801 exists only by virtue of said statutory enactment as no such liability provided for therein existed at common law. It is well established, therefore, that the legislature having granted such a right by statutory enactment, it may also prescribe the procedure by which it may be enforced. In this regard the particular section of the School Code involved in the present action specifically provides, as a condition precedent to the securing of a judgment against a school district, that a *verified claim* for damages be presented in writing and filed with such school district within ninety days from the time of the occurrence of the accident.

[2] Irrespective of plaintiff's argument to the effect that his unverified claim has satisfied the purposes intended by the requirements of Section 2.801 in that all matters necessary to a proper investigation into the merits of his particular claim have been supplied to the school district, it is our opinion that the requirement that a verified claim for damages be filed with the school district is a necessary prerequisite to the maintaining of suit by any party against the school district.

[3] The requirement is mandatory and it is therefore unnecessary to further debate the question of substantial compliance with Section 2.801, as contended by plaintiff.

The decision in the case of Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320, is, we believe, controlling of the question presented in the instant case, irrespective of the fact that suit therein was brought against a municipality and did not involve the application of the provisions of the School Code. The action against the City of Calipatria was instituted to recover damages for injuries alleged to have been received through a defective sidewalk located within the city. Suit was brought under the Statutes of 1931, pp. 2475 and 2476 (Deering's Gen.Laws, Acts 5149 and 5150), which statutes required the filing of a verified claim and performance of certain essential facts before the filing of suit against a municipality. Plaintiff therein did deliver a written claim to the city clerk and to the board of trustees of the city of Calipatria, setting forth certain facts concerning his injuries and claiming compensation therefor but no verified claim was filed as required by the statutes. The contention was made, as it is in the present case, that there was substantial compliance with the statutory provisions under which that suit was brought. The court, at page 269 of 9 Cal.App.2d at page 321 of 49 P.2d, of the opinion, held otherwise, and said: "Not only is the filing of an unverified claim not a substantial compliance with a statute requiring that a verified claim be filed, but, in two recent cases, it has been held that the provisions of the two statutes here in question are mandatory and must be complied with in order to lay the foundation for an action. Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185; Myers v. Hopland Union Elementary School District of Mendocino County [6 Cal.App.2d 590], 44 P.2d 654. No right to bring such an action exists independent of statutory enactment and, in giving such a right, the Legislature may prescribe the procedure and conditions under which it may be exercised. That such a claim must be verified is a reasonable provision which should not be held to be ineffectual and meaningless."

No sound reason is advanced why the law applicable to the filing of verified claims with municipalities and counties should not apply to Section 2.801 of the School Code, which by the provisions therein clearly indicates the necessity of taking certain steps as a condition precedent to the maintaining of an action against a school district. We do not believe there is any sound reason for making such distinction. The same principle is applicable to this case.

The case of Myers v. Hopland Union Elementary School District, 6 Cal.App.2d 590, 44 P.2d 654, decided by this court, and cited with approval in the Spencer case, supra, also supports our conclusions in the present case. In the Myers case the plaintiff, a minor, through his guardian ad litem, brought an action against the school district to recover for injuries received as a result of the alleged dangerous and defective condition of the school property. Plaintiff's right to maintain an action against the school district was authorized by the provisions of the act of June 13, 1923 (Stats.1923, p. 675), and section 2.801 of the School Code. The act of June 19, 1931 (Stats.1931, p. 2476), in effect at the time of plaintiff's injuries, provided that a person injured as a result of the dangerous or defective condition of school premises or buildings or as a result of the negligence of a public officer of a school district shall file with the school district, within ninety days of the accident, a *verified claim* for damages in writing. The plaintiff failed to present a verified claim for damages to the school district within ninety days after the accident, and after making a specific finding to that effect the trial court rendered judgment for the defendant. The judgment was affirmed by this court on appeal and, at page 591 of 6 Cal.App.2d, at page 654 of 44 P.2d, of the opinion, the following language appears:

"The provisions of this section are mandatory and a person has no right to maintain such an action unless he complies therewith. Thompson v. County of Los Angeles, 140 Cal.App. 73, 35 P.2d 185. * * *

"The failure of plaintiff to present his claim *as required by law* is fatal to his cause of action. Bancroft v. City of San Diego, 120 Cal. 432, 52 P. 712." (Italics ours)

[4] The provisions of Section 2.801 of the School Code requiring the filing of a verified claim for damages are in every respect the same as those provisions considered by this court in the Myers case, supra, and the conclusions of this court we believe, are controlling in the instant case. Although, as indicated by plaintiff, no claim at all was filed with the school district by the injured minor in the Myers case and it is urged that the question of the necessity of a verified claim was not at issue, the decision reached therein cannot be deemed to have been so limited. The issue therein included a consideration of the provision requiring a *verified* claim to be filed with the school district and that provision was held to be mandatory. As previously stated in this opinion, where the performance of requirements are mandatory, there can be no *substantial* compliance with the statute except in accordance with the particular provisions.

[5, 6] Not unmindful of the declaration contained in section 3 of the School Code, liberality of construction will not justify a disregard of the plain terms of a statute. To conclude that language requiring a verified claim might be so construed as calling for an unverified claim only, would be placing a strained and unwarranted construction thereon, not intended by section 3 of the School Code.

The plaintiff has not, we believe, cited any authority which is in conflict with the conclusions reached in regard to the issue presented on this appeal.

The judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

Hearing denied; CARTER, J., dissenting.

61 Cal.App.2d 570

HOLLAND v. PENDLETON MORTG. CO.

Civ. 13958.

District Court of Appeal, Second District,
Division 3, California.

Dec. 3, 1943.

1. Mortgages 🔑357

Where sale under trust deed was regularly postponed from July 2 to February 7, sale made on August 17, without further notice, in absence of any saving circumstance, was void. Civ.Code, § 2924; Code Civ.Proc. § 692.

2. Appeal and error 🔑909(1)

Where it appeared, on review of declaratory relief action to determine validity of sales under trust deed, that the files of moratorium proceedings under which trustee's sale was postponed were introduced in evidence but were not in record on appeal, District Court of Appeal presumed that such proceedings were regular and postponement orders were valid. Civ. Code, § 2924; Code Civ.Proc. § 692; St. 1937, pp. 465, 468, §§ 16, 17, 29.

3. Mortgages 🔑357

Where trust deed provides that sale thereunder may be postponed from time to time by trustee by public announcement at time fixed without further notice, and sale is postponed from time to time in accordance with such provision and under postponement orders in moratorium proceedings, a sale held at time fixed by any such postponement is valid. Civ.Code, § 2924; Code Civ.Proc. § 692; St.1937, pp. 465, 468, §§ 16, 17, 29.

4. Mortgages 🔑338

An order made under provisions of mortgage and trust deed moratorium authorizing beneficiary and trust deed to proceed forthwith in accordance with law to sell property in satisfaction of trust deed must be construed, if possible, so as to be within authority given by the moratorium. St.1937, p. 465, § 17.

5. Mortgages 🔑338

The mortgage and trust deed moratorium of 1937 was applicable to moratorium proceedings although they were begun before it was passed. St.1937, pp. 465, 468, §§ 16, 29.

6. Mortgages 🔑338

The mortgage and trust deed moratorium of 1937 does not authorize an order in moratorium proceedings dispensing with requirement that sale under trust deed may only be had after due notice of its time and place or at a time regularly postponed from some previous time and place of which due notice had been given. Civ.Code, § 2924; Code Civ.Proc. § 692; St.1937, pp. 465, 468, §§ 16, 17, 29.

7. Mortgages 🔑338

Order in trust deed moratorium proceedings permitting trustee to proceed forthwith in accordance with law to sell the property was not an order to sell forthwith without notice of sale, but merely permitted trustee to proceed forthwith in accordance with law. Civ.Code, § 2924; Code Civ.Proc. § 692; St.1937, pp. 465, 468, §§ 16, 17, 29.

8. Mortgages 🔑338

Where, at time of entry of order in trust deed, moratorium proceedings, authorizing trustee to proceed forthwith in accordance with law in the sale of the premises, regularly noticed time of sale had been postponed to a time after date of order, trustee had option of waiting until time to which sale had been postponed or of fixing a new date and giving new notice of sale. Civ.Code, § 2924; Code Civ. Proc. § 692; St.1937, pp. 465, 468, §§ 16, 17, 29.

9. Mortgages 🔑338

Where notice of default under terms of a trust deed was recorded and, after lapse of three months, notice of sale was given but sale was postponed to a future date under moratorium proceedings, upon default under the terms of the moratorium it was not necessary to file a second notice of default before giving of a second notice of sale designating a new date. Civ.Code, § 2924; Code Civ.Proc. § 692; St.1937, pp. 465, 468, §§ 16, 17, 29.

10. Evidence 🔑383(7)
Mortgages 🔑20

Provision, in trust deed, that recital in trustee's deed to purchaser of any matters affecting regularity or validity of sale shall be conclusive proof of truthfulness thereof and such deed shall be conclusive against all persons as to all matters or facts therein recited, is valid, and recitals made in pursuance thereto are conclusive in absence of grounds for equitable relief.

11. Evidence ⚷383(7)

Where trust deed provided that recital in trustee's deed to purchaser of matters affecting regularity or validity of sale shall be conclusive proof of truthfulness thereof and trustee's deed declared that statutory provisions and provisions of trust deed were complied with as to acts to be performed and notices to be given and that moratorium order for postponement of sale to February 2 was vacated August 13 and that sale was made August 17, specific recitals were controlling and disclosed that sale was invalid for want of proper notice. Civ.Code, § 2924; Code Civ.Proc. § 692; St.1937, pp. 465, 468, §§ 16, 17, 29.

12. Mortgages ⚷355

Actual notice of trustor under trust deed of court order vacating former order for postponement of trustee's sale and permitting trustee to proceed forthwith in accordance with law to sell property was not actual "notice" of the sale. St.1937, p. 465, § 17.

See Words and Phrases, Permanent Edition, for all other definitions of "Notice".

13. Mortgages ⚷369(8)

Where sale under trust deed was void, trustor was entitled to have payments made to beneficiary after the sale either under an alleged agreement to redeem by series of monthly payments or as rent credited against indebtedness secured by trust deed as of dates when payments were made.

14. Action ⚷6

Where trustee's sale under trust deed was void, trustor was entitled to declaratory relief declaring that such sale was void and that trustor was entitled to reconveyance of property by trustee upon payment of amount due from trustor and that if trustor fails to make payment beneficiary may proceed according to law to have property sold under trust deeds. Civ.Code, § 2924; Code Civ.Proc. § 692.

◆

Appeal from Superior Court, Los Angeles County; Chas. D. Ballard, Judge.

Action by Tony Mae Holland against Pendleton Mortgage Company for declaratory relief to determine validity of sales under two trust deeds. Judgment for defendant, and plaintiff appeals.

Reversed.

Harold B. Pool, of Los Angeles, for appellant.

Hooper & Miller and Lloyd O. Miller, all of Los Angeles, for respondent.

SHAW, Justice pro tem.

This is an appeal by plaintiff from a judgment for defendant in an action for declaratory relief. The individuals named as defendants were dismissed at the trial, and the judgment appealed from runs in favor of the corporate defendant only, which will hereinafter be referred to as the defendant. Plaintiff's complaint shows that she, being the owner of described real property, executed, as security for two promissory notes, two trust deeds of this property, which were assigned to the defendant, that the defendant recorded notices of default under these trust deeds and caused sales of the property to be made under them, at each of which defendant became the purchaser, that these sales were not made at the time stated in the notices of sale, that the plaintiff claims the sales were void, and that defendant disputes this claim. The trial court found the sales to be valid, and entered judgment declaring that the plaintiff has no right, title or interest in the real property in question and defendant is the owner thereof.

The facts regarding the sales are not in dispute. The defendant recorded notices of default under the two trust deeds on July 1, 1936. Thereafter the trustee (the same one being named in both trust deeds) gave due notice of sales to be held under the deeds on February 5, 1937, and at that time the trustee postponed the sales to February 15, 1937. On February 15, the sales were again postponed to July 2, 1937, and on July 2, they were postponed until February 2, 1938. Each of these postponements was made by the trustee by a public announcement made at the time and place previously fixed for the sale, and in pursuance of an order of court made in proceedings under the moratorium statute. The sales were made on August 17, 1937. No other or further notice of sale was given by the trustee after the original notice of sale to be made on February 5, 1937, and no notice of any sale to be held on August 17, 1937, was ever given.

Each of the trust deeds required the trustee before making a sale to give "notice of the time and place of such sale in the manner and for a time not less than that required by the laws of the State of California for sales of real property under Deeds of Trust." Section 2924 of the Civil Code, as it read at the time of these proceedings, required notice of sale of real property under a trust deed made as security, to be given "in the manner and for a time not less than that required by law for sales of real property upon execution." Section 692 of the Code of Civil Procedure, as in force at the same time, provided that: "Before the sale of property on execution or under power contained in any deed of trust, notice thereof must be given as follows: * * * In case of real property: by posting a similar notice * * * for twenty days * * * and publishing a copy thereof once a week for the same period * * *." Detailed provisions for the places and medium of posting and publication and the contents of the notice, not being material here, are omitted from the last quotation.

[1] It is at once apparent that these provisions of law and of the trust deeds were not complied with in respect to the sales made on August 17, 1937. No notice whatever of those sales was either posted or published, nor were they postponed to that date from any previous time fixed for them. Unless saved by some of the matters presently to be discussed, these sales were invalid, and the finding that they were valid is without support in the evidence. (Winbigler v. Sherman (1917) 175 Cal. 270, 272, 165 P. 943; United Bank & Trust Co. v. Brown (1928) 203 Cal. 359, 264 P. 482; Seccombe v. Roe (1913) 22 Cal.App. 139, 143, 133 P. 507; Standley v. Knapp (1931) 113 Cal.App. 91, 102, 298 P. 109.)

[2, 3] The details of the moratorium proceedings which resulted in the postponements of the sales are not before us. While the files of those proceedings appear to have been introduced in evidence, they are not in the record. We must presume that these proceedings were regular and the postponement orders were valid. The trust deeds also provide that sales under them may be postponed from time to time by the trustee by public announcement at the time fixed, without further notice. If the sales had been held at the time fixed by any of the postponements, they would have been valid. (Cobb v. California Bank (1936) 6 Cal.2d 389, 57 P.2d 924; Craig v. Buckley (1933) 218 Cal. 78, 81, 21 P.2d 430; Alameda County Home Inv. Co. v. Whitaker (1933) 217 Cal. 231, 235, 18 P.2d 662.) But this principle cannot avail the defendant here, for after the sales had been regularly postponed to February 2, 1938, the time was advanced and the sales were made without notice on August 17, 1937.

It appears in the record that after the moratorium order which resulted in the postponement from July 2, 1937, to February 2, 1938, the defendant presented to the court a petition to vacate that order on the ground that plaintiff had failed to comply with its terms. While the contents of this petition as a whole are not before us, the record does show that its prayer was that the previous order be vacated and "that the order heretofore made by the above entitled court may be set aside and that an order be made permitting the petitioner, the and/or Southern Title Guaranty Co., a corporation, trustee under said trust deeds, to proceed forthwith in accordance with law to sell said property in satisfaction of said trust deeds." On August 13, 1937, the court made an order on this petition which reads: "Petition is granted." Defendant construes this as an order directing that the sales be made forthwith, without any further notice, and the trial court in its findings adopted this construction.

[4-7] This was error. The order was made under section 17 of the "Mortgage and Trust Deed Moratorium of 1937" (Stats.1937, p. 460 et seq., Deering's General Laws, 1937 ed. Act 5101) and must be construed, if possible, so as to be within the authority given by it. This statute is applicable to these proceedings although they were begun before it was passed and under a prior statute (see sections 16 and 29). Section 17 above mentioned provided: "If the trustor * * * defaults in any payment or any act required by order or decree of court, the court, unless good excuse therefor is shown, must order that the sale * * * postponed by its order or decree proceed as provided by law * * *." Here it was provided by law that before a sale could proceed due notice of its time and place must be given or the sale must have been regularly postponed from some previous time and place of which due notice had been given. No authority was given by this statute for an

order to dispense with either of these requirements. The order made, when properly construed, does not purport to do so. In itself it orders nothing, but refers to the petition for a statement of the court's order. In this case the petition contained a prayer for relief, and the order must be construed as granting the relief so prayed for, and no more. Consequently it is an order vacating the previous stay of sales and "permitting" the trustee "to proceed forthwith in accordance with law to sell said property." This does not order sales; it merely permits them and removes a previous impediment. It is not an order to *sell* forthwith, but an order permitting the trustee to *proceed* forthwith in accordance with law, and is in substantial conformity to the statutory authorization.

[8, 9] When the order was made, the situation was that sales had been regularly noticed and had been duly postponed under order of the court to a time long after the date of the order. Under the order the trustee might proceed as provided by law either by waiting until the time to which the sales had been postponed and then making them, or by fixing a new date, nearer at hand, and giving new notices of sale. The first course would, of course, not satisfy the desires of the defendant. By the second it would be delayed only twenty days after the order, and to that much delay it must submit, to obtain valid sales. Defendant suggests that it would, on our construction of the order, be delayed four months. We suppose, although it is not plainly stated, that this is on the theory that defendant would be required to record a new notice of default under section 2924 of the Civil Code, since such notice must be recorded at least three months before notice of sale is given. But this notice of default is not required to state the time or place of sale and is not a notice of sale. The notice of sale may be given "after the lapse of three months" from the recording of the notice of default. The latter notice would be as effectual for a second as for a first notice of sale, at least under the circumstances of this case.

[10] Defendant contends further that the deeds given by the trustee to it in pursuance of the sales are conclusive upon plaintiff that due notice of the sales was given. The trust deeds provide that the recitals in the deeds given by the trustee to purchasers "of any matters or facts affecting the regularity or validity of said sale shall be conclusive proof of the truthfulness thereof and such deed or deeds shall be conclusive against all persons as to all matters or facts therein recited." Such a provision is valid and the recitals made in pursuance of it are conclusive, in the absence of grounds for equitable relief. (Pacific States S. & L. Co. v. O'Neill (1936) 7 Cal.2d 596, 599, 61 P.2d 1160; Cobb v. California Bank, supra (1936) 6 Cal.2d 389, 57 P.2d 924; Central Nat. Bank v. Bell (1936) 5 Cal.2d 324, 327, 54 P.2d 1107; Carpenter v. Smallpage (1934) 220 Cal. 129, 133, 29 P.2d 841.)

[11] In this case each of the trustee's deeds contains the recital that "all of the statutory provisions of the State of California and all of the provisions of said Deed of Trust have been complied with as to acts to be performed and notices to be given." If this recital stood alone, it might, perhaps, be sufficient, as a statement of ultimate fact, to show that notice was given of the sale that was made (Sorensen v. Hall (1934) 219 Cal. 680, 684, 28 P.2d 667), although it is much more general than the recital upheld in the case last cited. But it does not stand alone. Accompanying it in each deed are recitals of all the postponements above mentioned, with a statement that the postponement to February 2, 1938, was "by virtue of Order of Court, Superior Court Case No. 417,264, which stay of Sale was vacated by the Superior Court of Los Angeles County, Case No. 417,264 on August 13th, 1937," and a statement that the sale was made on August 17, 1937. This shows all the facts on which the sale appears to be invalid. While it does not expressly state that there was no notice of the sale of August 17, it shows that the postponement to February 2 was by order of court and that that order was vacated on August 13. Until the first order was vacated there could be no lawful notice of sale, and the time between the vacating order and the sale was too short for a proper notice. The case is very much like that where a general finding is accompanied by specific findings absolutely inconsistent with it, in which case the specific findings control. (Staub v. Muller (1936) 7 Cal.2d 221, 227, 60 P.2d 283; Wallace Ranch W. Co. v. Foothill D. Co. (1935) 5 Cal.2d 103, 118, 53 P.2d 929.) The specific recitals must be accepted here as controlling and they show that the sales are invalid.

[12] Defendant contends that the plaintiff had actual notice of the sale and that this is equivalent to the notice required by law and the trust deeds. We need not decide what would be the effect of such actual notice, for the evidence does not show it. Defendant's contention is largely based on the fact, which was conceded by plaintiff at the trial, that plaintiff and her attorney were present in court on August 13, 1937, and knew of the court's order made that day, and on defendant's claim that this was an order for a sale forthwith. We have already disposed of that claim adversely to defendant. The order as we construe it was not notice to plaintiff of any sale, or of the time or place thereof. There is also some contention that plaintiff's attorney had notice of the sale, but on a careful reading of his testimony it is clear he had knowledge only of the order of August 13, 1937, and of the petition on which it was based.

[13, 14] It appears without dispute that since the sales plaintiff has remained in possession of the property, either in person or by tenants, and that she has paid to defendant the sum of thirty-five dollars per month. Plaintiff and her attorney testified that these payments were made on an arrangement, evidenced by a writing which was lost, by which she was to redeem the property from the sales by a series of monthly payments, whereas defendant's evidence was that the payments were made as rent merely. If on a new trial it should be found—as it must, unless the evidence is different from that now before us—that the sales were invalid for want of notice, plaintiff will be entitled to have an account taken of the amounts of the debts and the advancements made under the trust deeds, and to have these payments credited thereon as of the dates when they were made. Thereupon a declaration of the rights of the parties should be made, declaring that the sales are void, that the plaintiff is entitled to reconveyances of the property by the trustee upon payment by her of the respective amounts appearing to be due from her, such payments to be made as provided in any valid new agreement, if the court finds that one was made, or within a reasonable time, to be fixed by the court, after judgment, if the court finds that no such agreement was made, and that if the plaintiff fails to make payments accordingly the defendant may proceed according to law to have the property sold under its trust deeds.

The judgment is reversed.

DESMOND, P. J., and SHINN, J., concur.

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61 Cal.App.2d 535

UNGER v. HALL et al.

Civ. 12324.

District Court of Appeal, First District, Division 2, California.

Dec. 1, 1943.

1. Evidence ⚷444(2)

In broker's action on written agreement for commission for procuring lease of defendants' realty, evidence of contemporaneous oral agreement that no compensation would be payable unless existing lease could be terminated was admissible to show that no effective contract ever existed.

2. Evidence ⚷444

Parol evidence is admissible to show conditions precedent which relate to delivery or taking effect of the instrument in question, as that it shall only become effective on certain conditions or contingencies.

3. Brokers ⚷69

Where contract for employment of broker did not contain express promise to pay for his services, it would be inferred that implied promise to pay reasonable value arose.

4. Appeal and error ⚷1012(1)

Where trial court finds in accord with evidence that presumption has been rebutted in fact, appellate court will not seek to weigh the evidence against the presumption.

5. Brokers ⚷82(4)

In broker's action for commission, it was incumbent on broker to allege and prove that express or implied promise to pay for broker's services was made.

6. Brokers 🔑84(1)

A broker, suing for commission, had burden of proving reasonable value of his services.

7. Brokers 🔑85(10)

In action against owners of realty for broker's commission for procuring lease, wherein broker admitted receiving first month's rent, evidence that broker orally assured owners that no compensation would be due unless prior lease, also negotiated by broker, was canceled, was admissible to prove that broker's services were not worth more than amount of first month's rent.

Appeal from Superior Court, Alameda County; Andrew R. Schottky, Judge.

Action by Benjamin B. Unger against Walter G. Hall and others for a commission for procuring a lease of realty owned by defendants. From a judgment for defendants, plaintiff appeals.

Affirmed.

William H. Hollander, of Oakland (Albert K. Whitton, of Oakland, of counsel), for appellant.

McClymonds, Wells & Wilson, of Oakland, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for a commission for services in procuring a lease of real property owned by defendants. The cause was tried without a jury and defendants had judgment.

The facts are not disputed. Plaintiff for many years past was a real estate broker. In 1937 he negotiated for defendants a ten year lease of the premises. Rubin, the lessee, got into financial difficulties and in 1940, while his affairs were in the Bankruptcy Court, the plaintiff approached the defendants, assured them that Rubin would be compelled to abandon the premises, and persuaded them to permit him to negotiate a lease with a new tenant. Testimony was offered over objection of plaintiff disclosing these facts and the separate oral agreement between the parties that, in the event the Rubin lease could not be terminated, the plaintiff would not seek, or be entitled to, a commission for procuring the new lease.

The trial court found in accord with this evidence: "That it was expressly stated and understood between plaintiff and defendants, both before and at the time of the execution of said agreement hereinbefore set forth, that no compensation would be payable to or received by plaintiff unless Rubin, the tenant then in possession were evicted or evacuated from said premises so that possession could be delivered to the lessee obtained by plaintiff, and that plaintiff undertook that matter of securing a new tenant upon such express understanding and agreement." There is no contention that the evidence does not fully support this finding.

The appellant grounds his attack upon the judgment upon the argument that the evidence was improperly admitted to prove this issue because it tended to vary the terms of the written document by parol. The respondents reply that the evidence was admissible to show a condition precedent, the happening of which was essential to give the document binding force. The appellant also contends that this evidence was inadmissible because the condition of the oral contract was not pleaded and that, having received part payment of the contract, the agreement as a whole was affirmed by respondents.

[1] From our review of the authorities we are satisfied that the evidence objected to was properly admitted, and, since it was by this evidence alone that the true story was presented to the trial court, the case illustrates the soundness and propriety of the rule which permits a case of this kind to be determined upon the true facts.

[2] Gleeson v. Dunn, 113 Cal.App. 347, 298 P. 119, is similar to the facts involved here. The parties executed a written contract whereby plaintiff was employed by defendant to prepare plans for the construction of a building. The defendant sought to prove a collateral oral agreement to the effect that the contract of employment was to take effect only on the condition that defendant should first secure title to the property on which the proposed building was to be erected. This evidence having been rejected this court reversed the judgment on the authority of P. A. Smith Co. v. Muller, 201 Cal. 219, 256 P. 411; Reiner v. Crawford, 23 Wash. 669, 63 P. 516, 83 Am. St.Rep. 848; and Burke v. Dulaney, 153 U.S. 228, 14 S.Ct. 816, 38 L.Ed. 698. In so deciding we followed the general rule which is so well stated in 32 C.J.S., Evidence, § 935, p. 857 as follows: "Hence, parol evidence is admissible to show conditions precedent, which relate to the delivery or

taking effect of the instrument as that it shall only become effective on certain conditions or contingencies, for this is not an oral contradiction or variation of the written instrument but goes to the very existence of the contract and tends to show that no valid and effective contract ever existed * * *."

In Texas Co. v. Berry Garage, 121 Cal.App. 455, 9 P.2d 241, the same question arose in reference to parol evidence offered to prove a collateral oral agreement that the written contract should not be binding, but was to be used only as an inducement to other customers of the plaintiff. In holding the evidence admissible for that purpose, the court quoted with approval the portion of the opinion in P. A. Smith Co. v. Muller, supra, reading (201 Cal. at page 222, 256 P. at page 412): "evidence that parties never intended a writing to constitute a contract, but that in lieu thereof another contract was entered into between them, is not objectionable under the parol evidence rule. Such evidence does not change a written contract by parol, but serves to establish that such contract had no force, efficacy, or effect." It would serve no purpose to add here the numerous authorities there cited by the Supreme Court in support of the quotation.

Cooper v. Cooper, 3 Cal.App.2d 154, 39 P.2d 820, is cited in support of this rule, but it is equally applicable upon a different theory. The complaint alleged that the services were of the reasonable value of $1,104. The answer denied that they were worth that or any sum. In the cited case the court said (3 Cal.App.2d at page 159, 39 P.2d at page 822): "It has been frequently held that oral evidence is always competent to show want of consideration, or even partial lack of consideration, for an instrument. This rule is invoked for the reason that such evidence does not result in varying the terms of the written instrument, but really amounts to an impeachment of the character of the document. Richardson v. Lamp, 209 Cal. 668, 290 P. 14, 15; Wurdeman v. Waller, 88 Cal.App. 393, 263 P. 558; section 1962, subd. 2, Code Civ. Proc.; Brannan's Neg. Instr. Law (4th Ed.) p. 254, § 28. In the Richardson case, supra, it is said in that regard: 'While the truth of the facts recited in a written instrument is conclusively presumed between the parties thereto, or their successors in interest by a subsequent title, this rule does not apply to the recital of a consideration. * * * The true consideration or the want of consideration may always be shown by extrinsic evidence for the purpose of impeaching a contract, notwithstanding that it states facts to show a valuable consideration.' "

[3-5] Here the contract did not contain an express promise to pay for the services to be rendered under it, nor did it contain a stipulation for determination of the value of such services, if an obligation of payment therefor should be implied. These were issues which the trial court must try. It is true that under those conditions it will be presumed that an implied promise to pay the reasonable value arises. But this presumption, like other rebuttable presumptions, is but evidence of the facts to be proved. And it is settled law that when the trial court finds in accord with the evidence that a presumption has been rebutted in fact the appellate court will not seek to weigh the evidence against the presumption. Though we have used the word "presumption" in this discussion, it would be more appropriate to say "inference," since the implied promise to pay is not a deduction which the law expressly directs to be made from the facts proved. Here it was incumbent upon the appellant to allege and prove that a promise to pay, either express or implied, was made. This fact was not alleged. The appellant rested upon the "inference" of an implied promise. The evidence objected to was admissible to present the facts under which the respondents contended that such inference could not be reasonably drawn.

[6, 7] But the evidence was admissible for another reason. The appellant alleged that the reasonable value of the services was $1,104. He offered evidence showing that such figure was calculated on the basis of the schedule of fees of the local realty board. He also offered evidence that the sum of $300 paid for the first month's rent by the prospective tenants was retained by him with the consent of the respondents. He now argues that this was part payment on the "promised" fee of $1,104, and that this court should direct judgment for the balance. It is our view that these circumstances merely opened the door wider to respondents to prove what the true value of the services was. Upon appellant rested the burden to prove the reasonable value of his services. Evidence that the premises were leased at the time, that the old lease had seven years to run, that this lease had been

negotiated by appellant and that he was fully aware of its terms, and the evidence that appellant had assured respondents that there would be no compensation unless the prior lease was cancelled all went to prove the true story—that appellant, as the moving party, sought the employment with the clear understanding that if the lessees should vacate the premises the new lease should then become operative, and that then, and only then, he would be entitled to compensation for his services. It also tended to prove that the services rendered under these conditions were not worth more than the sum of $300 which appellant concedes he was paid.

No other point requires discussion.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concur.

ELLINWOOD v. BANK OF AMERICA et al.

Civ. 14190.

District Court of Appeal, Second District, Division 1, California.

Dec. 8, 1943.

Rehearing Denied Jan. 4, 1944.

Hearing Granted Feb. 3, 1944.

Dismissal and nonsuit 🔑60(2)

Where stipulation referring only to continuation of issues in partition suit and making no attempt to continue issues in suit to foreclose equitable lien and indicating that it was within contemplation of parties that an adjudication might be had in equiable lien suit before final decree in partition suit was filed in partition suit, stipulation did not postpone trial of equitable lien suit until after entry of final decree in partition suit which was more than five years after equitable lien suit had been filed, so as to defeat dismissal of equitable lien suit. Code Civ.Proc. § 583.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Lathrop McD. Ellinwood against Bank of America and others to establish and foreclose an equitable lien on an undivided interest in realty, wherein Charlotte McD. Greer intervened. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Call, Murphey & Davis, of Los Angeles, for appellant.

W. C. Shelton and George W. Burch, Jr., both of Los Angeles, for respondent.

YORK, Presiding Justice.

Lathrop McD. Ellinwood, Veranus Ellinwood, and Charlotte McD. Greer (intervener) are brothers and sister. By the terms of the last will of their mother, Elizabeth Steele Ellinwood, and the decree of distribution of her estate, there was distributed to Lathrop McD. Ellinwood, and Mrs. Greer, as trustees for Veranus Ellinwood, under a spendthrift trust, an undivided one-fifth interest in a tract of land comprising 1,000 acres located in Los Angeles County. This trust was to terminate when Veranus Ellinwood reached the age of 48 years, to-wit: October 23, 1936, and the interest in said property was to vest in him without the necessity for a conveyance from the trustees.

On June 11, 1937, Lathrop McD. Ellinwood commenced the instant action, referred to throughout the record as the "equitable lien action", or as "Action No. 416839", to establish and foreclose an equitable lien on the said one-fifth interest of Veranus Ellinwood in the said thousand acre tract of land. Said equitable lien was given by Veranus Ellinwood to Lathrop McD. Ellinwood as security for a number of promissory notes, executed by the former. Mrs. Greer intervened in the action on February 24, 1938, and the cause was originally at issue on September 23, 1938, and was first set for trial on March 17, 1941. Negotiations for compromise were continuously carried on until February 24, 1942, by and through which the "said Veranus Ellinwood sought to have the plaintiff and said Charlotte McD. Greer release their claim of equitable lien against the said real and personal property in order that he might effect a settlement or part payment of the claims against him by the said Alice Salee Ellinwood, Bank of America, the plaintiff, said Charlotte McD. Greer, and others."

A motion to set the instant action for trial was filed on October 26, 1942, and three days later, October 29, 1942, Veranus Ellinwood served and filed his notice of motion to dismiss the action for failure to prosecute the same under the provisions of section 583 of the Code of Civil Procedure.

This appeal is prosecuted from "that certain order or judgment made and entered in the above entitled action, on or about December 28, 1942, granting the motion of Veranus Ellinwood to dismiss the above entitled action and dismissing the above entitled action."

While the instant action in equity was pending, there was also pending an action to partition the thousand acre tract of land here involved, in which issues were presented as to the ownership or interest of the plaintiff Lathrop McD. Ellinwood, and Veranus Ellinwood in the one-fifth interest therein, devised to Veranus Ellinwood under the terms of his mother's will. An interlocutory decree in said partition action, which is referred to herein as "Action No. 419847", was rendered on February 24, 1942, and the final decree therein was entered on June 30, 1942.

While both actions were pending, the following stipulation was filed in the partition action on February 10, 1942: "It is hereby stipulated in the above entitled action on behalf of plaintiff and the defendant Veranus Ellinwood that any and all issues as to ownership or interest of either of the parties hereto as between the said plaintiff and the said Veranus Ellinwood, so far as the same affects that undivided one-fifth interest in said property devised and bequeathed to the said Veranus Ellinwood by the last will and testament of Elizabeth Steele Ellinwood, deceased, and distributed to him, need not and shall not be tried in the above entitled action, but that the determination of the claim of said Veranus Ellinwood to that portion of said one-fifth interest claimed by the plaintiff Lathrop McD. Ellinwood, may and shall be determined after the final decree has been entered in the above entitled action, unless otherwise previously determined in that certain action of Ellinwood v. Bank of America, No. 416839 * * *."

The interlocutory decree dated February 24, 1942, which was rendered in the partition suit, provided as follows: "Said Lathrop McD. Ellinwood, plaintiff, and Veranus Ellinwood, have, by stipulation filed herein, agreed that the trial of the issues affecting the said one-fifth interest in said property may be deferred for future determination in the said action No. 416839 (equitable lien action) and that any decree or judgment rendered herein partitioning said property or confirming the sale thereof shall be without prejudice to the determination in said action No. 416839 of the respective interests of the plaintiff, Charlotte McD. Greer and Veranus Ellinwood in the one-fifth interest in said property distributed to said Veranus Ellinwood by said decree of distribution."

The following question is here presented for determination on this appeal: Did the stipulation heretofore recited have the effect of postponing the trial of this action (the action for equitable lien) until a date after the expiration of the five year period prescribed by section 583 of the Code of Civil Procedure?

Appellant urges that the "only reasonable construction of the stipulation of February 10, 1942, inasmuch as there is no conflict in the evidence, is that the issues involved in this action were to be tried after the entry of the final decree in the partition suit, which did not occur until after the expiration of the five year period prescribed by section 583, Code Civil Procedure. It is therefore a written stipulation extending the five year period and constituted sufficient cause to defeat a dismissal."

An examination of the language of the stipulation discloses an apparent intention to eliminate from the trial of the partition suit "any and all issues as to the ownership or interest of either of the" two brothers, as between themselves, "so far as the same affects that undivided one-fifth interest in said property devised and bequeathed to the said Veranus Ellinwood by the last will and testament of Elizabeth Steele Ellinwood, deceased, and distributed to him"; but that such issue be determined after the entry of the final decree in the partition suit, "unless otherwise previously determined" in the instant cause, i. e., the equitable lien action.

It should not be overlooked that the stipulation was filed in the partition suit and not in the instant action; that it referred only to a continuation of the issues presented by the partition suit and made no attempt to continue the trial of the issues in this case. In other words, there is no stipulation to continue the instant case at all, much less to continue it beyond the five year period prescribed by section 583, supra. Moreover, the stipulation is so worded as to indicate that it was within the contemplation of the parties thereto that an adjudication might be had in this case before the final decree was entered in the partition suit.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

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61 Cal.App.2d 646

PEOPLE v. MUNOZ.

Cr. 3739.

District Court of Appeal, Second District,
Division 2, California.
Dec. 8, 1943.

1. Criminal law 🔑1144(13)

On appeal from judgment of conviction in a criminal case the evidence is viewed in a light most favorable to the people.

2. Sodomy 🔑6

Evidence *held* sufficient to sustain conviction of sodomy. Pen.Code, § 286.

3. Criminal law 🔑1023(10)

An appeal does not lie from verdict of conviction in a criminal case and will be dismissed.

4. Criminal law 🔑1023(11)

An appeal does not lie from the sentence in a criminal case and will be dismissed.

◆

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Lauro A. Munoz was convicted of sodomy in violation of Penal Code, section 286, and he appeals.

Affirmed.

David C. Marcus, of Los Angeles, for appellant.

Robert W. Kenny and David K. Lener, both of San Francisco, for respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 286 (sodomy) of the Penal Code after trial before the court without a jury, defendant appeals. There are also purported appeals from (a) the "verdict" and (b) the sentence.

[1] The evidence being viewed in the light most favorable to the People (respondent), the essential facts are:

Defendant had carnal connection[1] with the prosecuting witness, a male 13 years of age.

Defendant relies for reversal of the judgment upon the following proposition:

[2] *There is not any substantial evidence to sustain the findings upon which the judgment was necessarily predicated.*

This proposition is untenable. An examination of the record discloses substantial evidence which, taken together with inferences which the trial judge may have reasonably drawn therefrom, sustains each and every material finding of fact upon which the judgment was necessarily predicated. For example, the prosecuting witness gave positive testimony that defendant committed the act interdicted by section 286 of the Penal Code. Also, a police officer testified that defendant said that he had "an act of sexual intercourse" with the prosecuting witness.

Further discussion of the sordid details disclosed by the record would serve no useful purpose. (See People v. Pianezzi, 42 Cal.App.2d 265, 269[2], 108 P.2d 732.)

[3, 4] An appeal does not lie from (a) the verdict (People v. Boles, 35 Cal.App. 2d 461, 464, 95 P.2d 949), or (b) the sentence (People v. Arrangoiz, 24 Cal.App. 2d 116, 118, 74 P.2d 789). Therefore the purported appeals from the "verdict" and sentence are dismissed.

The judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

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[1] People v. Battilana, 52 Cal.App.2d 685, 694, 126 P.2d 923. See, also, "Sodomy", Cyclopedic Law Dictionary, (1922), page 950; 2 Bouvier's Law Dictionary, Rawle's 3rd Revision, (1914), page 3088. The statements in People v. Allison, 25 Cal.App. 746, 145 P. 539, relative to the definition of "carnal knowledge" which are contrary to the definition of such phrase in the foregoing authorities, are overruled.

SEASIDE MEMORIAL HOSPITAL OF LONG BEACH v. CALIFORNIA EMPLOYMENT COMMISSION et al.

Civ. 14115.

District Court of Appeal, Second District, Division 2, California.

Nov. 26, 1943.

Rehearing Denied Dec. 21, 1943.

Hearing Granted Jan. 24, 1944.

1. Prohibition 🔑3(3)

Where respondent in mandamus proceeding had plain, speedy and adequate remedy at law by appealing from any adverse ruling of Superior Court, respondent's petition for a writ of prohibition was denied.

2. Action 🔑66

The term "ex parte" implies an examination of a cause or proceeding in absence of one or both parties, and fact that opposite party to a proceeding has notice thereof does not necessarily prevent action of court from being ex parte.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Parte".

3. Prohibition 🔑29

Proceeding by which District Court of Appeal denied application for writ of prohibition without a hearing and in absence of either party was an "ex parte proceeding," notwithstanding that respondent in prohibition proceeding was served with a petition for writ of prohibition and filed written objections thereto.

See Words and Phrases, Permanent Edition, for all other definitions of "Ex Parte Proceeding".

4. Judgment 🔑646

The denial by an appellate court, without written opinion, of a petition for a "prerogative writ", which term includes writs of mandamus, prohibition, quo warranto, habeas corpus and certiorari, without the court passing upon the merits of the petition, does not render res judicata averments in a subsequent petition, which averments are substantially identical with those of the earlier petition.

See Words and Phrases, Permanent Edition, for all other definitions of "Prerogative Writ".

5. Judgment 🔑653

Ex parte denial by District Court of Appeal without written opinion of petition for writ of prohibition without passing on merits of petition did not render averments therein relative to lack of jurisdiction of Superior Court over mandamus proceeding res judicata as to substantially same averments raised in Superior Court in mandamus proceeding and on appeal from Superior Court judgment.

6. Action 🔑10

It is a jurisdictional prerequisite to an action for judicial relief that litigant must first invoke and exhaust administrative remedies provided by statute.

7. Taxation 🔑543(1)

Under provision of Unemployment Insurance Act authorizing suit to recover contributions paid under protest, but prohibiting other remedies, alleged employer, which did not follow procedure outlined in statute, was not entitled to judicial relief. Gen.Laws Supp.1939, Act 8780d, § 45.10.

8. Taxation 🔑497, 543(1)

Under provision of Unemployment Insurance Act prohibiting resort to writ of mandate or other legal or equitable process to prevent collection of any contribution sought to be collected but authorizing suit for recovery of contributions paid under protest, Superior Court had no jurisdiction to grant relief under petition for writ of mandate to compel Employment Commission to rule that petitioner was not a subject employer and not subject to contributions. Gen.Laws 1937, and Supps. 1939, 1941, Act 8780d; Gen.Laws Supp.1939, Act 8780d, § 45.10.

◆

Appeal from Superior Court, Los Angeles County; Emmet H. Wilson, Judge.

Mandamus by Seaside Memorial Hospital of Long Beach against California Employment Commission, Henry F. Grady, and others, as members thereof, and R. G. Wagenet as director thereof, and Edith Newby Cope and others, to require the Commission, its members and director to rule that petitioner was not a subject employer within meaning of California Unemployment Insurance Act. Writ issued and Commission, its members and director appeal.

Reversed.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Forrest M. Hill, and Doris

H. Maier, Deputy Attys. Gen., for appellants.

Musick, Burrell & Pinney, of Los Angeles (Howard Burrell, Anson B. Jackson, Jr., and Philip C. Jones, all of Los Angeles, of counsel), for respondent.

Luce, Forward, Lee & Kunzel, of San Diego, amici curiae, for respondent.

McCOMB, Justice.

This appeal is from a judgment granting respondent's application for a writ of mandate to require the California Employment Commission, its members and directors (appellants herein), to rule that respondent was not a subject "employer" within the meaning of the California Unemployment Insurance Act. (Act 8780d, Deering's Gen. Laws 1937, Supplement 1939 and Supplement, 1941 to the California Codes, General Laws, and Constitution, page 2441 et seq.)

The material facts are:

[1] On March 26, 1942, pursuant to respondent's (petitioner in the trial court) application, the Superior Court issued an alternative writ of mandate requiring appellants to show cause why they should not (a) rule that respondent was not "an employer" within the meaning of the California Unemployment Insurance Act, and (b) refund all contributions previously paid by respondent to the commission under said act. Subsequently, appellants filed an answer and return to respondent's petition and the alternative writ issued thereon. On May 25, 1942, subsequent to the filing of appellants' answer and prior to the submission of the cause to the Superior Court, appellants filed a petition for a writ of prohibition in this court, by which writ it was sought to prohibit further action of the Superior Court in the mandamus proceeding on the ground that said court was without jurisdiction to entertain the same. On May 25, 1942, this court denied said petition for a writ of prohibition without a hearing for the reason that we were of the opinion that appellants (petitioners on the application for a writ of prohibition) had a plain, speedy and adequate remedy at law by appealing from any adverse ruling or decision of the Superior Court. We did not file a written opinion, but made an order which read as follows:

"By the Court:

"Petition for writ of prohibition is denied.

"Moore, P. J."

Appellants urge that in view of the provisions of section 45.10 of the California Unemployment Insurance Act (Act 8780d, Deering's Supplement (1939) to the Calif. Codes, General Laws and Constitution, page 1717), the Superior Court was without jurisdiction to grant the relief sought by respondent.

This proposition we believe to be tenable and requires us to determine three questions which will be stated and answered hereunder seriatim.

First: *Was the order of this court made May 25, 1942, denying, without written opinion, appellants herein application for a writ of prohibition an ex parte proceeding?*

[2] This question must be answered in the affirmative. The term ex parte implies an examination of a cause or proceeding in the absence of one or both parties. The fact that the opposite party to a proceeding has notice thereof does not necessarily prevent the action of the court from being ex parte. (See vol. 1 Bouv. Law Dict., Rawle's Third Rev. (1914), page 1103; Cyclopedic Law Dictionary, Second Edition, (1922) page 374.)

[3] In the present case respondent was served with a petition for a writ of prohibition and filed written objection thereto. However, there was not a hearing and neither party was present when the proposition was considered by the court and the order denying the prayer of the petition made. Such proceeding was obviously an ex parte one.

Second: *Was the denial by this court of appellants' application for a writ of prohibition res judicata on the question of the jurisdiction of the Superior Court to hear and determine respondent's petition for a writ of mandate?*

This question must be answered in the negative, and is governed by this rule:

[4] The denial of an appellate court without written opinion of a petition for a prerogative writ [1] without the court passing upon the merits of the petition does not render res judicata averments in a subse-

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[1] Writs of mandamus, prohibition, quo warranto, habeas corpus, and certiorari are prerogative writs. (Cyclopedic Law Dictionary, (1922) page 796; Bouv.Law Dict., Rawle's Third Rev., vol. 2, (1914), page 2670.

quent petition, which averments are substantially identical with those of the earlier petition. (Funeral Directors Ass'n v. Board of Funeral Directors, 22 Cal.2d —, 136 P.2d 785.)

[5] Applying the foregoing rule to the facts of the present case it appears that though appellants' petition for a writ of prohibition, filed with this court, contained averments relative to the lack of jurisdiction of the Superior Court substantially the same as the issues later presented to the Superior Court and now before this court for decision, the ex parte denial of appellants' application for a writ of prohibition did not constitute the matters alleged in the petition res judicata because we denied such application without passing upon the merits of the issues subsequently raised in the Superior Court. (See Funeral Directors Ass'n v. Board of Funeral Directors, supra.)

The cases of Reilly v. Police Court, 194 Cal. 375, 228 P. 860; Gubin v. Superior Court, 104 Cal.App. 331, 285 P. 1071, and People v. Hadley, 66 Cal.App. 370, 226 P. 836, relied upon by respondent are factually distinguishable from the present case. (Funeral Directors Ass'n v. Board of Funeral Directors, supra.)

Third: *In view of the provisions of section 45.10 of the Unemployment Insurance Act, supra, was the Superior Court without jurisdiction to entertain respondent's application for a writ of mandate?*

This question must be answered in the affirmative. Section 45.10 of the Unemployment Insurance Act, enacted September 19, 1939, reads:

"§ 45.10. *No* injunction or *writ of mandate or other legal or equitable process shall issue in any suit, action or proceeding, in any court against this State or against any officer thereof to prevent or enjoin under this act the collection of any contribution sought to be collected;* but after payment of any such contribution under protest, duly verified and setting forth the grounds of objection to the legality of such contribution, the employer paying such contribution may bring an action against the Unemployment Reserves Commission in any court of competent jurisdiction in the county seat of the county wherein the employer maintains his principal place of business for the recovery of contributions so paid under protest. No such action may be instituted more than sixty days after the payment of such contribution, and failure to bring suit within said sixty days shall constitute waiver of any and all demands against this State on account of any alleged overpayment of contributions hereunder, except that such demands may still be prosecuted in accordance with the provisions of section 45.11 of this act. No grounds of illegality of the contribution shall be considered by the court other than those set forth in the protest filed at the time of the payment of the contribution.

"If in any such action judgment is rendered for the plaintiff, the amount of the judgment shall first be credited on any contribution, interest and penalties due from the plaintiff under this act, and the balance of the judgment shall be refunded to the plaintiff from the clearing account. [2] In any such judgment, interest shall be allowed and paid out of the clearing account of the unemployment fund only to the extent that interest and penalties collected under section 45 and 45.3 are available therefor, at the rate of 6 per cent per annum upon the amount of contributions found to have been illegally collected from the date of payment thereof to the date of such credit or refund on account of such judgment." (Italics added.)

[6, 7] The foregoing statute clearly provides that respondent's remedy consisted in paying under protest the contribution which had been levied, and thereafter bringing an action against appellant as provided in the statute. Since respondent did not follow the procedure outlined in the statute, the established rule in California applies, to wit, it is a jurisdictional prerequisite to an action for judicial relief that the litigant must first invoke and exhaust an administrative remedy provided by statute. (United States v. Superior Court, 19 Cal.2d 189, 194, 120 P.2d 26; see, also, Metcalf v. County of Los Angeles, Cal.App., 142 P.2d 66.)

[8] Applying the foregoing rule of law to the facts of the instant case, it is apparent that the portion of the foregoing section which we have italicized deprived the Superior Court of jurisdiction to grant the

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[2] The last sentence in the cited section which provides for interest, in our opinion, makes inapplicable the rule in Hopkins v. Southern California Telephone Company, 275 U.S. 393, 399 et seq., 48 S.Ct. 180, 72 L.Ed. 329.

relief respondent sought in its petition for a writ of mandate. The same provision of the Unemployment Act was before this court for construction in the case of Louis Eckert B. Co. v. Unemployment Reserves Commission, 47 Cal.App.2d 844, 119 P.2d 227. In such case we held that the Superior Court was without jurisdiction to grant a declaratory relief judgment in view of the provisions of the Unemployment Insurance Act above quoted. We also held, contrary to respondent's contention here, that the California Employment Commission had authority to determine whether an employer was subject to the terms and provisions of the California Unemployment Act or not, and that such determination was subject to review only in the manner prescribed by the act. (Louis Eckert B. Co. v. Unemployment Reserves Commission, supra, 47 Cal.App.2d 847, 119 P.2d 227.)

In view of our conclusions, it is unnecessary for us to consider other questions argued by counsel.

For the foregoing reasons, the judgment is reversed.

MOORE, P. J., and W. J. WOOD, J., concur.

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61 Cal.App.2d 641

PEOPLE v. SUTTLES.

Cr. 3749.

District Court of Appeal, Second District, Division 1, California.

Dec. 8, 1943.

1. Criminal law 🔑566

Identification of defendant as perpetrator of crime need not be made positively or in manner free from inconsistencies.

2. Criminal law 🔑260(11)

In prosecution for violation of statute regarding crimes against children, violation of statute regarding sex perversion, assault with intent to commit rape, and burglary, the sufficiency of identification of defendant was matter for consideration of trial court trying case without a jury. Pen.Code, §§ 288, 288a.

3. Criminal law 🔑260(11)

Findings of trial court regarding identification of defendant as perpetrator of crime cannot be disturbed on appeal unless it can be said as a matter of law that there was no evidence to support the conviction.

4. Burglary 🔑41(6)
Infants 🔑20
Rape 🔑53(2)
Sodomy 🔑6

In prosecution for violation of statute regarding crimes against children, violation of statute regarding sex perversion, assault with intent to commit rape, and burglary, evidence identifying defendant as perpetrator of the crimes was sufficient to support conviction. Pen.Code, §§ 288, 288a.

Appeal from Superior Court, Los Angeles County; Harold B. Landreth, Judge.

Seburn Suttles was convicted of violating Penal Code, §§ 288, 288a, assault with intent to commit rape and burglary, and he appeals.

Affirmed.

Maurice A. Gleason, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., John F. Hassler, Jr., Deputy Atty. Gen., for respondent.

DORAN, Justice.

By information, the district attorney of Los Angeles County charged defendant with violations of Penal Code, section 288, in two counts, a violation of Penal Code, section 288a, assault with intent to commit rape, burglary and kidnaping. Defendant entered a plea of not guilty to all counts, as charged, and the cause was tried by the court without a jury. Defendant was found not guilty of the charge of kidnaping, but was found guilty of all the other charges; and judgment and sentence were pronounced thereon. Defendant's motion for a new trial was denied; and defendant appeals from the denial of his motion and from the judgment.

Defendant in his argument does not attack the sufficiency of the evidence as to the commission of the crimes charged, but confines his argument to the contention that the evidence was insufficient to identify him as the perpetrator of the crimes. His victims were two young girls, nine years and thirteen years old, respectively. Other children were present when some of the acts were perpetrated. The children who testified identified the defendant. The thirteen year old girl testified that the man who attacked her was wearing a zipper jacket, bearing a picture, and that both such picture and jacket were the same as that introduced in evidence. The "picture" on the jacket in evidence was a worker's identification badge bearing defendant's photograph; and the jacket with the badge attached were found in an alley near the cabin courts where the crimes charged were committed. Groceries, identified as having been in the possession of defendant, were found at or near the scene of the crimes. Among these groceries was a bag of nuts. Similar nuts were found in the pocket of the jacket. The children had heard nuts rattling in the pocket of the man who had committed the crimes, and some of these nuts had rolled out on the bed where the nine year old girl had been molested and the thirteen year old girl had been attacked. The defendant was also identified by certain facial scars he bore and by certain missing teeth, and by his general physical similarity to the appearance of the attacker. The crimes were committed in the night-time but the lights were on when the attacker entered the cabin where the children were. The thirteen year old girl was taken outside of the cabin by her attacker.

[1-4] It is well settled that it is not necessary that identification of the defendant as the perpetrator of the crime be made positively or in a manner free from inconsistencies. People v. Addington, 43 Cal.App.2d 591, 111 P.2d 356, and see also cases cited in 7 McK. Dig., Criminal Law, sec. 565. The sufficiency of the identification of defendant was a matter for the consideration of the trial court, and the findings of the trial court may not be disturbed upon appeal unless it can be said as a matter of law that there was no evidence to support the conviction. People v. Farrington, 213 Cal. 459, 2 P.2d 814; People v. Harsch, 44 Cal.App.2d 572, 112 P.2d 654; People v. Soldavini, 45 Cal.App.2d 460, 114 P.2d 415. The evidence was plainly sufficient and the appeal is devoid of merit.

The judgment and the order denying the motion for a new trial are, and each of them is, affirmed.

YORK, P.J., and WHITE, J., concur.

61 Cal.App.2d 648

CALIFORNIA COLLECTION AGENCY, Inc., v. FONTANA et al.

No. 12385.

District Court of Appeal, First District, Division 2, California.

Dec. 9, 1943.

1. Appeal and error 🔑1024(3)

An order granting or denying motion for change of venue, based on conflicting affidavits, should not ordinarily be reversed, but such rule presupposes conflict of evidence on real issue for determination by trial court.

2. Venue 🔑72

The mere fact that complaint states facts sufficient to impose joint and several liability on all of several defendants, including single defendant residing in county of venue, is not conclusive on hearing of nonresident defendants' motion for change of venue on ground of improper joinder of resident defendant solely for purpose of having action tried in such county. Code Civ.Proc. § 395.

3. Venue 🔑72

On hearing of motion for change of venue by defendants residing outside county in which action is pending, court should not try, on conflicting affidavits, fact issues going to merits of cause of action stated against defendant residing in such county. Code Civ.Proc. § 395.

4. Venue 🔑72

On hearing of motion by defendants residing outside county in which action is pending for change of venue on ground of improper joinder of defendant residing in such county, real issue was whether plaintiff, in joining resident defendant, had reasonable grounds for belief in good faith that plaintiff had cause of action against such defendant. Code Civ.Proc. § 395.

5. Venue ⚿70

In action against bankrupt corporation's former officers and directors to recover corporation funds wrongfully applied by defendants in payment of their individual liabilities, admitted entries in corporation's books of charge of portion of federal taxes, paid from corporation's funds, against only defendant residing in county of venue, showed conclusively that plaintiff had reasonable grounds for belief in good faith that cause of action existed against such defendant, so that court erred in granting nonresident defendants' motion for change of venue on ground of improper joinder of resident defendant. Code Civ.Proc. § 395.

◆

Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by the California Collection Agency, Inc., as assignee of the trustee in bankruptcy of the Escalon Winery, Inc., against Frank Fontana and others, former officers and directors of the bankrupt corporation, to recover funds thereof wrongfully applied by defendants to payment of their individual liabilities. From an order granting a motion by certain defendants for change of venue, plaintiff appeals.

Reversed, with directions.

Aaron M, Sargent and John Langer, both of San Francisco, for appellant.

R. L. Gianelli, of Stockton, for respondents.

SPENCE, Justice.

Plaintiff, as the assignee of the trustee in bankruptcy of Escalon Winery, Inc., sued eight defendants, who had been the officers and directors of the corporation, seeking the recovery of funds of the corporation alleged to have been wrongfully applied by said defendants to the payment of their individual liabilities. The complaint was filed in the superior court in San Francisco. Three defendants, who resided in Stanislaus County, filed a notice of motion for change of venue to Stanislaus County. Numerous affidavits were filed in support of and in opposition to said motion. The trial court entered its order granting said motion and plaintiff appeals from said order.

It is conceded that only one of the eight defendants, namely, Marino Lima, resided in the City and County of San Francisco; that the three moving defendants resided in Stanislaus County; and that of the remaining defendants, one resided in Sacramento County and three resided in San Joaquin County. It seems to be further conceded that the complaint alleged sufficient facts to state a cause of action against all defendants, including the resident defendant. The contention made by the moving defendants upon the hearing of the motion was that the resident defendant Marino Lima, had been "improperly joined as a defendant, or had been made a defendant solely for the purpose of having the action tried in" the City and County of San Francisco so that the residence of said resident defendant should not be considered in determining the proper place for the trial of the action. Code of Civil Procedure, section 395.

Certain facts were undisputed upon the hearing of the motion, said facts appearing from the uncontradicted allegations of the verified complaint and uncontradicted allegations found in the affidavits offered by plaintiff and the uncontradicted allegations found in the affidavits offered by defendants. A partnership formerly conducted a winery prior to the incorporation of Escalon Winery, Inc. Upon the incorporation, stock was issued to the partners under a permit from the Division of Corporations in exchange for the partnership assets, the amount of which stock was determined by an appraisal of the net value of the partnership assets. In submitting the statement for the purpose of the appraisal, the partners had failed to list a liability of the partnership in the sum of $17,185.04 for taxes owed to the federal government upon the fortification of certain wines. The stock was issued and the partners became directors of the corporation. Thereafter the directors of the corporation caused said taxes to be paid from the funds of the corporation and certain entries were made in the corporation journal and ledger. In the journal appeared entries purporting to list proportionate charges against each of the former partners for these expenditures. The following notation appeared in the journal immediately under these charges:

"At the time the corporation took over the assets and liabilities of the partnership, there was a liability of $17,185.04 for fortifying tax on the 1935 production of wine which had been produced by the partnership.

"This liability was not known until after the stock had been issued to the respective partners in exchange for their net worth.

"The journal entry is made for the purpose of charging the tax back to the respective partners in proportion to their interest in the partnership, as this tax would reduce the net profit of the partnership which has been credited to the partners."

Similar entries purporting to cover proportionate charges against each of the former partners were made in the ledger under "Stockholders Accounts Receivable". In both the journal and ledger, Marino Lima, the resident defendant, was charged as a partner with two per cent of the total tax expenditure, or $343.70.

The complaint was drawn in four counts. The first count charged that all defendants had been partners and that after the incorporation, all defendants became officers and directors of the corporation. It further charged that the defendants, while acting as such directors, conspired to appropriate and did appropriate the corporation funds to pay their individual liability for said taxes thereby becoming jointly and severally liable to the corporation for the funds so appropriated. The second count charged defendants with a joint and several liability upon a common count for money paid by the corporation for the use and benefit of defendants. The third count charged defendants with a joint and several liability upon an open and current book account. And the fourth count charged that when the Commissioner of Corporation threatened to cancel the permit and rescind the issuance of the stock to defendants, defendants expressly agreed, for the purpose of avoiding such action, to pay to the corporation amounts equal to those charged against them in the journal and ledger of the corporation.

The affidavits offered by defendants in support of the motion for change of venue were all directed to the claim that Marino Lima, the resident defendant, had not been a partner of the remaining defendants. The affidavit of defendant Marino Lima read, "That affiant was and is improperly joined as defendant in the above entitled matter, in that, at all times mentioned in the complaint herein filed, affiant was not, or at any time since has been, a partner or in any way associated with the remaining defendants." Similar language was used in other affidavits of other defendants with the following language added, "Affiant further states that the obligation, indebtedness or liability against the said Marino Lima, if any, was and is the obligation, indebtedness or liability of the remaining defendant partners." We will not pause to discuss the sufficiency of these affidavits for the purpose for which they were offered. We will assume, without deciding, that they were sufficient as allegations of fact rather than conclusions of law, and we will further assume, without deciding, that said allegations were not pregnant with the admission that Marino Lima had been a partner prior to the incorporation and a stockholder and director following the incorporation. It is obvious, however, that defendants were seeking, upon the hearing of the motion for change of venue, to have the cause determined upon the merits insofar as it concerned the defendant Marino Lima. In opposition to the motion, plaintiff relied upon the allegations of the verified complaint and similar allegations contained in counter-affidavits together with the further allegations hereinafter mentioned. Plaintiff included in the affidavits photostatic copies of the above-mentioned journal and ledger entries for the purpose of showing that plaintiff had reasonable grounds for the belief in good faith that it had a cause of action against all defendants including defendant Marino Lima. Plaintiff further alleged in the affidavits that Marino Lima was joined "in good faith" as a defendant and was not joined solely for the purpose of having the action tried in San Francisco. The showing made by plaintiff concerning the reasonable grounds for its belief was not controverted except that defendants filed an affidavit claiming to show "the error and mistake on the part of said entries" in the journal and ledger. They did not deny the existence of said entries but alleged that said entries "were made by the accountant merely as a memorandum or for a balance; that it was not the intent of the corporation that the individual shareholders holding said stock to pay for any excessive interest that they had received due to said error, mistake or inadvertence, but that they were to return, cancel or surrender that portion received in error or mistake, or to surrender all their stock and have a new issue made pursuant to whatever was provided for in the new amended permit * * *"; and that "the entries were arbitrarily made by said accountant in amounts to equal the said $17,195.04 against various parties who were not even a member of the copartnership, which said copartnership was evidenced by an agreement in writing." The showing made in plaintiff's affidavits concerning plaintiff's good faith was in no way controverted by defendant's affidavits. Furthermore, the alleged agreement in writing which evidenced the copartnership was not set forth in the affidavits or produced upon the hearing.

Upon the hearing, counsel for plaintiff claimed that defendant Marino Lima was properly joined as a defendant and was not made a defendant solely for the purpose of having the cause tried in San Francisco. He stressed the following facts (1) that the complaint stated a cause of action giving rise to a joint and several liability on the part of all defendants, including defendant Marino Lima; and (2) that the affidavits in opposition to the motion showed that plaintiff had reasonable grounds for its belief in good faith that Marino Lima was one of the partners and that plaintiff had a cause of action as alleged against all defendants, including defendant Marino Lima. The trial court, however, appears to have taken the view that the merits of the action as to defendant Marino Lima were to be tried upon the conflicting affidavits for the purpose of determining the motion for change of venue. This is indicated by the following discussion between the trial court and counsel: "The Court: Suppose you have evidence and you introduce evidence in good faith and it develops later, in good faith, that that evidence is not sufficient to overcome the other evidence—Mr. Sargent. That belongs in the trial."

[1] In support of the order of the trial court granting the motion, respondent contends that this court should not reverse the order as it was "based upon conflicting affidavits as to whether a cause of action exists against the resident defendant." It is true that an order granting or denying a motion for change of venue should not ordinarily be reversed when based upon conflicting affidavits, but this rule of law presupposes a conflict of evidence upon the real issue for the determination of the trial court. Therefore the first question presented is what was the real issue for the determination of the trial court.

[2-4] We find some difficulty in reconciling all the language found in the authorities dealing with this general question. It should be kept in mind that we are dealing with a situation involving a complaint which stated facts sufficient to impose a joint and several liability upon all defendants including the resident defendant. We will hereinafter discuss the fourth count, which differed from the first three counts, in that it was based upon an alleged express agreement by the several partners to pay their proportionate shares of the total liability. It seems settled, however, that the mere fact that a complaint states facts sufficient to impose a joint and several liability upon all defendants including the resident defendant is not conclusive upon the hearing for a motion for change of venue when the motion is made upon the ground above stated. Coen v. Watson, 105 Cal.App. 297, 287 P. 525; Heringer v. Schumacher, 88 Cal.App. 349, 263 P. 550; Lachman Co. v. Berry Growers' Ass'n, 58 Cal.App. 748, 749, 209 P. 379; Karst v. Seller, 45 Cal.App. 623, 188 P. 298. It also appears clear from the language of the decisions that upon the hearing of such motion, the court should not try, upon conflicting affidavits, the issues of fact going to merits of the cause of action stated against the resident defendant. Pacific Coast Auto Ass'n v. Ahlf, 115 Cal.App. 21, 24, 300 P. 841; Sourbis v. Rhoads, 50 Cal.App. 98, 101, 194 P. 521; Mitchell v. Kim, 42 Cal.App. 111, 114, 183 P. 368; Lakeshore C. Co. v. Modoc L. & L. Co., 108 Cal. 261, 262, 41 P. 472; McKenzie v. Barling, 101 Cal. 459, 462, 36 P. 8. In our opinion the rule, supported by reason and by authority, is that upon the hearing of the motion for change of venue under the circumstances presented here, the real issue for determination by the trial court was whether plaintiff, in joining the resident defendant as a party, had reasonable grounds for the belief in good faith that plaintiff had a cause of action against the resident defendant. If he did, then we do not believe that it may be said that the resident defendant was *improperly* joined as a defendant or was made a defendant *solely* for the purpose of having the action tried in the county of the residence of the resident defendant within the meaning of section 395 of the Code of Civil Procedure.

The views which we have expressed find support in Miller v. Collins, 8 Cal.App.2d 10, 47 P.2d 334. While that was an appeal from an order denying the motion, the real issue presented by the motion is clearly indicated. It was there charged that plaintiff had fraudulently joined the resident defendants solely for the purpose above mentioned. Affidavits were filed by the moving defendants in an attempt to show that no cause of action existed against the resident defendants. The showing made in opposition is stated by the court as follows on pages 11 and 12 of 8 Cal.App.2d, on page 335 of 47 P.2d: "On the face of the complaint the said codefendants of the defendants Collins are proper parties to the action. The affidavit of their attorneys states facts which strongly tend to show that the plaintiff and said attorney had some reason to believe, and in good faith did believe, 'that all of said defendants bore responsibility and liability to the plaintiff,' and that they were proper parties defendant." This showing was held sufficient, the court indicating that it was incumbent upon the moving defendants to show that plaintiff's claim against the resident defendants was "a mere pretense and made only for the purpose of having the action tried in the county" of the residence of the resident defendants. Similar language was used in Sourbis v. Rhoads, 50 Cal.App. 98, at page 101, 194 P. 521, 522, where the court further indicated the nature of the issue when it referred to "the question whether the plaintiff has acted fraudulently in joining another party defendant."

The nature of the issue is further indicated in McDonald v. California Timber Co., 151 Cal. 159, at page 160, 90 P. 548, where the court said the motion of the corporate defendant was properly denied "unless it had a right to show, and succeeded in showing, as it attempted to do, that the plaintiff, without having any cause of action against Dent, *or any reason to believe* that he was liable to respond in damages for the injury alleged, had fraudulently named him as a defendant for the mere purpose of defeating the right of the real defendant to demand a change of the place of trial to the county of its legal residence." (Italics ours.) In Henderson v. Cohen, 10 Cal.App. 580, on page 584, 102 P. 826, on page 827, the court treats the issue as one akin to fraud and, in affirming an order denying the motion, said, "* * * we think the plaintiff not only acted properly in joining him (the resident defendant) but that it was the safest course for him to adopt." In Pacific Coast Auto Ass'n v. Ahlf, 115 Cal.App. 21, 300 P. 841, the issue is again treated as one akin to fraud and the evidence was held "sufficient * * * to show that certain of the defendants were not joined in bad faith * * *". Page 24 of 115 Cal. App., page 842 of 300 P. The court further said on page 25 of 115 Cal.App., page 843 of 300 P., "It is enough upon the hearing and determination of the demand for change of venue, that the cause of action purported to be stated is apparently pleaded in good faith * * *."

In some of the decisions holding that the allegations of the complaint are not conclusive, there is language indicating that, upon the hearing of a motion for change of venue, it may be shown that the cause of action stated against the resident defendant does not in reality exist. From the language of those cases respondent argues that upon the hearing of the motion for change of venue, the court should try disputed issues of fact going to the merits of the cause upon the conflicting affidavits in order to determine whether or not a cause of action does in reality exist against the resident defendant. We believe that the decisions containing the language to which reference is made are distinguishable upon their facts and that the broad implications drawn by respondent from the language of those decisions is not justified. In Lachman Co. v. Berry Growers' Ass'n, 58 Cal. App. 748, 209 P. 379, the trial court was not called upon to determine any disputed issue of fact going to the merits of the cause. It was admitted there that plaintiff's cause of action, if any, arose out of certain written contracts which were before the trial court. On the appeal, it is pointed out on page 752, of 58 Cal.App. on page 380 of 209 P. that under such circumstances the question presented to the trial court "was purely one of law". In Coen v. Watson, 105 Cal.App. 297, 287 P. 525, the court states that the facts appeared from the depositions on file and were "not contradicted". It is of interest to note in that case, which was an action for damages for death of the husband of plaintiff, that it is indicated near the bottom of page 299 of 105 Cal.App., 287 P. 525, that plaintiff had no reasonable ground for any belief that she had a cause of action against the resident defendant. In Denna v. Red

River Lumber Co., 47 Cal.App.2d 235, 117 P.2d 689, the only named resident defendant was the Redwood Company, Inc. The uncontradicted showing was that said corporation had been defunct since 1935 and had had nothing to do with the incident which was alleged in the complaint to have occurred in 1938. It was admittedly joined only because certain plaintiffs had mentioned a redwood company to their counsel and because counsel had merely surmised that the named defendant might have been the company mentioned. The court indicated on page 238 of 47 Cal.App.2d, on page 691 of 117 P.2d that the "reasons were not sufficient" to justify the joinder of the defunct corporation and to defeat the motion of the other defendants. In Karst v. Seller, 45 Cal.App. 623, 188 P. 298, the action was one for rescission of a contract and the uncontradicted showing made upon the hearing of the motion was that the resident defendant was not a party to the contract. The question of whether a cause of action for rescission existed against the resident defendant was therefore purely one of law. In Heringer v. Schumacher, 88 Cal.App. 349, 263 P. 550, the question of whether a cause of action existed against defendant Schumacher involved only the construction of the written contract which was admitted to be the contract upon which plaintiff sought to charge both defendants.

Several cases are cited in the briefs in which the propriety of the joinder of the resident defendants was determined solely from the allegations of the complaint. While the rules set forth in those cases are not controlling in the determination of the question before us, it is interesting to note that frequent reference is made in those cases to the question of the apparent "good faith" of the plaintiffs in joining the resident defendants. Freeman v. Dowling, 219 Cal. 213, 216, 25 P.2d 980; Mills v. Brown, 205 Cal. 38, 41, 269 P. 636; McClung v. Watt, 190 Cal. 155, 159, 160, 161, 211 P. 17; White v. Anderson, 50 Cal.App.2d 634, 636, 123 P.2d 543; Richmond Terminal Corp. v. Parr Terminal Co., 96 Cal.App. 152, 153, 154, 156, 273 P. 845. In the Richmond Terminal case last cited, at page 155 of 96 Cal.App., at page 846 of 273 P., it is said, "Much of the argument of respondent is directed to the proposition that plaintiff cannot finally prevail on the merits of the case. This may or may not be true, but is not in issue here." And in two cases from other jurisdictions, it has been held that the ultimate failure of plaintiffs to prevail against the resident defendants upon the trial did not defeat a judgment obtained by plaintiff against the nonresident defendants. Van Buren v. Pratt, 123 Kan. 581, 256 P. 1006; Toland v. Sutherlin, 49 Tex.Civ.App. 538, 110 S.W. 487. In the Van Buren case, at page 1007 of 256 P., the court said, "Of course, if Gann was not regarded by plaintiff as a real party but was joined for the mere purpose of obtaining jurisdiction over Pratt, it would amount to a misuse of judicial process and defeat the action, but this rule cannot be applied to a plaintiff who sued in good faith and in an honest belief that he had a cause of action against the resident as well as the nonresident, and the mere fact that he fails to recover against the former will not, of itself, defeat a judgment against the latter."

[5] In view of our conclusions as to the real issue before the trial court upon the hearing of the motion for change of venue, we turn to a consideration of the showing made to the trial court. The affidavits filed by defendants in support of the motion contained only bald denials of the allegations that the resident defendant had been a partner of the nonresident defendants. They were effectively controverted, as far as they went, by counter-affidavits. The portions of the counter-affidavits showing that plaintiff had reasonable grounds for the belief in good faith that plaintiff had a cause of action against the resident defendant were not controverted. That showing, based upon the books of the corporation, was such that counsel for plaintiff, having knowledge of the entries in said books, would have been derelict in his duty to plaintiff if he had not advised the joinder of the resident defendant. Upon the trial of the cause, said entries may be successfully explained by defendants, but for the purpose of the motion for change of venue, the admitted entries in the corporation books showed conclusively that plaintiff had reasonable grounds for the belief in good faith that a cause of action existed against the resident defendant. There being no conflict in the affidavits on the real issue before the court, we are of the opinion that the trial court erred in granting the motion.

Defendants make one further point which should be mentioned. Defendants call attention to the fact that the fourth count, based upon an alleged express agreement, claimed a liability of only $343.70 with respect to the resident defendant. They therefore claim that that count must be disregarded in determining the right to a change of venue as the municipal court in San Francisco would have had exclusive jurisdiction over the cause of action stated against the resident defendant in that count. In what has been said above, we have disregarded the allegations of that count and have discussed the situation as though the first three counts, charging a joint and several liability for the full amount against all defendants, were the only counts contained in the complaint.

The order granting the motion for change of venue is reversed, with directions to the trial court to enter its order denying said motion.

NOURSE, P. J., and DOOLING, Justice pro tem., concur.

NEEL et al. v. BARNARD et al.

Civ. 13831.

District Court of Appeal, Second District, Division 3, California.

Dec. 3, 1943.

Rehearing Denied Dec. 23, 1943.

Hearing Granted Jan. 27, 1944.

1. Trusts ⇨25(1)

Plaintiffs' transfer of realty encumbered by trust deeds to defendant under agreement giving defendant irrevocable power to sell, lease, or otherwise dispose thereof in such parcels, for such prices, and on such terms as defendant might deem proper, and to use proceeds to pay the encumbrances, created a "voluntary trust" and made defendant a "trustee" and not a mere "mortgagee in possession," notwithstanding defendant's letter constituting part of agreement stated that defendant declined to enter into any trust agreement. Civ. Code, §§ 852, 2216, 2219, 2221, 2222.

See Words and Phrases, Permanent Edition, for all other definitions of "Mortgagee in Possession", "Trustee" and "Voluntary Trust".

2. Trusts ⇨25(1)

No particular language is necessary to create a trust, nor need the word "trust" or "trustee" be used. Civ.Code, §§ 852, 2216, 2219, 2221, 2222.

3. Executors and administrators ⇨449
Pleading ⇨430(2)

The rule prevailing where an issue not made by pleading is tried by consent did not apply to defendants' contention that claim of plaintiffs was not within scope of complaint nor of claim presented by plaintiffs to estate of deceased defendant, where defendants made timely objection to evidence on which plaintiffs based their claim. Probate Code, § 709.

4. Executors and administrators ⇨224

An action for accounting under deceased trustee's written agreement to sell plaintiffs' realty and other property conveyed to trustee and to account for proceeds, and for damages for breach of the agreement, in going beyond an attempt to follow and reclaim specific property and in asserting general liability against deceased trustee, was subject to Code provision requiring filing of claim where action is pending at decedent's death. Probate Code, § 709.

5. Pleading ⇨34(5)

A complaint which in first cause of action sought only accounting by trustee for property conveyed to him under trust agreement authorizing him to sell property to pay plaintiffs' debts, and in second cause of action sought damages for failure to sell for amounts sufficient to liquidate plaintiffs' indebtedness and leave them a specified balance and for making certain sales for less than value of properties, without specifically alleging repudiation of trust, could not by implication be construed as including repudiation of trust by trustee.

6. Executors and administrators ⇨431(2)

The rule that holder of claim against an estate cannot maintain action thereon unless claim is first presented means that he cannot maintain action on any claim not first presented for allowance, and that in any action brought he can recover only on a claim presented and rejected. Probate Code, § 709.

7. Executors and administrators ⇨448, 449

A claimant's cause of action against estate of deceased trustee arises on claim in form in which it has been presented, and he is not permitted to prove a cause of action different from that stated in the claim nor to amend his complaint so as to set up any other cause of action. Probate Code, § 709.

8. Executors and administrators ⚷227(1)

A claim against decedent's estate must sufficiently indicate the nature and amount of demand to enable executor and probate judge to act advisedly on it. Probate Code, § 709.

9. Appeal and error ⚷179(1)

Where plaintiffs' claim as filed against deceased trustee's estate for accounting and complaint in action on the claim contained no allegation of trustee's repudiation of trust and consequent liability of trustee's estate for the then value of trust property, plaintiffs' contention as to repudiation would not be considered by reviewing court. Probate Code, § 709; Civ.Code, §§ 852, 2216, 2219, 2221, 2222.

10. Trusts ⚷191(3)

Under contract requiring trustee within reasonable time to sell realty conveyed to him by beneficiaries, but giving trustee large amount of discretion regarding prices, terms and conditions of sale, trustee's mere failure to make a sale of particular tract at adequate price, viewed from present standpoint, did not necessarily establish trustee's breach of duty.

11. Trusts ⚷191(3)

Where written contract created trust under which trustee was empowered to sell land conveyed to him by beneficiaries for purpose of paying beneficiaries' indebtedness, in such pieces, for such prices, and on such terms and conditions as trustee might deem proper, trustee was given absolute discretion as to matters referred to, and exercise thereof could not be reviewed by any other person or tribunal on considerations going to soundness of judgment exercised by trustee, in absence of fraud or bad faith. Civ.Code, § 2269.

12. Trusts ⚷305

In action against trustee for accounting under contract authorizing trustee to manage and sell parcels of realty on such terms and at such times as trustee, within his discretion, should determine, evidence did not show that trustee, in refusing offer to purchase property at price subsequently shown to be adequate, did not exercise an honest judgment, and his estate was, therefore, not liable for damages for such refusal.

13. Trusts ⚷305

In action against trustee by beneficiaries of trust for accounting and for damages, finding that trustee had no opportunity to sell property involved at such prices as would have liquidated plaintiffs' indebtedness as provided by contract creating trust, or on such terms as trustee properly fixed, determined in effect, that a reasonable time for sale of property had not elapsed.

14. Evidence ⚷265(2)

In action against trustee for accounting and for breach of trust agreement in failing to sell realty for benefit of beneficiaries, trial court was not bound to accept trustee's admission in letter that he was holding land for higher price as conclusive of fact stated, even though not directly contradicted.

15. Trusts ⚷305

Even if offer was made to trustee for purchase of realty which trustee held for sale for benefit of beneficiaries of trust, it would be presumed that trustee exercised his judgment upon it and deemed price offered too low, and court could not say that he acted fraudulently or in bad faith in declining to sell.

16. Trusts ⚷191(3)

Even if lands held by trustee under agreement to sell at prices sufficient to pay debts of beneficiaries of trust and leave a substantial surplus could have been so sold by trustee, trustee's failure to sell would not necessarily establish his bad faith or breach of duty if refusal to sell was because of belief that market would improve, in absence of evidence that beneficiaries ever urged trustee to sell at best prices obtainable or that they were not satisfied to rely on his judgment.

17. Trusts ⚷191(3)

Where, under agreement under which beneficiaries had conveyed lands to trustee for management and sale thereof and to pay beneficiaries' indebtedness, beneficiaries had no right to control trustee's discretion as to time or conditions of sale, fact that beneficiaries made no protest against his failure to make sale indicated that beneficiaries did not then question either trustee's good faith or his good judgment.

18. Trusts 🔑191(3)

The exercise of mistaken judgment by trustee vested with large discretion in the sale of realty and terms and conditions of sale is not necessarily "unreasonable judgment," nor is it equivalent of "bad faith", as respects right to charge trustee or his estate.

See Words and Phrases, Permanent Edition, for all other definitions of "Bad Faith" and "Unreasonable Judgment".

19. Appeal and error 🔑1008(1)

In action against trustee for accounting under agreement empowering trustee to sell lands to pay beneficiaries' indebtedness and to pay any balance and to reconvey any unsold property to them, evidence on issue of trustee's good faith in refusing or failing to sell property, or in selling at an inadequate price, presented questions for trial court.

20. Appeal and error 🔑1010(1)

Trial court's fact findings supported by adequate evidence cannot be disturbed.

21. Trusts 🔑231(2)

Where agreement creating trust was executed because of trustee's promise not to humiliate plaintiffs by recording notice of default under trust deed securing money he had advanced and plaintiffs' expectation that proceeds of sales by trustee would be greater than could be obtained at foreclosure sales, and trustee, to avoid recording of notice of default, necessarily acquired notes secured by trust deed, and his purchase of notes secured by other trust deeds was perhaps necessary to avoid foreclosure sales, trustee was not guilty of breach of trust on theory that he "acquired an interest adverse to the trust," within statutory prohibition. Civ.Code, § 2233.

See Words and Phrases, Permanent Edition, for all other definitions of "Acquired an Interest Adverse to the Trust".

22. Trusts 🔑305

On an accounting, trustee has burden to establish correctness of his accounts.

23. Trusts 🔑305

It is duty of trustee to support every item of his account by satisfactory evidence or the item must be disallowed.

24. Trusts 🔑305

The rule requiring trustee to support every item of his account or have the item disallowed goes merely to items in the account, and does not require trustee to anticipate and defend against charges of malfeasance not arising from anything on face of accounts, but grounded on other matters, and does not relieve plaintiff suing trustee for fraud and malfeasance from sustaining the burden of proving his charges.

25. Trusts 🔑305

A trustee is entitled to benefit of presumptions of regularity and good faith when his account is attacked.

26. Trusts 🔑305

Where deceased trustee's executor presented his account and produced evidence that items of receipts and disbursements were correct in amount and were for proper purposes, trustee was entitled to benefit of presumption of good faith, and court properly made in its findings a complete account based on such account, as against contention that trustee should have been required to justify affirmatively his failure to make sales of trust property under contract creating trust.

◆

Appeal from Superior Court, Ventura County; L. N. Turrentine, Judge.

Action by Henry H. Neel and others against Charles Barnard for an accounting as trustee under an agreement between the parties and for damages, wherein defendant filed a cross-complaint. The named plaintiff and named defendant having died after commencement of the action, Thomas W. Neel, as executor of the last will of Henry H. Neel, deceased, was substituted as plaintiff for the deceased plaintiff, and Morris H. Barnard was substituted as executor of the last will of Charles Barnard, deceased, and Bertha Barnard Alvord, as executrix of the last will of Gertrude Irene Hall Barnard, deceased wife of original deceased defendant, was also made defendant. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Don G. Bowker, of Tujuna, and Henderson & Churchill and James C. Hollingsworth, all of Ventura, for appellants.

Rogers & Rogers, of Ventura, John H. Alvord, Newlin & Ashburn, and A. W. Ashburn, all of Los Angeles, for respondents.

SHAW, Justice pro tem.

This action was commenced by Henry H. Neel, Thomas W. Neel, his son, and Dessie L. Neel, wife of Thomas, against Chas. Barnard. After the action was begun, plaintiff Henry H. Neel and defendant Chas. Barnard died, the executors of their respective estates were substituted for them, and the executrix of the deceased wife of Barnard was also made a defendant. In discussing the case we shall use the terms "plaintiffs" and "defendant" to refer to the original parties, except as otherwise specially stated. The present plaintiffs appeal from a judgment in favor of the present defendants.

This action arose from a contract between the plaintiffs and the defendant by which, as plaintiffs claim and the trial court found, the defendant became a trustee for plaintiffs, and was based upon certain claimed breaches of duty by defendant as such trustee. The contract consisted of a letter written by defendant to H. H. Neel and T. W. Neel, two of the plaintiffs, dated December 23rd, 1930, and a more formal agreement naming all the plaintiffs as parties of the first part and defendant as party of the second part, dated December 26th, 1930, and signed by all of them. The letter transmitted the agreement to plaintiffs and referred to it in such fashion as to make both, as the trial court found, parts of the one contract between the parties. Also a part of the transaction was a deed, dated December 26th, 1930, by which the plaintiffs conveyed to defendant, without qualification or restriction of any sort, their real property hereinafter mentioned.

At and prior to the time of executing this contract the plaintiffs were the owners of approximately 245 acres of valuable farming land in Ventura County, mostly used for the purpose of producing walnuts, with some of it in beans and other crops. Only 10 acres of this land were owned by plaintiffs Thomas W. Neel and Dessie L. Neel, the balance being the property of plaintiff Henry H. Neel, who was a widower. At the time of this transaction this land was subject to trust deeds for money loaned to the plaintiffs, a large part of it by the defendant but some of it by others, amounting, with advances also secured by the trust deeds, to $228,260.92, as of March 31, 1931, according to the recitals of the agreement above mentioned, which projected the balances to include interest to that date. Payment of this sum and interest thereon was in default, in part, the trust deeds were subject to foreclosure, and plaintiffs were looking for some mode of refinancing their debts or otherwise saving themselves from the complete loss of their property which seemed impending.

The letter and agreement above mentioned recited the facts regarding the loans, the incumbrances and the default in all the detail necessary to a complete statement, provided for the execution of the deed above referred to, and declared that plaintiffs had received no consideration for the deed. By the agreement the plaintiffs gave the defendant "full authority and power irrevocable to sell, lease or otherwise dispose of any part of or all of said real property, or any interest or estate therein, in such pieces or parcels, and for such prices and upon such terms and conditions as the party of the second part may deem proper, and to enter into contracts, and execute all papers as may be proper or necessary in order to carry out and consumate said sale or sales, and upon receipt of the purchase price, either in cash or part of the purchase price in cash and the payment of the remainder to be secured by a mortgage or deed of trust upon the property so sold, to execute and deliver to the respective purchaser all necessary and proper contracts, bonds and deeds of conveyance for the lands so sold which are or may be necessary or proper to fully carry out and complete the transfer of the property so sold and to be in such form and under such conditions as the party of the second part may deem proper." Plaintiffs also authorized the sale of personal property used on the realty and of water stock appurtenant to it. In the agreement plaintiffs stated their "confidence and trust in the integrity and honesty" of defendant and their belief, by reason thereof, that "the disposition and sale of said real property and the payment of their indebtedness * * * can be more expeditiously accomplished, at less cost, expense and for a greater value than can possibly be made" on a foreclosure sale and that the proceeds of sale will probably be in excess of the debts "if the management and sale of said real property is intrusted to" defendant. The defendant agreed "that when the proceeds from the sale of said real property is ample and sufficient to pay the indebtedness herein described, and the advances, costs and expenses in the care and management of said real property, he will then make a full report and accounting" to the plaintiffs "of all the receipts and disbursements made and upon approval and acceptance of said report" the defendant will reconvey to plaintiffs "all the real property remaining unsold, if any; * * * and upon acceptance and approval of said final report * * * he shall be released and discharged from all confidence created by the acceptance of said grant to said real property." Another term of the agreement was that the proceeds of sales and the income from the property "shall be applied to the payment of the indebtedness herein described, the interest to accrue thereon, and the disbursements made by * * * [defendant] in the care and management of said real property, and for no other purpose." It was also agreed that defendant was to receive compensation for his services. Pursuant to this contract defendant took possession of the property described in it and has held and operated that property ever since, except two parcels which he sold.

[1, 2] Defendant contends that this agreement did not create a trust, but merely made of defendant a mortgagee in possession. The trial court, however, treated defendant as a trustee and we are satisfied that this view of the matter is correct. It is true the defendant, in his letter, referred to the fact that the deed was without limitation or qualification, saying also, "I decline to enter into any trust agreement, or declaration of trust"; but in this respect he was like Byron's maid who "whispering 'she would ne'er consent,' consented." The defendant was not even named as the lender and beneficiary in some of the trust deeds recited in the agreement, and many of the notes originally made to him as payee had at the date of the agreement been transferred to others. The powers given him by the contract far exceeded those of a mortgagee in possession. The relationship created by the contract has all the earmarks of a voluntary trust and must be so regarded. There is a transfer of property by plaintiffs to defendant, motivated by their personal confidence reposed in him, for the purpose of enabling him to carry out certain purposes for the benefit of plaintiffs as well as the holders of the indebtedness, which is voluntarily accepted by defendant, and he assumes an obligation to carry out these purposes, subject of course to the discretion provided for in the agreement; all in writing. This is sufficient to create a voluntary trust and make defendant a trustee. Civ.Code, secs. 852, 2216, 2219, 2221, 2222. No particular language or terminology is necessary to create a trust; nor need the word "trust" or "trustee" be used. Weiner v. Mullaney, 1943, 59 Cal. App.2d 620, 140 P.2d 704.

[3] Many of the points made by appellants are based upon the claim, which permeates their briefs, that the defendant, a short time after the trust was created, repudiated and abandoned it, claimed the trust property as his own and from that time forward treated the property as if there were no trust and the conveyance to him had been absolute, the plaintiffs further asserting that by such conduct defendant committed a conversion of the trust property and must be charged with the value of the property as of the date of repudiation. In reply the respondents contend that this claim of appellants is not within the scope of the complaint filed by plaintiffs or of the claim presented to the estate of the original defendant. These two points merge into one, for when, by reason of the death of the original defendant before the trial, it became necessary to file a claim against his estate (Prob.Code, sec. 709), the claim filed was simply a copy of the plaintiffs' complaint herein. There is no room here for the application of the rule that prevails where an issue not made by the pleadings is tried by consent, even if that rule could be applied to a variance from the claim filed, for defendant made timely objection to the evidence on which appellants found their contentions in this matter.

The complaint contained two statements of causes of action. The first alleged the creation of the trust, stating the surrounding circumstances, including defendant's superior knowledge and skill in the management and sale of property such as that of plaintiffs and plaintiffs' great trust and confidence in defendant, setting forth copies of defendant's letter and of plaintiffs' deed to him and giving what the plaintiffs understood to be the legal effect of the agreement, a copy of which they alleged they had been unable to find. This stated legal effect, while lacking many of the details of the actual agreement, did not differ from it in any respect material to the present inquiry. This count also alleged that defendant had made two sales of described portions of the land plaintiffs had conveyed to him, that he had received income, rents and profits from the land conveyed to him which were in excess of the costs of operation, that he had failed and refused to render an account and plaintiffs had demanded one. This count further alleged that defendant became trustee for the plaintiffs, that plaintiffs had done everything required of them by the contract, and that defendant had "failed, refused and neglected to properly perform and discharge his duties as trustee, in that" he had failed and refused to account.

The second statement of a cause of action began by incorporating the first. Then it alleged that by the contract between the parties it was agreed that defendant would "diligently and expeditiously sell so much of said * * * properties as would liquidate and satisfy the said indebtedness then owed by the plaintiffs; that by reason thereof it was the duty and obligation of the said Chas. Barnard to sell, transfer and dispose of so much of said real properties within a reasonable time as would liquidate said indebtedness; that there was at said time an active market for the disposal of said real property, and at such prices as would have liquidated said indebtedness then owed by plaintiffs and which would have left a balance either in money or property for the plaintiffs of approximately Two Hundred Thousand Dollars." Then followed allegations that defendant had at various times not stated received bona fide offers from cash buyers for various parts of the property, which would have enabled defendant to sell the entire property for more than $400,000, but he "refused to sell, transfer and dispose of certain parcels of said * * * properties" and if he had sold them plaintiffs "would have been restored to the occupation and possession of certain parcels of said real properties and would have received the rents, issues, incomes and profits therefrom, and all to plaintiffs' damage in the sum of Two Hundred Thousand Dollars." The second count then alleged facts regarding each sale made by defendant, showing that in each case the sale had been made for much less than the market value, to plaintiffs' damage in the aggregate sum of $37,619.28. Finally, it alleged that "by reason of the failure, refusal and neglect on the part of said Chas. Barnard to sell and dispose of said real properties within a reasonable time after taking the record title thereto," interest on plaintiffs' indebtedness had accumulated and increased in the sum of $100,000, but if he had made sales within a reasonable time $85,000 would have been credited thereon, to their further damage in the sum of $85,000. Prayer was for an accounting, that upon the accounting defendant be required "to pay, convey and deliver to said plaintiffs property cash that may be due them," and for damages in the sum of $322,619.28.

[4] The action, as characterized by the complaint, goes far beyond an effort to follow and reclaim a specific fund or specific property. It asserts a general liability against defendant, to be satisfied out of the assets of his estate, whatever they may be, and arising out of the contract pleaded. It is therefore subject to the provisions of Probate Code, section 709, requiring the filing of a claim where an action is pending at the time of a decedent's death. See 11A Cal.Jur. 706, 711, 712. This conclusion is even more obvious as applied to appellants' theory of a repudiation of the trust, leading to a liability for the value of the property, for this theory involves an abandonment of the property by plaintiffs.

[5] Neither of the causes of action stated in the complaint constituting plaintiffs' claim said anything of a repudiation of the trust. The first was solely and simply an action to obtain an accounting. The second added to the first four items of damage which plaintiffs sought to recover; that is, $200,000 arising from defendant's failure and refusal to sell the property for enough to liquidate plaintiffs' indebtedness and leave them a balance of $200,000; $6,619.28 and $31,000 caused by defendant's sales of two properties for less than their value; and $85,000 for interest which accrued on plaintiffs' debts by reason of defendant's delay in selling. We cannot see how any of these allegations even hints at, or can be regarded by any sort of implication as including, a repudiation of the trust by defendant, with concomitant claim to hold the property in his own right, free of any trust.

[6-9] "The provision that the holder of a claim against an estate cannot maintain an action thereon unless the claim is first presented is equivalent to a declaration that he cannot maintain an action upon any claim that he has not first presented for allowance, and that in any action brought he can recover only upon the claim which has been presented and rejected. This rule is settled by a long line of decisions. The claim as presented and passed upon is the foundation of the cause of action. The

claimant's cause of action arises upon the claim in the form in which it has been presented; that is the only action he may maintain, and plaintiff is not permitted to prove a cause of action other than or different from that stated in the claim, or to amend his complaint so as to set up any other cause of action." 11A Cal.Jur. 865–867; to same effect see cases cited in notes to Cal.Jur. A claim must "sufficiently indicate the nature and amount of the demand to enable the executor and judge in probate to act advisedly upon it." Thompson v. Koeller, 1920, 183 Cal. 476, 485, 191 P. 927. Applying these rules to the present case, we conclude that the plaintiffs' claim as filed did not cover their present claim of a repudiation of the trust and a consequent liability of defendant's estate for the then value of the trust property. There was nothing in it to suggest that any such liability was to be asserted, and the executor was therefore not put in a position to act advisedly upon the claim as now made. For this reason we dismiss the claim of repudiation from our attention in giving further consideration to the appeal.

The complaint and the claim do, however, clearly present the point that it was the duty of defendant to sell the trust property, or so much of it as was necessary, in a reasonable time, that he failed to do so, and that by reason of such failure the plaintiffs suffered damage. The trial court put a construction on the contract which contravenes plaintiffs' contention, in this finding: "That it was not the duty or obligation of Chas. Barnard to sell, transfer and dispose of so much of the real property involved herein within a reasonable time as would liquidate said indebtedness, but that it was his duty to offer said properties for sale at what he deemed a reasonable and fair price in an endeavor and an attempt to liquidate said indebtedness within a reasonable time and have a substantial sum left over to pay to the Neels, or in case of a liquidation by sale of a part of the property, to return the remaining properties to the plaintiffs." We shall not undertake to decide whether the construction thus put on the contract in regard to defendant's duty to sell within a reasonable time is correct; for assuming plaintiffs' construction to be the true one, that is, that it was the defendant's duty to make sufficient sales within a reasonable time to liquidate plaintiffs' indebtedness, other findings and other terms of the contract are such that an error in the finding just quoted would not lead to a reversal.

[10] Much of plaintiffs' argument on this point is based on the further finding that the defendant had "an opportunity to sell the 89 acre tract [part of the land conveyed to defendant by plaintiffs] for a net sum of $133,000.00, (the offer of $140,000.00 being subject to a 5% real estate commission) which offer was made in January of 1931, and which was refused * * *." This is coupled with the further finding that "at said time and place defendant offered to sell said property to the same person for $150,000.00 cash, which offer was likewise refused. That said offers and refusals were not made in violation of the terms of the contract, but in the exercise of an honest judgment and discretion made and exercised in good faith." The contract, while it may have required a sale within a reasonable time, conferred a large amount of discretion on the defendant regarding the prices, terms and conditions of sale. The question, what was a reasonable time, is inextricably bound up with his exercise of discretion in these matters, and the time might vary accordingly. Defendant's mere failure to make a sale, even if, as plaintiffs contend was the case here, the price was adequate, as viewed from the standpoint of the present and the information on market conditions and trends now available, does not necessarily convict him of a breach of duty as trustee, for his discretion would properly take other matters into consideration.

[11, 12] By the formal agreement defendant is given power to sell the land "in such pieces or parcels, and for such prices and upon such terms and conditions as the party of the second part [defendant] may deem proper," and in the letter defendant stated "I must have the total and absolute control of the entire property as to its care, management, recital [so reads the record; perhaps 'rental' as intended] and sale or as to the disposition of the proceeds from the income or the proceeds or as to the disposition of the proceeds from a sale, and certainly there must be no restriction as to a sale and conveyance under such terms and conditions, as I may deem proper for as to those matters, I am to be the sole judge." By these provisions the defendant is given an absolute discretion, whose exercise cannot be reviewed or controlled by any other person or tribunal on consid-

erations going to the soundness of the judgment exercised by him. Civ.Code, sec. 2269. No doubt his exercise of this discretion could be attacked for fraud or bad faith, but we discover no evidence which requires a finding of fraud or bad faith, contrary to the trial court's finding of good faith, in regard to the offer mentioned in the finding above quoted. This offer was made in January, 1931, within a month of the execution of the contract between plaintiffs and defendant. There is evidence that real estate values in the vicinity of this land dropped greatly in the latter part of 1931 and thereafter, but we find nothing to show defendant was not exercising an honest judgment when he refused the price offered him in January of that year.

[13-15] Concerning the later failure of defendant to sell, the court found "That it is untrue that on or about December 26, 1930, or at any time thereafter, there was an active market for the disposal of said real property, but it is true that there were only occasional sales of like properties, similarly situated, and that there was not an active market for said properties at any time subsequent to December 26, 1930, and it is untrue that the defendants had an opportunity to sell any or all of said properties at such price as would have liquidated the indebtedness owed by plaintiffs to defendants and which would have left a balance either in money or property for plaintiffs of approximately $200,000.00 or any other sums. That the two sales made by plaintiff were made in the due course of business and were the only one which could have been made other than an opportunity to sell the 89 acre tract * * *" (here follows the finding already quoted regarding this offer). Upon examining the evidence we see therein sufficient support for this finding, which it seems unnecessary to set forth here, to the mere lengthening of this opinion. Conditions of depression during the time in question are so well known that little proof of them is necessary. This finding, while it does not directly pass upon the question of reasonable time, does in effect dispose of it; for if the property could not have been sold, on such terms as defendant properly determined, a reasonable time for sale had not elapsed. Plaintiffs point to a letter of defendant written in January, 1931, stating that he had declined an offer for a 24-acre tract. No details of this offer appear except the price, and as to that the letter stated that defendant was holding the land for a higher price. Evidently the trial court did not accept this admission as proving the fact admitted, for it found that no such sale could have been made. The trial court was not bound to accept such an admission as conclusive of the fact, even though it was not directly contradicted. But even if the offer was made, it is to be presumed that defendant exercised his judgment upon it and deemed the price too low, and we cannot say he was guilty of fraud or bad faith in declining to sell.

[16-18] Even if, as plaintiffs contend, the properties could have been sold for enough to pay the debts and leave a substantial surplus, defendant's failure to sell would not necessarily convict him of bad faith or breach of duty. It was not necessarily unreasonable for him to believe that the market would improve, and the court may well have concluded that plaintiffs shared that belief. There was no evidence that plaintiffs ever urged defendant to close the properties out at the best prices obtainable or that they were not satisfied to rely upon his judgment. It is true that they had no right to control defendant's action, but the fact that they made no protest against his failure to make sales indicates that they did not then question either his good faith or his good judgment. Furthermore, mistaken judgment is not necessarily unreasonable judgment and of course neither is the equivalent of bad faith.

[19, 20] In regard to this issue of fraud and bad faith, which is raised as to all of defendant's acts in accepting and carrying out the trust, and particularly as against the court's finding "That it is untrue that the defendant, Chas. Barnard, acting as trustee or otherwise under the contract herein, has failed, refused and neglected, or failed, refused or neglected, to properly perform and discharge his duty as trustee," there are circumstances pointed out by plaintiffs which tend to cast some doubt on defendant's complete bona fides, and if the trial court had made findings in plaintiffs' favor on this issue, perhaps they could have been sustained. But on a consideration of all these matters and of the evidence as a whole we are of the opinion that the question was one for resolution by the trial court and that its decision in favor of defendant has adequate support in the evidence and cannot be disturbed by us.

The record is so voluminous and consists so largely of documentary matter that it would unduly prolong this opinion to set forth even a synopsis of the evidence on this point; we have, however, considered everything to which our attention is directed by the parties, with the result already stated.

[21] Complaint is made that defendant was guilty of a breach of trust because he acquired the notes secured by the various trust deeds incumbering the property deeded to him, this being called the acquiring of an interest adverse to the trust, which is prohibited by section 2233 of the Civil Code. The trial court found that this was done "pursuant to the contract" between the parties, and we think this finding is supported. Defendant had been the payee of notes amounting to $160,000 and secured by trust deeds of plaintiffs' land, and had sold them to others with his endorsement, so that upon the default which is recited in the contract he could be compelled by the holders to take them up. The motives inducing plaintiffs to execute the contract, as expressly recited in the formal agreement, were the promise of defendant not to humiliate or embarrass them by recording a notice of default under the trust deed securing the money he had advanced and their expectation that the proceeds of sales by defendant would probably be greater than could be obtained at foreclosure sales and greater than the amount required to pay their indebtedness. The agreement also mentions disbursements to be made by defendant in the care and management of the property. The defendant's letter transmitting the agreement stated that "all my future investments will be for the care and protection of the property" and that "it will be necessary to invest much additional capital before we can complete the entire matter." If defendant was to avoid the recording of a notice of default on the trust deed running to himself, he must, of necessity, obtain the notes secured by it; and the purchase of notes secured by other trust deeds would be advisable and perhaps necessary to avoid the foreclosure sales, in accordance with the purpose of the contract.

[22-26] Plaintiffs further complain that defendant should have been required to assume the burden of proof on the accounting. At the trial defendant presented an account and produced evidence in support of the items contained in it, such as tended to show that the items of receipts and disbursements were correct in amount and that the disbursements claimed were for proper purposes, and on this evidence the court made and stated in its findings a complete account, which differed in some respects from that submitted by defendant. Plaintiffs' point here is not, as we understand it, directed at the proceedings on the account so stated and does not involve the claim that evidence is lacking to support the findings as to the items included by the court in its account. The contention is, rather, that the defendant should have been required to justify affirmatively his failure to make sales of the trust property. On an accounting for a trust, the trustee does have a burden to establish the correctness of his accounts, but the rule does not go so far as plaintiffs claim. Their main reliance in support of the claim is Purdy v. Johnson, 1917, 174 Cal. 521, 527, 163 P. 893. That was an action against trustees for an accounting and other appropriate relief. The trustees presented an account to the court, and were cross-examined by the plaintiffs there in regard to the items in it, but apparently produced no evidence in its support. Of this procedure the court said: "We think the course pursued was irregular * * *. The entire trial was conducted upon the erroneous theory that the burden of proof was upon the beneficiary to point out the particulars in which the account was erroneous, and that she was bound to go forward and establish affirmatively the impropriety of the charges and credits which she assailed. Such is not the law * * * in fact, the burden is upon the trustees to prove that charges made by them are proper." As a final statement of the rule in this respect the court declared, 174 Cal. at page 531, 163 P. at page 897, "that it is the duty of the trustees to support every item of their account, and that wherever they fail to support the correctness of a charge or a credit by satisfactory evidence, the item must be disallowed." All of this the defendant here did. This rule goes merely to items in the account. It does not require the trustee to anticipate and defend against charges of dereliction of duty and malfeasance which do not arise from anything on the face of his accounts but are grounded on other matters. It does not remove from a plaintiff who sues a trustee on charges of fraud and malfeasance the burden, which the law would cast on him in case of another defendant, of proving his charges.

The trustee is entitled to the benefit of the presumptions of regularity and good faith. See Estate of Vance, 1904, 141 Cal. 624, 626, 75 P. 323; Burke v. Maguire, 1908, 154 Cal. 456, 468, 98 P. 21.

Many other points are made and argued in the 762 pages of briefs filed herein, but they relate to the contention that there was a repudiation of the trust and to the weight of the evidence and a discussion of them here is not deemed necessary to a disposition of this appeal. All have been considered, and our consideration leads to the conclusion which we now state:

The judgment appealed from is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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61 Cal.App.2d 600

GRIFFETH v. FEHSEL et al.

Civ. 14139.

District Court of Appeal, Second District
Division 2, California.
Dec. 6, 1943.

1. Joint adventures ⇨5(2)

Evidence supported finding that a joint venture in wholesale distribution of health food in the Pacific Coast states had been terminated by mutual agreement of the venturers and that an accounting and settlement had been effected, precluding an accounting between them.

2. Joint adventures ⇨5(2)

In accounting, evidence that "over writes" had been settled monthly between joint venturers in wholesale distribution of health food in the Pacific Coast states justified finding against plaintiff venturer on contention that his indebtedness to defendant venturer had been discharged by virtue of his credits for "over writes".

3. Joint adventures ⇨2

Where there was no suspicion of fraud relative to settlement between joint venturers in wholesale distribution of health food in the Pacific Coast states, the agreement for joint venture was effectively terminated by the venturers' mutual agreement.

4. Joint adventures ⇨2

Where no definite term was fixed for duration of joint venture in wholesale distribution of health food in the Pacific Coast states, the venturers' oral agreement to termination of venture and an accounting left nothing for the court to adjudicate in accounting action.

5. Joint adventures ⇨2

Where parties to business arrangement have reached an understanding to dissolve and have agreed upon an accounting, courts must not undo such mutual, extrajudicial determinations.

6. Joint adventures ⇨1

That plaintiff venturer purchased some health food from defendant venturer after dissolution of joint venture in wholesale distribution of health food in the Pacific Coast states did not revive the venture or impose upon defendant the obligation to pay to plaintiff a share of defendant's profits on business of plaintiff's customers after dissolution.

7. Joint adventures ⇨1, 2

Where joint venture in wholesale distribution of health food in the Pacific Coast states owned no assets, upon its dissolution, defendant venturer was free to solicit business of any past patron without obligation to pay to plaintiff venturer a share in defendant's profits on business of plaintiff's customers after dissolution.

8. Equity ⇨65(2)

Where defendant venturer might have closed joint venture in wholesale distribution of health food in Pacific Coast states because of plaintiff venturer's failure to fulfill his obligations, plaintiff had secretly accepted a fee from the manufacturer for getting defendant to accept the appointment as distributor and had demanded a larger share of defendant's earnings with a threat of disaster in event of denial, plaintiff did not come with "clean hands" to ask the aid of equity to secure a share in defendant's profits after the venture was terminated.

See Words and Phrases, Permanent Edition, for all other definitions of "Clean Hands".

9. Stipulations ⇨14(7)

Where at beginning of trial of accounting action upon stipulations of the parties it was ordered that the evidence relating to plaintiff's claim for damages or an accounting should only be inquired into in the event that the trial court should hold that plaintiff was entitled to recover and trial court properly held that plaintiff was not entitled to recover, rejection of plaintiff's offers of evidence on the accounts was proper. Code Civ.Proc. § 597.

10. New trial ⚷102(8)

Where plaintiff intended to sue for 18 months before he filed accounting action and trial commenced some six months thereafter and judgment for defendant was signed some five weeks after trial was commenced, plaintiff's showing of diligence in contacting witnesses to corroborate testimony as to a payment to defendant was insufficient to entitle plaintiff to new trial and he should have moved for a continuance at commencement of trial or reopening of the case prior to judgment.

11. New trial ⚷108(2)

Plaintiff was not entitled to new trial on ground of newly discovered evidence, where such evidence was not such as to render a different result probable.

* * *

Appeal from Superior Court, Los Angeles County; James M. Allen, Judge.

Action by Forrest Griffeth against Oscar J. Fehsel and another for an accounting. From an adverse judgment, plaintiff appeals.

Affirmed.

Lewis & Taylor and Neville R. Lewis, all of San Fernando, for appellant.

Ernest C. Griffith, of Los Angeles, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the evidence is sufficient to support the finding that a joint venture whereby the parties hereto had operated was terminated by mutual agreement of the parties. Judgment having been awarded defendants, upon such finding, plaintiff appeals.

Prior to his association with Oscar J. Fehsel, hereinafter referred to as defendant or respondent, plaintiff was a retail distributor of a certain health food, hereinafter referred to as Concentra, which was manufactered by Jean Ferrell, Inc., of Chicago. Defendant had recently retired from the wholesale grain and flour business. In May 1938, plaintiff, having no funds with which to qualify as a wholesaler, proposed that he would undertake to induce the manufacturer to appoint defendant as its wholesale distributing agent for the Pacific Coast states. Following that proposal, respondent received the appointment and the parties entered into a joint venture arrangement whereby it was agreed between the two that for certain services to be performed for defendant by plaintiff, the latter should receive one fourth of the profits earned by respondent's wholesale business. For such share plaintiff promised that he would devote his entire time and efforts continuously and diligently to soliciting and otherwise promoting the sales of Concentra and the Ferrell cosmetics by soliciting the retailers in all of the Pacific Coast states; that he would do everything necessary to promote such sales; that as a retailer he would place with respondent all of his own orders in amounts of at least $2,000 net per month; and that the great increase in the volume of sales to be realized by virtue of his own efforts would more than compensate for the share paid him. No term for the continuance of the arrangement was mentioned.

The initial order of the product in excess of $500 was made by respondent during the negotiations of the parties. Defendant's contract with Jean Ferrell, Inc., to become wholesale distributor was executed on June 30, 1938. The ultimate requisite was the purchase of a shipment of Concentra at a cost of $5,000. While defendant was consummating his transaction with Jean Ferrell, plaintiff stealthily entered into some secret transactions with that lady on his own account. By one of these he collected $150 for obtaining Mr. Fehsel as a wholesaler for Jean Ferrell; by another he obtained a contract with the manufacturer by means of which he later asserted his power to take the wholesale business from respondent, unless he were granted one half of the profits.

Thereafter plaintiff delivered to defendant the names of five retail distributors of Concentra while Jean Ferrell herself furnished the names of a large number of retailers of the Ferrell products. Subsequently she applied other prospects to whom respondent himself made sales by soliciting them, notwithstanding such work was to be done by plaintiff for his one-fourth share of defendant's profits. Although defendant continued as the wholesale dealer until December 1940, no names of customers or prospects were furnished him by plaintiff during 1939 or 1940. However, until the termination of the arrangement, respondent allowed plaintiff his one fourth of plaintiff's profits, and with the exception of one shipment plaintiff made all of his wholesale purchases from defendant.

After respondent became established as the wholesale distributor for Concentra, plaintiff offered to travel into Washington and Oregon to make sales and promote the wholesale business. To make such journey defendant advanced him $315. He made no other trips, although respondent requested that he do so. Instead of working continuously at promoting the wholesale business, plaintiff on one occasion sojourned in Canada and eastern points for two and a half months. Contrary to his promise to make all of his purchases from defendant for his own retail distribution, plaintiff made one purchase directly from the manufacturer. Notwithstanding his failure to perform his agreements, in February, 1939, plaintiff demanded of defendant one half of the latter's profits and declared that unless this request were complied with he would take the wholesale business away from responden. Following plaintiff's return from his eastern travels, on a number of occasions after June 1, 1939, defendant offered to pay the commissions to which plaintiff was entitled. In a conference finally had, plaintiff was credited with all commissions to which he was entitled and still he was in debt to defendant. Defendant then stated to him that their joint venture was at an end; that plaintiff was not to work for defendant again and plaintiff's reply was, "I am all through, from now on I am going to get my stuff from Chicago."

[1] Details of the accounting and settlement effected between the parties was detailed in the testimony of respondent who in substance stated that after plaintiff had checked all the figures in defendant's books he accepted the sum of $876.63 as the amount of commissions unpaid to him for the period from January 1 to June 1, 1939, and admitted his debt to defendant for merchandise in the sum of $1,160.61. Subtracting his credit from his debit he owed a balance of $283.98. After his purchase of a final order of Concentra in the amount of $137.86 his total debt to defendant was $421.84 which had not been paid prior to filing this action. While some of the testimony of plaintiff was contradictory to that of respondent, the latter is ample support for the findings.

[2] Plaintiff makes the contention that his indebtedness in the sum of $402 had been discharged by virtue of his credits for "overwrites." These were extra profits made on sales to certain retailers at a 45 per cent discount instead of 50 per cent from the retailers' list prices. This extra 5 per cent profit the venturers agreed to divide equally. But upon the testimony of both parties the court's finding against plaintiff on his contention was justified by the evidence that these "overwrites" were settled monthly during 1939 and 1940.

[3-5] The agreement for a joint venture between the parties was effectively terminated by their own mutual agreement. 40 Amer.Jur. p. 292, sec. 235. There is no suspicion of fraud relative to the settlement. Having fixed no definite term for the duration of the joint venture, their oral agreement to its termination and to an accounting left nothing for the court to adjudicate. Zenos v. Harden, 129 Cal.App. 545, 19 P.2d 67. Parties to any sort of a business arrangement are their own best judges of the accounts between themselves. They understand their own plans and purposes as well as their settlements and after they have reached an understanding to dissolve and have agreed upon an accounting, courts must not undo such mutual, extrajudicial determinations. Branger v. Chevalier, 9 Cal. 353, 363; 20 Cal.Jur. 819, 820.

[6, 7] Plaintiff contends that he is entitled to share in the profits on business of his customers after the dissolution of the venture. No contribution to the wholesale business was made by plaintiff after the dissolution. Without loss or expense to himself he purchased some merchandise from respondent as did any other retail dealer. But that did not revive the joint venture or impose any other obligation upon defendant to pay anything he earned after the termination of their former alliance. Peabody v. Pioneer Sand & Gravel Co., 172 Wash. 313, 317, 20 P.2d 15. The joint venture owned no assets. Therefore, upon its dissolution defendant was free to solicit business of any patrons of the past. 28 C.J. 735; Pollock v. Ralston, 5 Wash.2d 36, 104 P.2d 934; Ruppe v. Utter, 76 Cal. App. 19, 25, 243 P. 715; Middleton v. Newport, 6 Cal.2d 57, 56 P.2d 508. Where a joint venture has no capital but is founded

solely upon the services and personal qualifications of the parties the venturer who continues his business following the dissolution is under no obligation to share his profits earned after the dissolution. Note, 80 A.L.R. 42, 70. If the rule were otherwise, the retiring partner could stand by, watch the course of his erstwhile associate, and then assert a right to profits or deny liability according to the outcome. In the instant case the entire risk in the venture was the investment of respondent. A short time after defendant embarked upon the wholesale business an agency of the Federal government required the manufacturer to change the label from one of "health food" to one of a "laxative." From that time the volume of the sales constantly diminished. Plaintiff not only did nothing to prevent the failure of defendant's investment, but from the day of the dissolution until defendant finally closed his wholesale business, plaintiff devoted all of his time to his own retail business. He made no pretense of a claim against respondent during those 18 months, but while secretly nursing his vengeful purpose he procured his supplies of Concentra from defendant. Having by the mutual dissolution been freed of all liability for the obligations of the wholesale venture, plaintiff may not share in the profits subsequently earned by defendant's industry and capital. Miller v. Butterfield, 79 Cal. 62, 65, 21 P. 543. After the parties had agreed to a termination of the venture no obligation of either remained except to liquidate and divide the assets. Maryland Casualty Co. v. Little, 102 Cal.App. 205, 210, 211, 282 P. 968.

Appellant cites a number of authorities in support of his contention that he should share in the profits earned after the joint venture had been terminated: Champagne v. Passons, 95 Cal.App. 15, 272 P. 353; Freeman v. Donohoe, 65 Cal.App. 65, 223 P. 431; Ruppe v. Utter, 76 Cal.App. 19, 243 P. 715; Falkner v. Hendy, 80 Cal. 636, 22 P. 401; 20 Cal.Jur. 817; 33 C.J. 851; 80 A.L.R. 21; Lind v. Webber, 36 Nev. 623, 134 P. 461, 135 P. 139, 141 P. 458, 50 L.R.A.,N.S., 1046, Ann.Cas.1916A, 1202; Karrick v. Hannaman, 168 U.S. 328, 18 S.Ct. 135, 42 L.Ed. 484; Major v. Todd, 84 Mich. 85, 47 N.W. 841; Chambers v. Mittnacht, 23 S.D. 449, 122 N.W. 434. Each of these cases is readily distinguishable. In some of them there was an express or implied provision for the duration of the partnership for a definite term; in some a dissolution had been agreed upon without a final accounting; in others, valuable assets of the partnership continued to earn in the hands of the possessor after dissolution. In the Ruppe case, after the partnership was terminated, the defendant continued to use the assets of the firm including its good will.

[8] In the instant action there was not only a dissolution proved and an accounting agreed upon but the evidence shows that defendant might with right and propriety have closed the venture because of plaintiff's failure to fulfill the obligations he had assumed for his one fourth of the earnings. Maryland Casualty Co. v. Little, supra. He did not produce orders approximating $2,000 monthly; had absented himself for two and a half months of the year of the venture; had not traveled into Oregon or Washington to promote the sales to retailers; had secretly accepted a fee from the manufacturer for getting respondent to accept the appointment as wholesale distributor. He merely demanded a larger share of defendant's earnings with a threat of disaster in event of a denial. He did not come with clean hands to ask the aid of equity. But had he faithfully performed all of his obligations under the venture he would still have been denied a judgment because upon substantial evidence it was found that the joint venture had been mutually dissolved.

[9-11] Two rulings of the court are assigned as prejudicial error, viz.: (1) that the court rejected plaintiff's offers of evidence on the accounts; (2) that the court improperly denied the motion for a new trial. At the beginning of the trial upon the stipulations of the parties it was ordered that the "evidence relating to the amount of plaintiff's claim for damages or an accounting should abide the conclusion of the evidence of both sides upon all other issues * * * and only be inquired into and determined in the event the court should thereupon hold that plaintiff was entitled to recover * * *." Pursuant to Section 597, Code Civ.Proc., such stipulation and order are in common practice, in the trial courts and have been approved. Booth v. Bond, 56 Cal.App.2d 153, 132 P.2d 520. No sufficient showing of diligence was made in support of the motion for a new trial. Plaintiff had cherished his purpose to sue for eighteen months, after which he filed his action on January 11, 1941. The trial commenced on July 10, 1942. The judgment was not signed until

August 20, 1942. Plaintiff testified to the payment of a sum to defendant. His inability to contact his corroborating witnesses on that question should have been the basis of a motion for continuance at the commencement of the trial or for a reopening of the case prior to rendition of judgment. Moreover, a new trial is properly denied unless the newly discovered evidence is such as to render a different result probable. Bradbury Estate Co. v. Carroll, 98 Cal.App. 145, 154, 276 P. 394.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

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61 Cal.App.2d 636

CRAWFORD et al. v. HOPPER et al.

Civ. 14129.

District Court of Appeal, Second District, Division 1, California.

Dec. 8, 1943.

Rehearing Denied Dec. 31, 1943.

Hearing Denied Feb. 3, 1944.

1. Vendor and purchaser 🔑116

Where purchasers paid entire purchase price with understanding that within 30 days vendors would deliver a deed and certificate of title, and sum demanded by vendors for purchasers' proportionate part of tax liability was only an estimate, after expiration of thirty days purchasers could rescind the contract without paying the estimated tax. St.1939, p. 1307, § 2192; Civ.Code, § 1691.

2. Vendor and purchaser 🔑341(3)

Vendors could not excuse their failure to deliver deed under contract for sale of realty on ground that purchasers requested that title order be kept open for indefinite period within which purchasers might arrange for a building loan, in view of showing that order for title certificate was kept open for ten days with purchasers' consent, and that thereafter they abandoned the building plan.

3. Vendor and purchaser 🔑341(4)

In purchasers' action for rescission of contract for purchase of realty, whether vendors breached their agreement to deliver deed and certificate of title within 30 days after execution of agreement for sale, and whether purchasers' offer to restore vendors to their original position was a sufficient prerequisite to an action for rescission were questions of fact. Civ.Code, § 1691.

4. Appeal and error 🔑1010(1)

A judgment supported by ample evidence will not be disturbed.

◆

Appeal from Superior Court, Los Angeles County; George A. Dockweiler, Judge.

Action by Charles William Crawford and another against Charles B. Hopper and others for rescission of a contract for purchase of realty and for money had and received. From a judgment for plaintiffs, defendants appeal.

Affirmed.

Overton, Lyman & Plumb, and B. R. Ware, all of Los Angeles, for appellants.

Joseph Musgrove, Robert H. Miller, and Thomas H. Cannan, all of Los Angeles, for respondents.

YORK, Presiding Justice.

This is an appeal by defendants from a judgment rendered in favor of plaintiffs in an action for rescission of a contract for the purchase of real property, and for money had and received.

It appears from the record herein that on November 21, 1941, appellant Hopper, as sales agent for the corporate appellants, issued a receipt to respondents for the sum of $500, being a deposit on the total purchase price of $6,000 for Parcel 126 on Linda Flora Drive of Bel-Air, in the City of Los Angeles. The balance of $5,500 was paid by respondents on November 24, 1941.

The instrument of November 21st was accepted by respondent Madeline Thomas Crawford, and contained, among others, the following terms:

"Subject to Company restricting Parcel 125 adjoining above site on the South to a one-story dwelling * * * Taxes to be prorated for the year 1941, 1942 * * * The purchaser also agrees within 30 days * * * to accept a grant deed used by the seller * * * Time is the essence of this agreement. No verbal representations or promises not contained herein pertaining to the purchase of said property shall be binding upon Chas. B. Hopper, General Sales Agent, or the owner of said property. This receipt is given subject to the approval of the owner. On execution of the deed a certificate of title issued by a reputable title company with liability limited to the amount of the purchase price shall be furnished by the seller showing title vested in such seller. * * *"

Some time during the latter part of December, 1941, while the property was in possession of appellants and without the knowledge of respondents, the United States Army took possession thereof, constructed buildings thereon, erected concrete foundations and made excavations for gun placements, and thereafter continued in possession without the consent of respondents.

On the twenty-ninth day after the date of said agreement, to-wit: on December 20, 1941, appellant Hopper indited a letter to respondents to the effect that the transaction had been concluded and the grant deed to the property recorded. Enclosed therewith was a preliminary title report showing taxes due and delinquent in an amount of $3,501.22 for the year 1941—1942 on an unsegregated parcel of land which included said parcel 126. There was also enclosed a guaranty from the Bell Corporation for the payment by it of such taxes as soon as a segregated tax bill could be secured or a subdivision map could be recorded. Said letter also stated that the respondents' prorata of the 1941—1942 taxes amounted to $44.75, a check for which respondents were requested to issue.

Immediately after receipt of the above-named letter, respondents inquired at the office of appellant Hopper concerning their deed and also asked for an explanation relative to the tax lien and the guaranty of the Bell Corporation to discharge the same. They were informed that they would receive their deed in due course from the County Recorder and were advised to consult their attorney regarding the delinquent taxes.

On January 17, 1942, respondents, through their attorney, having discovered by a search of the records that no deed had been recorded, cancelled the agreement of November 21 to purchase the property and demanded a return of the purchase price, giving as their reason for such action the failure of appellants to deliver a deed and certificate of title as provided in said agreement.

On February 14, 1942, appellants executed and caused a grant deed to be recorded and subsequently caused the same, together with a certificate of title, to be delivered to respondents, who shortly thereafter returned both documents to appellants accompanied by a notice of rescission tendering a quitclaim deed to the property in question dated March 2, 1942, demanding a return of the purchase price of $6,000, and offering to restore appellants to their original position with respect to the transaction.

[1] Appellants' main point on appeal is that respondents acquired no right to rescind the agreement to purchase until they had paid or tendered their prorata share of the city and county taxes for the year 1941–1942 for the reason that the provision relating thereto in said agreement without specifying when the payment should be made, constituted a concurrent dependent obligation which should be performed by respondents before they could place appellants in default.

Real property taxes become a lien upon land on the first Monday of March of the year preceding the fiscal year for which they are levied (Rev. & Tax.Code, sec. 2192, St.1939, p. 1307), and for nonpayment thereof the property will be sold in due course and in any event. The provision in the agreement of November 21, 1941, was doubtless inserted to insure respondents that appellants, as sellers, would pay the taxes for that part of the tax year which would eventually elapse before the execution of the deed conveying the property to respondents.

It is clear from the record that there existed a delinquency in the matter of tax payments covering a large tract of land of which the parcel here in question formed a part, and that the sum of $44.75 which was demanded by appellants from respondents was not a final ascertained amount, but was only an estimate. Respondents paid the entire purchase price of $6,000 on November 24, 1941, with the understanding that within 30 days after November 21, 1941, appellants would deliver to them a deed to the property and a certificate of title. It was not until February 14, 1942, that appellants performed their part of the contract. Meanwhile, on January 14, 1942, respondents had given them notice of cancellation and on March 2, 1942, rescinded the contract, at the same time executing a quitclaim deed and offering to restore appellants to their original position.

In the circumstances, it was not necessary for respondents to make payment of the estimated tax in order to restore appellants to their original position.

In the case of Longway v. Newbery, 13 Cal.2d 603, 615, 91 P.2d 110, where a purchaser seeking rescission of a lot purchase and to recover the price paid therefor, gave formal notice of rescission, made demand for a return of the purchase price, offered to return anything of value received by him and executed a quitclaim deed to be delivered upon return of the money demanded, it was held that such purchaser complied adequately with section 1691 of the Civil Code, defining how rescission may be effected.

[2] Appellants sought to excuse their failure to deliver the deed upon the ground that the respondents requested that the title order be kept open for an indefinite period within which they might arrange for and file additional documents respecting a building loan. However, respondent Charles William Crawford testified that the order for the title certificate was kept open for a period of ten days with his consent; and that after December 7, 1941, he abandoned his plans to build on the lot.

In the case of Moresco v. Foppiano, 7 Cal.2d 242, 245, 60 P.2d 430, 431, an action in rescission by the purchaser of real property because of failure of seller to deliver a deed thereto, it is stated: "The evidence supports the conclusion that the plaintiff did not waive delivery of the deed by the payment of $2,250 on March 17, 1932, but that at that time and at subsequent times he demanded a deed of the defendant's agent. It appears that the defendant in February, 1932, entered into an exclusive agency contract with one Harper, concerning the property here involved, and as to which there was then some litigation or threat of litigation, and from which the defendant did not become released or consider himself released so as to be in position to deliver a deed to plaintiff until one month after the present action was commenced. The questions whether the defendant committed a breach of his agreement to deliver the deed or whether there was a waiver by the plaintiff under the facts here presented were for the trial court to determine. Mercer v. Frank Meline Co., 8 Cal.App.2d 142, 47 P.2d 499; Goold v. Singh, 88 Cal.App. 339, 343, 263 P. 548. If the defendant was in default for failure to deliver the deed on March 17, 1932, and for failure to comply with subsequent promises to make delivery thereof, he may not rightly contend that the plaintiff under the facts could himself be considered in default so as to preclude the recovery by him of moneys paid under the contract."

[3, 4] Under the evidence presented at the trial herein, the questions (1) whether appellants breached their agreement to deliver the deed and certificate of title within thirty days after the agreement for sale was entered into; and (2) whether respondents' offer to restore appellants to their original position with respect to the transaction was a sufficient prerequisite to an action for rescission,—were questions of fact for the trial court to determine. Moresco v. Foppiano, supra. That court having found against appellants, in support of which ample evidence appears in the record, it is not within the province of this court to reverse the judgment based thereon.

For the reasons stated, the judgment is affirmed.

DORAN and WHITE, JJ., concur.

FAIRCHILD et al. v. RAINES et al.

Civ. 14168.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1943.

Hearing Granted Feb. 3, 1944.

1. Covenants 🔑1

Agreement by lot owners that lots should not be used or occupied by persons other than of the white race was binding on owners signing agreement, though some of the lots within the scheme of restrictions were not bound by the restrictive covenants.

2. Covenants 🔑1

A provision in an agreement that property shall not be used or occupied by persons other than of the Caucasian race is valid and enforceable.

3. Injunction 🔑128

In action to enjoin use or occupation of lot by negroes contrary to restrictions finding that there had been no change in negro occupancy as to any of the lots described in the agreement except the lot involved was supported by substantial evidence.

4. Injunction 🔑128

In action to enjoin occupation and use of lot by negroes contrary to restrictive agreement evidence showed that defendants did not acquire their interest in the lot as bona fide purchasers without notice of the restrictions contained in such agreement.

5. Vendor and purchaser 🔑231(1)

Where an instrument affecting the title to real property is duly placed of record, such recordation carries constructive notice of the contents of such instrument to subsequent purchasers of the real property affected by the recorded agreement. Civ. Code, § 1213.

6. Vendor and purchaser 🔑229(1)

Where a purchaser has constructive notice of the contents of a recorded instrument, there is no need to prove that he had actual notice of it. Civ.Code, § 1213.

7. Appeal and error 🔑1170(3)

Whether complaint stated a cause of action because it failed to allege that restrictive agreement was supported by a fair, just and adequate consideration could not be considered on appeal, where evidence disclosed that the agreement was fair, just and supported by the adequate consideration of the mutual promises of the parties to the agreement. Const. art. 6, § 4½.

8. Injunction 🔑58

Where lot was acquired with notice of race restrictions agreement, owners were properly enjoined from permitting negroes to use or occupy lot contrary to terms of agreement.

9. Injunction 🔑128

In action to enjoin use and occupation of lot by negroes contrary to restrictive agreement, evidence sustained findings that persons executing agreement were owners of the property set opposite their respective names, that the agreement was duly executed and acknowledged, that the agreement was duly placed of record, that defendants had notice of the agreement, and that plaintiffs suffered damages by reason of occupancy of lot by negroes.

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

Action by Hazel Fairchild and others against Ross H. Raines and others to enjoin certain defendants from using and occupying a certain lot and to enjoin certain other defendants from permitting their codefendants to occupy such lots. From a judgment for plaintiffs, the defendants appeal.

Judgment affirmed.

Lester V. Peterman, of Pasadena, for appellants.

McEachern & Ritchie, of Pasadena, for respondents.

McCOMB, Justice.

From a judgment in favor of plaintiffs after trial before the court without a jury in an action to enjoin defendants (a) Ross H. Raines and Helen Louise Raines (Negroes) from using and occupying lot 43 of the Palisades Tract as per map recorded in Book 8, page 40 of Maps, records of the County Recorder of Los Angeles County, and (b) Frank F. Winsell and Mary Winsell from permitting their codefendants to occupy the aforesaid property, defendants appeal.

These are the undisputed facts:

On or about March 21, 1927, plaintiffs and certain other persons including Harry E. Mayhew and Dorothy Mayhew entered into an agreement concerning the parcel of property above mentioned, and lots adjacent thereto. So far as material here the agreement which was placed of record in the Office of the County Recorder of Los Angeles County on April 14, 1927, read thus:

"Witnesseth:

"That, Whereas, each of the parties hereto is the owner of, or a contract purchaser of, the real property designated and particularly described opposite their respective signatures, all of which said real property is situated in the City of Pasadena, County of Los Angeles, State of California, and within a certain district therein which includes certain lots in the said City of Pasadena described as Lots 3 to 18, both inclusive, 29 to 51, both inclusive, of 'The Palisades', as per map recorded in Book 8, page 40 of Maps, Records of said Los Angeles County; and

"Whereas, the several parcels of land within the above described area which are now occupied, are occupied with only a few exceptions exclusively by persons of the White or Caucasion race; and

"Whereas, it is for the mutual benefit and advantage of each of the parties hereto, and for the benefit and advantage of each and every parcel of land within the district aforesaid, whether the same are now occupied or not, that each and every parcel of land within said area shall be limited and restricted to occupancy by, and that the same shall be occupied exclusively by persons of the White or Caucasian race;

"Now, therefore, in consideration of the premises, and the advantages to be derived by each of the parties hereto by the making of this agreement, and further in consideration of the benefits which will accrue to the real property of the undersigned, respectively, or in which they are respectively interested: It is Hereby Mutually Covenanted and Agreed by and between the parties hereto that up to and including the first day of January, 1950, each and every of the lots or parcels of land designated and particularly described opposite the respective signatures of the parties hereto shall be subject to the following restrictions and covenants which shall apply to and be binding upon the parties hereto, their and each of their heirs, devisees, executors, administrators, successors and assigns, namely:

"That no portion or part of said lots or parcels of land shall be used or occupied by, or be permitted to be used or occupied by, any person not of the White or Caucasian race. That no person shall live upon said property at any time whose blood is not entirely that of the Caucasian race, but if persons not of the Caucasian race are kept thereon by such Caucasian occupant strictly in the capacity of servants or employees of such occupant, such circumstances shall not constitute a violation of this covenant."

Of the thirty-nine lots mentioned in the agreement, five for various reasons were not subject to the restrictive covenant contained in the agreement.

Through mesne conveyances defendants Winsell acquired title to lot 43 on March 14, 1940. The deed of conveyance to them made no mention of the race restrictions contained in the agreement nor did they have actual knowledge of said restrictions.

On or about June 4, 1942, defendants Raines, without actual knowledge of the above-mentioned race restrictions, entered into an agreement to purchase from their co-defendants lot 43, and on or about the last-mentioned date defendants Raines entered into the possession and occupancy of said lot.

There are six questions necessary for us to determine which will be stated and answered hereunder seriatim.

First: *Did the race restrictions in the above agreement bind the lots of the owners who had signed the agreement since some of the lots embraced within the scheme of the restrictions were not bound by the restrictive covenant?*

[1, 2] This question must be answered in the affirmative, and is governed by the rule which has been established in California since 1919, that a provision in an agreement that property shall not be used or occupied by a person other than of the Caucasian race is valid and enforceable. (Wayt v. Patee, (1928), 205 Cal. 46, 49, 269 P. 660; Janss Investment Co. v. Walden, (1925), 196 Cal. 753, 754, 239 P. 34; Los Angeles Investment Co. v. Gary, (1919), 181 Cal. 680, 682, 186 P. 596, 9 A.L.R. 115; Littlejohns v. Henderson, (1931), 111 Cal.App. 115, 118, 295 P. 95).

The provision here in question is almost identical with the covenants upheld by our Supreme Court in the cases just cited.

The cases of Foster v. Steward, 134 Cal. App. 482, 25 P.2d 497, and Oberwise v. Poulos, 124 Cal.App. 247, 12 P.2d 156, are factually distinguishable from the present case. In the Foster case the trial court found supported by substantial evidence that the race restrictions were not to become effective until all of the lot owners in the area described in the agreement had executed it, and that all of the lot owners had not signed the agreement. In the Oberwise case the trial court found supported by substantial evidence that the race restrictions were not to become effective until 140 lot owners had executed the agreement, and that such minimum number of lot owners had not in fact signed the agreement. The same factual situation exists in Thornhill v. Herdt, Mo.App. 130 S.W.2d 175, 179.

In the instant case there is no requirement in the agreement that any number of lot owners execute it prior to the race restrictions becoming effective so far as the subscribing property owners are concerned.

On the contrary, from the very language of the agreement, it appears that it was to be effective "by and between the subscribers" thereto.

Second: *Had there been such a change in the character of the surrounding neighborhood as to prevent equity from enforcing the race restrictions by granting injunctive relief?*

[3] This question must be answered in the negative. The trial court found supported by substantial evidence that there had been "no change in Negro occupancy as to any of the lots described" in the agreement above set forth except in the single instance of lot 43 which is the subject of the present controversy. In view of the trial court's finding the rule announced in the following cases is inappplicable: Hurd v. Albert, 214 Cal. 15, 3 P.2d 545, 76 A.L.R. 1348; Friesen v. City of Glendale, 209 Cal. 524, 288 P. 1080; Bryant v. Whitney, 178 Cal. 640, 174 P. 32; Letteau v. Ellis, 122 Cal.App. 584, 10 P.2d 496; and Jewett v. Albin, 90 Cal.App. 535, 266 P. 329.

The foregoing cases are all predicated upon a finding that the character of the property involved had changed materially subsequent to the date of the restrictive agreement.

Third: *Did defendants acquire their interest in lot 43 as bona fide purchasers without notice of the race restrictions contained in the above mentioned agreement?*

[4] This question must be answered in the negative. There was received in evidence a certified copy of the agreement of March 21, 1927, which had been duly recorded April 14, 1927, in the Official Records of the Office of the County Recorder of Los Angeles County.

[5] There is no merit in defendants' contention that the deed was defectively recorded for it appears from an examination of the instrument received in evidence that on March 26, 1927, W. A. Goodwin and Emma Goodwin, two of the signers of the agreement, appeared before Harry E. Mayhew, a notary public, that he duly acknowledged their signatures to the agreement here involved, and that subsequent thereto the agreement was duly placed of record. The rule is established that where an instrument affecting the title to real property is duly placed of record such recordation carries constructive notice of the contents of such instrument to subsequent purchasers of the real property affected by the recorded agreement. Civil Code, § 1213.

[6] It is likewise established that where a purchaser has constructive notice of the contents of a recorded instrument there is no need to prove that he had actual notice of the same. (Christy v. Dana, 42 Cal. 174, 179.)

From the foregoing, it is clear that defendants had notice of the race restrictions contained in the agreement of March 21, 1943, when they acquired their interest in lot 43.

Fourth: *Did the complaint state a cause of action because it failed to allege that the agreement of March 21, 1927, was supported by a fair, just and adequate consideration?*

It is unnecessary for us to consider this question for the reason that Article VI, section 4½ of the Constitution of the State of California provides that a judgment shall not be reversed "for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

[7] In the instant case, irrespective of any allegation in the complaint, the evidence discloses that the agreement was fair, just and supported by an adequate consideration, to wit, the mutual promises of the parties to the agreement.

Fifth: *Did the trial court have jurisdiction to enjoin defendants Winsell from permitting their co-defendants to occupy and use or live upon lot 43?*

[8] This question must be answered in the affirmative. Defendants Winsell having acquired lot 43 with notice of the race restrictions agreement, stood in the position of a party to the agreement and in accordance with the authorities cited under the first question, supra, were subject to an order enjoining them from violating the terms of the agreement. (Wayt v. Patee, supra, 205 Cal. at page 49, 269 P. 660.)

Sixth: *Was there substantial evidence to sustain the trial court's finding that (1) those who executed the agreement of March 21, 1927, were owners of the property set opposite their respective names, (2) the agreement was duly executed by the parties whose names appear thereon and that their* *signatures were duly acknowledged by a notary public (3) the agreement was duly placed of record, (4) defendants had notice of the race restrictions agreement, and (5) plaintiffs suffered damage by reason of defendants Raines occupying lot 43?*

[9] This question must likewise be answered in the affirmative. The certified copy of the agreement of March 21, 1927, which was before the trial court, of itself constitutes substantial evidence to support items 1, 2, 3, and 4. A duly qualified expert on real estate values testified that the value of surrounding property dropped at least fifty per cent when a lot was occupied by a Negro, and that the occupancy of lot 43 by defendants Raines would have such effect on other lots described in the agreement here under discussion. This testimony supports item 5.

For the foregoing reasons the judgment is affirmed.

W. J. WOOD, J., concurs.

MOORE, Presiding Justice.

I concur. Prior to June 4, 1942, Ross Raines and his wife, Negroes, purchased lot 43 and occupied it. Before that event, the owners of that lot, one Harry E. Mayhew and wife, had executed and recorded an agreement with other owners of lots in the same tract whereby they covenanted that no portion of their lot 43 should be occupied by any person not of the Caucasian race prior to the second day of January, 1950. That was a valid covenant and was binding upon the contracting parties. Los Angeles Investment Co. v. Gary, 181 Cal. 680, 186 P. 596, 9 A.L.R. 115. Inasmuch as the agreement was recorded in the proper records, appellants had constructive notice of it. Wayt v. Patee, 205 Cal. 46, 49, 269 P. 660. Having made the purchase with notice of the agreement appellants are bound to the same extent as were the Mayhews who had agreed to restrict the occupancy of the lot to members of the Caucasian race. Pomeroy's Equity Jurisprudence, 4th Edition, Sec. 688.

Likewise were appellants, Winsell, under obligation to refrain from *permitting the lot to be used or occupied by a person not of the Caucasian race.* McBride v. Freeman, 191 Cal. 152, 215 P. 678. They made their contract and it cannot be violated merely because they now desire to be relieved therefrom. Obligations solemnly undertaken cannot be ignored by a party thereto, merely because he has changed his views or because it may have become profitable for him to do so.

Litigants should ever be mindful that the sanctity of contracts intelligently and solemnly executed is one of the most sacred of our constitutional guaranties. To gain effective relief from the hardship realized by a contracting party on his discovery of a new and detrimental significance of his commitment his only available remedial source is the lawmakers, not the courts. For us to ignore the decisions of the Supreme Court and the most vital principles of the law of contracts would be not only base but stupid.

PEOPLE v. ELLIS.

Cr. 1848.

District Court of Appeal, Third District, California.

Nov. 26, 1943.

Criminal law 🔑1130(4)

Where on date set for hearing of appeal appellant's brief was not on file and appellant was given an additional 20 days within which to file brief, and appellant's counsel was notified that appeal would be dismissed if brief was not filed within such time, after expiration of additional period, appeal was dismissed.

◆

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Proceeding by the People against Hughes Ellis. From an adverse judgment, defendant appeals.

Appeal dismissed.

Nathan B. McVay, of Modesto, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PER CURIAM.

It appears that the record on appeal in this action was filed in this court on August 4, 1943; that said cause was, on or about the 5th day of October, 1943, ordered placed on the calendar for hearing and argument on November 4, 1943, and counsel for appellant notified of said hearing; that no brief was filed in this court by said appellant and that there was no appearance for appellant on November 4, 1943, when said cause was called; that this court at said time ordered that appellant have twenty days' additional time within which to file his brief and that his counsel be notified that if said brief be not filed within said time said appeal would be dismissed; that appellant's counsel was so notified on the 4th day of November, 1943; that more than twenty days have now elapsed and no brief has been filed by appellant. It is therefore ordered that the appeal in said action be and it is hereby dismissed.

23 Cal.2d 221

In re BRISTOL'S ESTATE.

BRISTOL v. YOUNG.

L. A. 18641.

Supreme Court of California.
Dec. 1, 1943.

Rehearing Denied Dec. 27, 1943.

1. Wills 🔑300, 322, 386

The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court are the same in a will contest as in any other civil case.

2. Appeal and error 🔑930(1)

In reviewing the evidence on appeal, all conflicts must be resolved in favor of respondent, and all legitimate and reasonable inferences indulged to uphold verdict if possible.

3. Appeal and error 🔑989

Where verdict is attacked as unsupported by the evidence, appellate court's power begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support conclusion reached by jury.

4. Appeal and error 🔑996

When two or more inferences can reasonably be deduced from the facts, appellate court cannot substitute its deductions for those of trial court or jury.

5. Evidence 🔑5(2)

It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial in a phonographic record.

6. Appeal and error 🔑931(1)

Appellate courts, if there be any reasonable doubt as to sufficiency of evidence to sustain a finding, should resolve that doubt in favor of the finding, and in searching the record and exploring the inferences to discover whether such doubt exists, court should be realistic and practical.

7. Wills 🔑290

Where evidence shows that will cannot be found and that when last seen or known to exist it was in custody or possession of decedent, presumption is that writing was destroyed by decedent and that he acted with intention of effecting a revocation thereof, but proponent is entitled to a favorable decree where he presents evidence showing that it is equally probable that will was destroyed by another person than decedent, or that the act was not done with intention to revoke the instrument. Probate Code, § 350.

8. Wills 🔑386

On appeal by will contestant from finding in favor of proponent, evidence would be viewed in aspects most favorable to sustaining the finding.

9. Wills 🔑386

A finding of the trial court that lost codicil was in existence at testator's death, authorizing admission of copy of codicil to probate, was based on substantially conflicting inferences, and hence was conclusive. Probate Code, § 350.

TRAYNOR, CURTIS, and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Myron Westover, Judge.

Proceeding in the matter of the estate of Luther Bristol, deceased, by Agnes Bristol, against Edith Young. From a judgment admitting a will and two codicils to probate, Agnes Bristol appeals.

Affirmed.

Prior opinion, 137 P.2d 724.

Jacob Forst and W. P. Smith, both of Los Angeles, for appellant.

Don Lake and Charles G. Young, both of Los Angeles, for respondent.

SCHAUER, Justice.

[1-6] The controlling question on this appeal is the sufficiency of the evidence to support the finding of the trial court that "the deceased never cancelled or destroyed the codicil of April 28th, 1941, and said codicil was in existence at the time of his death." The contest is purely one of presumptions and inferences. That the codicil was duly executed is established without question but, after the testator's death, it was never found. No witness was produced who claimed (or admitted) to have seen such lost codicil after the day of its execution nor, on the other hand, to have seen the testator destroy it or to have heard

him declare that it had been revoked. There is evidence which, on the cold pages of the record, appeals to reason as supporting the conclusion that the codicil was destroyed by the testator, but a critical consideration of the entire record impels us to the conviction that the circumstances depicted are not devoid of substantially conflicting inferences. The rules of evidence, the weight to be accorded to the evidence, and the province of a reviewing court, are the same in a will contest as in any other civil case. (In re Estate of Snowball (1910), 157 Cal. 301, 305, 107 P. 598; In re Estate of Barr (1924), 69 Cal.App. 16, 33, 230 P. 181.) The rule as to our province is: "In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court." (Italics added.) (Crawford v. Southern Pac. Co. (1935), 3 Cal.2d 427, 429, 45 P.2d 183, 184.) The rule quoted is as applicable in reviewing the findings of a judge as it is when considering a jury's verdict. The critical word in the definition is "*substantial*"; it is a door which can lead as readily to abuse as to practical or enlightened justice. It is common knowledge among judges and lawyers that many cases are determined to the entire satisfaction of trial judges or juries, on their factual issues, by evidence which is overwhelming in its persuasiveness but which may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record. Appellate courts, therefore, if there be any reasonable doubt as to the sufficiency of the evidence to sustain a finding, should resolve that doubt in favor of the finding; and in searching the record and exploring the inferences which may arise from what is found there, to discover, whether such doubt or conflict exists, the court should be realistic and practical. Upon such view of the law we cannot hold that any essential finding in this case is unsupported.

[7] Appellant-contestant relies upon the rule stated in section 350 of the Probate Code that "No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed fraudulently or by public calamity in the lifetime of the testator, without his knowledge", and upon the presumption which has been declared by this court (In re Estate of Sweetman (1921), 185 Cal. 27, 28, 195 P. 918; Estate of Johnston (1922), 188 Cal. 336, 340, 206 P. 628), and which is well stated in 26 California Jurisprudence 807, section 141, that "Where the evidence shows that the instrument cannot be found, and that when last seen or known to exist it was in the custody or possession of the decedent, the conclusion of law is that the writing was destroyed by the decedent, and that he acted with the intention of effecting a revocation thereof." Presenting the other side of the controversy, respondent calls attention to the legal proposition that the burden of proof was on appellant-contestant and urges that the circumstances shown are sufficient to at least balance, and therefore to overcome, the presumption invoked by appellant, through raising inferences that the decedent never destroyed or revoked the codicil, that he believed at the time of his last illness that it was still in existence, and that in fact it was in existence at the time of his demise.

It should be noted that the above-quoted presumption which is relied upon by appellant-contestant is qualified by the further statement in 26 California Jurisprudence at page 807, in section 141, that "*Nothing else appearing,* the admission of the writing to probate as a lost or destroyed will must be denied. However, the proponent may secure the admission of the instrument by presenting evidence which rebuts the conclusion or presumption that arises from the facts of possession by the decedent and loss or disappearance. * * * It follows that the proponent is entitled to a favorable decree where he presents evidence showing that it is *equally probable* (1) that the will was destroyed by another person than the decedent, or (2) that the act was not done with an intention to revoke the instrument." (Italics added.)

[8] The mooted codicil was referred to by the parties throughout the trial as the "lost codicil" and will be so designated in

this opinion. Viewing the evidence in aspects most favorable to sustaining the attacked finding (Von Breton v. Hicks, (1942), 55 Cal.App.2d 909, 912, 131 P.2d 560), the facts appear as hereinafter narrated.

[9] Luther Bristol successfully raised a family of five children, including four sons and one daughter, Edith Bristol Young, the respondent-proponent herein, and accumulated a modest fortune. Late in life, apparently having lost his first wife, the mother of his children, he took to wife Agnes Bristol, many years his junior. This latter marriage did not produce an altogether harmonious union. It was punctuated by a separate maintenance action filed by Agnes, by a cross-complaint for divorce filed by Luther, by an amended complaint on the part of Agnes also seeking a divorce, and by a rescission suit instituted by Luther in which he sought to recover from Agnes certain income-producing real property which he had deeded to her. The divorce litigation ended in an impasse in which neither party was granted a decree and the rescission action was dismissed in reliance upon a false representation by Agnes which will shortly be referred to again. The principal result of the controversy being litigated is the determination of whether Agnes, the widow, or Edith, the daughter, shall administer the affairs of the estate, and whether a crippled granddaughter, Rita, who appears to have been definitely in Luther's affections, shall inherit a share of the estate.

Luther died on September 30, 1942, at an age of more than ninety-three years. Three testamentary documents are involved in the proceedings: (1) a "Last Will and Testament of Luther Bristol," dated April 1, 1938, executed when the testator was approximately ninety years of age (and apparently shortly after the marriage to Agnes, the exact date of which does not appear); (2) a "Codicil to My Will Dated April 1, 1938," itself bearing the date of July 28, 1939; and (3) the lost codicil, dated April 28, 1941. Another instrument, admittedly lacking testamentary competence, was found typed on the first codicil. It was prepared and typed by a notary public who thus futilely assumed to engage unlawfully in the practice of law, but aside from some possible evidentiary value in the proof of intent—which the trial court found nonpersuasive—it has no significance here.

There is no contest as to the will of April 1, 1938, nor as to the codicil of July 28, 1939. The issue is joined solely as to the codicil of April 28, 1941—the "lost codicil." And it is not as to the fact of its original due execution but only as to the fact of its existence at the time of Luther's death that there is conflict. By the original will of April 1, 1938, Agnes, the newly acquired wife, was nominated executrix without bond, she was devised certain income-producing real property improved with a four-unit flat building and a single family residence, and, with the testator's children, was made a residuary legatee. The codicil of July 28, 1939, revised the original will (of April 1, 1938) only as to provision for the testator's son Walter and his granddaughters Ruth and Bernice Olsen. It does not affect the interests of either Agnes Bristol or Edith Bristol Young and has no significance in the litigated controversy except as it may tend to depict the scrupulous care and concern which the testator manifested for his own children and their children.

The lost codicil (of April 28, 1941), however, effects substantial changes in the testamentary plan. Subsequent to execution of the original will of April 1, 1938, and the first codicil of July 28, 1939, Mr. Bristol had deeded to Agnes the real property which had been the subject of his testamentary devise to her, and he had learned that his beloved granddaughter, Rita Fox, was not deceased, as had been believed at the time of execution of the earlier documents. (Rita had disappeared and remained absent from her family without communicating with them for an extended period; she returned prior to execution of the lost codicil.) The lost codicil revoked the provision of the original will devising to Agnes the subsequently deeded property, revoked the nomination of Agnes to act as executrix without bond, nominated Edith Bristol Young as executrix in place of Agnes, and added the name of Rita Fox (daughter of the testator's son Walter Bristol) to those of the granddaughters designated in the codicil of July 28, 1939, to share in the remainder of the limited devise to Walter. The original will also made testamentary disposition of certain parcels and items of property to the several children and various grandchildren, and it appears that deeds conveying the real property to the children in general accord with the testamentary plan were also prepared and signed but were not delivered during the testator's lifetime. Such deeds, together with the original will and first codicil (and the abortive attempt at a codicil typed on the first codicil by the notary public) were found in the testator's safety deposit box after his demise. The lost codicil, so far as appears, was never placed in the safety deposit box. It was last seen, so far as claimed or admitted by any witness, at the time the testator placed it in his pocket after its execution.

The evidence tends to show that Mr. Bristol, after executing the lost codicil, never changed his mind as to providing for Rita, the returned granddaughter, or as to revoking the devise of the income property which had been deeded to Agnes, or as to appointing the daughter, Edith Bristol Young, as executrix. Mr. Bristol apparently was of sound and disposing mind up to within a few hours of his death.

Until a few days before his passing, Mr. Bristol kept on his body a money belt in which he had disposited $5,950. This money at that time, in his presence, by his direction, and in the presence of others of the family, was handed to Mr. Charles G. Young, the husband of Edith, and a member of the bar, for safekeeping. While no oral statement was made specifying in words that this money was entrusted to Mr. Young because his wife (Mr. Bristol's daughter) Edith was by the terms of the lost codicil, to be the executrix of Mr. Bristol's will, the reticence of those participating in the conversation to speak bluntly concerning such matters at that time is easily understandable and the inference which the trial judge drew from the circumstances, to the effect that such was the object, the intent, and the understanding of the parties, is a reasonable one.

It is noteworthy that the petition for probate of the lost codicil expressly charges that such lost codicil "has never been revoked and was in existence at the time of the testator's death, but was destroyed and petitioner alleges on information and belief that *said codicil was destroyed by Agnes Bristol,* the surviving wife of the deceased." (Italics added.) Nowhere in the record does it appear that Agnes as a witness expressly or specifically or directly denied this charge. There is testimony that at a time eight days before Mr. Bristol's death, during his last illness, and after members of his family had been called to his bedside, Agnes said "if she could ever get her fingers on the will and the deeds she would tear them all up except Walter's."

That Agnes had knowledge of the lost codicil, and of its contents and potential effect, is established. Mr. Bristol himself, in the presence of his attorney, told her that he had "changed" his will and that "Edith is going to be the executrix." He said to her: "Why, Mrs. Bristol, you would not put a loan on this property? * * * I have given you that, and *that is all you are going to get out of my estate* * * *. *I have told you that I have changed my will, and that Edith is going to be the executrix,* and that you are to have the property to provide for yourself the rest of your life * * *. *If you are going to make a loan on that property, I will not permit Mr. Lake to dismiss this case.*" (Italics added.) While some of the testimony of Agnes appears to have been positive and emphatic to the degree of the dramatic, that pertaining to her knowledge of the lost codicil apparently was neither positive nor convincing to the trial judge. By way of illustration the following questions and answers are informative:

"Q. And did you ever see either in my office or in the possession of Mr. Bristol or about the home of yourself and Mr. Bristol, a codicil to his will which had been prepared by me? A. I don't *think* I have, Mr. Lake.

"Q. In other words, as far as you now recall you never saw that document at any time? A. I do not *think* so." (Italics added.)

To an extent seldom seen in a record, that before us in this case discloses on the part of Agnes Bristol, as a witness, an apparent determination to evade direct and forthright answers to pertinent questions. Repeatedly, through many pages of transcript, the trial judge is shown to have patiently and diligently, and by necessity, admonished her to answer directly and responsively material questions properly addressed to her. The recitals as to money and property which Agnes procured from Mr. Bristol at the time of and after her marriage to him, and the method she employed on one occasion, leave no doubt as to the legal sufficiency of the evidence to support a possible conclusion of the trial judge that the procurement of money and property from Mr. Bristol was a motivating influence in Agnes' life and that she would not necessarily permit compunctions of honesty to deter her pursuit of the end sought.

The title to the income property which Mr. Bristol deeded to Agnes was clear and apparently he was insistent that it be kept clear of encumbrances. She also promised that she would not sell the property. When questioned as to whether she had falsified to Mr. Bristol concerning the procurement of a loan on this property contrary to his admonitions, Agnes at first denied that she had placed an encumbrance upon it. She testified, "I did not, I sold it, I didn't put a loan, I sold it." The following questions and answers then appear:

"The Court: The question is, did you tell your husband that you were or were not putting a loan on it, what did you tell your husband about a loan? A. I put a loan on first, and then I saw that I would lose the property, I could not make expenses and I sold it.

"Q. By Mr. Lake: * * * My question is, at the time that you came to my office for me to sign this dismissal, when I told Mr. Bristol that you were trying to put a loan on the property, isn't it a fact that you turned to him and said, 'I am not, I have no intention of putting a loan on this property'? A. Well, I did not at that time, because there was already a loan on it, Mr. Lake.

"Q. I am not questioning whether or not there was a loan, did you tell Mr. Bristol that you had no intention of putting a loan on this property? A. Yes."

The object of the deceit disclosed by the above-quoted questions and answers becomes the more apparent upon mention of the fact that, as disclosed by the record, the object of the call of Agnes and Luther Bristol at the office of his attorney, when the quoted conversation took place, was to secure a dismissal of the rescission suit which had been filed by Mr. Bristol and which clouded the otherwise clear title of Agnes to the property. Agnes' application for a loan on the property was then pending and the title company had requested the dismissal of the suit with its accompanying notice of lis pendens. Mr. Bristol had no knowledge of the real object of Agnes in seeking the dismissal, and in reliance upon her disavowal of intent to hypothecate the property, instructed his attorney to dismiss the suit. The dismissal was filed. The loan was effected.

Concerning the subsequent sale of the hypothecated property the testimony of Agnes is on the same plane. She at first asserted that she had sold it for "about $4000" and under the probing of cross-examination finally admitted receiving a price of $5,500 for it. Her testimony concerning the regard and intentions of Mr. Bristol for his granddaughter Rita is also enlightening. It will be recalled that neither in the original will nor in the first codicil was any provision made for Rita, it being believed that she was no longer living. *Only in the lost codicil, executed after her return, does her name appear.* The significant testimony is as follows:

"Q. Did you ever hear Mr. Bristol say anything about Rita Fox, that he wanted her to be a beneficiary under his estate? A. She is one of his granddaughters.

"Q. That is not what I asked you, did you ever hear him say that he wanted her to participate in the distribution of his estate? A. Yes, sir.

"Q. And you also heard the conversation that he had with his daughter, Edith, before his death, in which he told her, and there was some discussion about him including Rita as a beneficiary in his estate, wasn't there? A. Yes.

"Q. And he mentioned the fact that he had included her as one of the beneficiaries, didn't he? A. Sure.

"Q. And you knew that right up to the time of his death, that that was his thought and that was his desire, that Rita would benefit, isn't that right? A. Well, she is his great-granddaughter [sic]."

The above-quoted testimony obviously depicts a state of mind of the testator which the trial judge could well have concluded was consistent only with the lost codicil's being, in Luther's belief, unrevoked and potentially operative. There is other evidence in the record, cumulative or corroborative in effect, which likewise tends to show the propensities of Agnes Bristol and the interests of Luther Bristol, but enough has been delineated to require us to hold that the determination of the trial court was based on substantially conflicting inferences and hence is conclusive.

The judgment of the trial court is affirmed.

GIBSON, C. J., and SHENK and CARTER, JJ., concurred.

TRAYNOR, Justice.

I dissent. There is no evidence in the present case to support the finding that the codicil was in existence at the time of the testator's death. No one saw the codicil after its execution and delivery to the testator on April 28, 1941. It did not appear amongst the papers that the testator kept in his safe-deposit box in which was found after his death, the will of April 1, 1938, a codicil of July 28, 1939, a so-called "Second Codicil" not legally executed, and deeds to his children. There is no explanation for its disappearance between the time of its execution and the death of the testator. No claim is advanced that it was destroyed by public calamity, and any contention that the appellant fraudulently destroyed it in the testator's lifetime is dispelled by the trial court's finding that it was in existence at the time of his death.

The respondent relies upon evidence with regard first to a conversation between herself and the testator concerning Rita Fox, then to the delivery of testator's money belt to respondent's husband, and finally to a conversation between appellant and Mrs. Della Bristol, to prove the existence of the codicil at the testator's death.

In the first codicil the testator's son Walter was given a life estate in certain real property, with remainder to two of Walter's daughters. A third daughter, Rita, who had disappeared and not been heard from, was not given an interest in the remainder in view of the understanding, that her two sisters would execute an agreement giving her an equal interest should she return. Rita returned and the lost codicil gave her an interest in the remainder equal to that of each of her two sisters. Some time after the execution of this codicil respondent had a conversation with the testator, as to which respondent testified as follows:

"Q. What did he say? A. Well, he said, 'I must fix it so Rita can get hers,' and I said, 'Why dad, don't you remember, you had Mr. Lake fix that up.' He said, 'Oh, I had forgotten all about it.' He was getting very forgetful, he could not seem to remember those things.

"Q. That was two months prior to his death? A. Yes, two or three months.

"Q. Could it have been as early as February of this year? A. Well, it might have been, it was February—I was over there February 20th, my son was home on furlough and he and I went over to see his grandpa.

"Q. Then when is the next time you went over? A. I went over about every two or three weeks.

"Q. Your recollection is now that this conversation about Rita Fox took place— A. After February.

"Q. And about two months before September 30th? A. Well, it might have been longer, it is in there between those dates.

"Q. By the Court: What was it you said about the matter having been taken care of for Rita? A. You see, she had disappeared and he had forgotten that he had Mr. Lake fix up that codicil naming her, and he said, 'Did Charley ever have those girls sign a paper that would give her her share?' He said, 'I want her to have her share.' And I said, 'Why, Dad, you had that fixed up in Mr. Lake's office.'

"Q. What did he say about it? A. He just said that he had forgotten about it, that he wanted to make sure that Rita was going to get her part of it.

"Q. By Mr. Lake: And when you mentioned the fact that he had taken care of it in my office, what did he say? A. Just that it had slipped his memory, that he had forgotten all about it."

This evidence given its utmost weight would prove only that the testator believed that the codicil was in existence at the date of the conversation some two or three months before his death. It in no way proves that the codicil was in existence when the testator died, or even that at any time after the conversation he did not revoke the codicil.

The testator at all times wore a belt containing a large sum of money. Two or three days before his death, after respondent had warned him of the danger of keeping the money belt on, the testator delivered it to respondent's husband, Mr. Charles G. Young, for safekeeping. Mr. Young placed the money in his safe-deposit box and properly accounted for it after the testator's death. There is nothing in this evidence that has any bearing upon the existence of the lost codicil at the time of the testator's death. It is apparently the view of respondent that since the testator named her as executrix in the lost codicil, he confirmed that choice when he turned over his money belt to her husband, Mr. Charles G. Young, for safekeeping. There is nothing in the record, however, to indicate that the testator was thinking in terms of the administration of his estate or that he turned his money belt over to Mr. Young, who was not only decedent's son-in-law but an attorney, rather than to any one else for any other reason than that he could trust Mr.

Young with its safekeeping during his illness.

According to the testimony of Mrs. Della Bristol, the wife of one of the testator's sons, the appellant made the statement to her eight days before the death of the testator that "if she could get her fingers on the will and the deeds she would tear them all up except Walter's." There is nothing here to suggest that the will was in existence at the time of the testator's death. Nor would this evidence by itself support a finding that appellant destroyed the codicil, and there is no indication in the findings that she did so. There is no evidence that she ever saw the codicil or had any opportunity to destroy it. The bank records show that no one but the testator ever had access to the testator's safe-deposit box in which he kept his valuable papers, and in which the will, the first codicil, codicil number two, and the deeds were found after his death. Appellant's character, however it is evaluated, and her motives, however suspicious they may appear, cannot stand as proof of the fraudulent destruction of the will when there are no facts or circumstances that make such a destruction plausible. Her own testimony did nothing to establish such a destruction, and it is therefore immaterial whether or not the trial court believed her, for a fact is proved by affirmative evidence, not by disbelief of a witness. Moulton v. Moulton, 178 Minn. 568, 227 N.W. 896; Hyslop v. Boston & Me. R. Co., 208 Mass. 362, 94 N. E. 310, 21 Ann.Cas. 1121; Boice-Perrine Co. v. Kelley, 243 Mass. 327, 137 N.E. 731; see 23 C.J. 51; 32 C.J.S., Evidence, § 1040, p. 1104, § 1046, p. 1134.

A finding of fact cannot be sustained if no evidence appears in the record from which the trier of facts could reasonably infer that it is more probable that the fact exists than that it does not. The suggestion in the majority opinion that evidence may be overwhelming in its persuasiveness even though it "may appear relatively unsubstantial—if it can be reflected at all—in a phonographic record" is in effect a suggestion that an appellate court may disregard the manifest unpersuasiveness of the evidence it is charged to review. If an appellate court could attribute reality to the phantom of a persuasiveness that does not survive in the record, it would no longer be bound by the record itself and could even affirm a judgment that was not sustained by any proof.

The relation between the presumption of revocation, invoked in the majority opinion, to Probate Code, section 350, requires clarification. Section 350 of the Probate Code provides: "No will shall be proven as a lost or destroyed will unless proved to have been in existence at the time of the death of the testator, or shown to have been destroyed fraudulently or by public calamity in the lifetime of the testator, without his knowledge." Some confusion has attended the application of this section since the majority opinion in In re Estate of Sweetman, 185 Cal. 27, 195 P. 918, first invoked the presumption that a will has been revoked when it is known to have been in the possession of the decedent but cannot be found after his death. Apparently the presumption was regarded as arising independently of section 1339 of the Code of Civil Procedure, the antecedent of Probate Code, section 350, for the will was admitted to probate not simply because the declarations of the testatrix showed that she had not revoked it and thus had the effect of overcoming the presumption (185 Cal. 27, 33, 195 P. 918), but also because under section 1963, subdivision 32 of the Code of Civil Procedure, a thing once shown to be in existence is presumed to continue in existence so long as things of that nature usually exist. 185 Cal. 27, 34, 195 P. 918, 921. It would not have been necessary to invoke the presumption of continued existence if in the opinion of the majority, the requirements of section 1339 had been satisfied by proof of nonrevocation. In a vigorous dissent, Justice Olney took the view that proof of nonrevocation was immaterial, since existence of the will at the time of the testator's death had to be established, and that the very purpose of section 1339 was "to make it impossible to probate an unproduced will by proof that it was in existence prior to the testator's death eked out by any presumption that it continued to exist until he died."

Subsequently in Re Estate of Ross, 199 Cal. 641, 647, 648, 250 P. 676, 679, the court overruled the holding in Re Estate of Sweetman that a will once in existence is presumed to continue in existence, declaring: "If the rule were otherwise all that would be necessary in order to prove a lost or destroyed will would be to show that the will was in possession of the testatrix some time, any time, prior to her death, with no apparent intervening cause for destruction or revocation, and thus rebut the presumption of revocation and entirely nullify the requirements of said section 1339." Without the presumption of continued existence the order admitting the will to probate could not have been affirmed in the Sweetman case, for there was nothing else to prove the existence of the will at the time of the death of the testatrix. Nothing in that case, therefore, affords any support for the proposition that proof of nonrevocation alone is sufficient to comply with Probate Code section 350.

While the overruling of In re Estate of Sweetman did much to dispel the confusion engendered by that case, the relation of Probate Code, section 350, to the presumption of revocation that is said to arise in these cases still requires clarification. If section 350 provided simply that a presumption of revocation arises in the case of a lost will, it would be necessary only to rebut the presumption to prove that the will was in existence at the time of the testator's death. A presumption of revocation independent of section 350 becomes superfluous, however, if the very existence of the will at the time of the testator's death must be proved. While proof of that existence establishes the fact of nonrevocation, the converse does not follow that a will exists because there is no revocation thereof. It would therefore be idle to rebut the presumption of revocation if there were no proof that a will existed at the time of the testator's death.

Section 350 cannot reasonably be construed as creating a presumption of revocation. It is concerned, not with the rules governing revocation, which are specifically set forth in section 74 of the Probate Code, but with the procedure for establishing a lost or destroyed will. In re Estate of Patterson, 155 Cal. 626, 633–638, 102 P. 941, 26 L.R.A.,N.S., 654, 132 Am.St.Rep. 116, 18 Ann.Cas. 625. Compliance with the substantive provisions that determine the status of the will as an executed instrument is not enough to render the will operative as a conveyance. A will cannot be given in evidence as the foundation of a right or title unless it has been duly probated (In re Estate of Patterson, 155 Cal. 626, 636, 102 P. 941, 26 L.R.A.,N.S., 654, 132 Am.St.Rep. 116, 18 Ann.Cas. 625), and section 350 prescribes the requirements that must be satisfied before a lost will can be probated. It is therefore not controlling that under the substantive provisions of the law, the will has been duly executed and has not been revoked, for it cannot be probated if the requirements prescribed in the Code for the probate of wills cannot be met. The requirement of proof that the will existed at the time of the testator's death cannot be translated into a requirement of proof of nonrevocation. Such a translation would render meaningless the provision regarding wills destroyed fraudulently or by public calamity, for under Probate Code section 74 there can be no revocation under such circumstances. Indeed, the amendment with respect to wills destroyed by public calamity was held applicable in Re Estate of Patterson, 155 Cal. 626, 102 P. 941, 26 L.R.A.,N.S., 654, 132 Am.St.Rep. 116, 18 Ann.Cas. 625, to a will destroyed before the adoption of the amendment, on the ground that the will had not been revoked. Had the destruction amounted to a revocation of the will, the estate would have vested in the heirs and the subsequent amendment could not have served to take the estate from them. Since the probate procedure related simply to the remedy and not to the foundation of the rights of those claiming under the will, the amendment was held applicable. The will was admitted to probate, not simply because it was unrevoked, but because by virtue of the amendment a will destroyed by public calamity without the knowledge of the testator could be probated even though it was admittedly not in existence at the time of the death of the testator.

In section 350 of the Probate Code, the Legislature has exercised the greatest caution not to leave the way open for the establishment of spurious wills or the probate of wills that testators have intentionally destroyed without leaving adequate proof of such destruction, even going so far as to preclude probate of a will that is lost or destroyed, other than by fraud or public calamity, before the death of the testator. In re Estate of Johnson, 134 Cal. 662, 66 P. 847; In re Estate of Patterson, supra; In re Estate of Kidder, 57 Cal. 282. It has placed upon the testator the responsibility for the safekeeping of his will until his death. At the same time it has recognized that once the testator dies there is greater risk of loss or destruction of his will, and it has therefore sought to insure that his wishes would nonetheless be carried out, by providing that his will need not be in existence at the time of probate so long as there is proof of its existence at the time of death and proof by two witnesses of its provisions. It is for the

Legislature to choose or modify the course it deems proper in this regard, not for the court to undertake modifications merely because in its view the Legislature has acted in excess of caution.

The judgment should be reversed.

CURTIS and EDMONDS, JJ., concurred.

Rehearing denied; CURTIS, EDMONDS, and TRAYNOR, J.J. dissenting.

23 Cal.2d 263

CHILDS REAL ESTATE CO., Inc., v. SHELBURNE REALTY CO. et al.

L. A. 18556.

Supreme Court of California.

Dec. 8, 1943.

1. Mortgages 🔑187

Indenture trustee's possession of incumbered premises was established by making the debtor the agent of the trustee to collect rents and manage property.

2. Assignments 🔑90

An assignee with notice of claims or equities against assignor ordinarily obtains no rights greater than those possessed by the assignor.

3. Mortgages 🔑151(1)

Where indenture trustee took trust deed and assignment of subleases from lessee with notice of lessor's prior lien, the assignment and lien of the trustee were subject to whatever priority the lessor obtained by virtue of its first lien.

4. Mortgages 🔑151(1)

Where trustee took trust indenture and assignment of subleases from lessee subject to lease which gave lessor a first lien on rents and permitted lessor to terminate lease if default continued for 30 days after notice, the trustee was entitled to subrents which accrued and were collected by it before lessor's lien was perfected by termination of lease after lessee's default. Civ.Code, § 2920.

5. Landlord and tenant 🔑243, 244

Where lease declared that rents reserved therein should be first liens, the lessor had an equitable lien or security interest which could be enforced against specific property, but in absence of provisions in lease for enforcement, equitable action would be necessary to make lien operative.

6. Mortgages 🔑145

Under the California law, a mortgagee has a security interest in nature of an equitable lien. Civ.Code, § 2920.

7. Mortgages 🔑199(2)

Where a mortgage or trust deed contains a clause which merely includes rents as a portion of property pledged to secure debt, only a security interest passes.

8. Mortgages 🔑199(2)

Where mortgage or trust deed contains a clause which merely includes rents as portion of property pledged to secure debt, until mortgagee secures lawful possession, mortgagor in possession may collect rents as they fall due.

9. Landlord and tenant 🔑205

Where under lease, lessee had 30 days after notice of default within which to remedy the default and only if it was not remedied could lessor take possession, lessor's lien on rents given by lease did not become effective until lessor exercised right to take possession.

10. Landlord and tenant 🔑205

Parties to lease may provide that immediately on default rents are assigned absolutely to lessor but it is enforced only when it is clearly expressed intention of parties that such assignment be made.

11. Landlord and tenant 🔑205

Where lease provided that rent reserved therein should be a first lien, and lease authorized lessor to take possession in event default continued for 30 days after notice, only ordinary security transaction was contemplated and rents were not assigned immediately on default.

12. Liens 🔑7

An equitable lien can be created if there is a sufficient expressed intention to make property security for a debt, and a subsequent incumbrancer with notice takes subject to the equitable lien.

13. Landlord and tenant 🔑205

Where trustee took trust indenture and assignment of subleases from lessee subject to lease which provided that rents reserved therein should be first liens, and gave lessor the right to take possession if default continued for 30 days after notice, lessor did not have equitable lien on rentals collected by trustee before lessor obtained lawful possession after lessee's default.

14. Landlord and tenant ⚷205

Where trustee took trust indenture and assignment of subleases from lessee subject to lease providing that rents reserved therein should be a first lien, after lessor's superior lien was established by lawful possession following lessee's default, the lien attached to all accrued and uncollected subrents.

15. Mortgages ⚷151(1)

Where trustee took trust indenture and assignment of subleases from lessee subject to lessor's superior lien on rents, and when lessor took possession because of lessee's default, policies which trustee had procured to insure its interest were canceled and unearned premiums returned to trustee, the lessor was not entitled to the premiums refunded even though they were paid out of subrentals collected by the trustee prior to time lessor took possession.

16. Mortgages ⚷209

Where policies on which lessee's indenture trustee had paid premiums were assigned by trustee to lessor, when lessor took possession following lessee's default and lessor agreed in consideration of assignment to pay trustee amount of unexpired premiums on policies, the trustee was entitled to recover the amount of the unexpired premiums from the lessor.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles D. Ballard, Judge.

Action by Childs Real Estate Company, Inc., against Shelburne Realty Company and others to quiet title and for judgment for rent, taxes due and attorney's fee and to recover from the Bank of America National Trust & Savings Association subrents collected and paid to the bank in its capacity as trustee under a trust indenture and to recover amount of insurance premiums refunded to the bank on policies insuring the bank's interest as trustee, wherein the bank filed a counterclaim. From a judgment for plaintiff, the Bank of America National Trust & Savings Association appeals.

Reversed and remanded with directions.

Prior opinion, 136 P.2d 16.

James A. McLaughlin, of Los Angeles, for appellant.

Chase, Barnes & Chase, Lucius K. Chase, and Ransom W. Chase, all of Los Angeles, for respondent.

GIBSON, Chief Justice.

This appeal was taken by the defendant Bank of America National Trust and Savings Association (hereafter called the bank) from a judgment awarding plaintiff $3,861.20 which was in the possession of the bank in its capacity as trustee under a trust indenture, and denying the bank recovery of $3,074.73 demanded by the bank in a cross-complaint.

In 1924 Childs Company of Providence, of which the plaintiff Childs Real Estate Company, Inc. (hereafter called Childs), is the successor, executed a 96-year lease on certain real property to the L. Harris Realty Company. The Harris company later changed its name to Shelburne Realty Company (hereafter called Shelburne). In 1925 Shelburne, then known as the L. Harris Realty Company, executed a trust indenture under which a predecessor of the defendant bank was designated trustee. Using $400,000 secured through the bond issue, and $200,000 more, Shelburne erected a building on the premises. Shelburne defaulted on the trust agreement in 1933, and the bank appointed Shelburne its agent to collect rents from subtenants and manage the building. The rents were deposited with the bank in an account under the name of "Shelburne Realty Co., Agent," and it was agreed that all moneys so deposited should belong to the bank.

Shelburne failed to pay the rent due Childs on December 1, 1939, and taxes on the property became delinquent on December 5, 1939. The lease provided that "in case default is made by lessee [Shelburne] * * * and in the event any such default shall continue for a period of thirty days, after written notice thereof shall have been served upon lessee, the lessor [Childs] at its option may at any time after the expiration of the number of days last above specified, declare this lease terminated, and the lease-hold interest hereby created, wholly ended and terminated and may thereupon or at any time thereafter enter into and upon said demised premises * * * and the lessee hereby waives in such event any demand for the possession of said demised premises.

* * *" Acting on this provision, Childs served notice of default on both Shelburne and the bank on December 15, 1939. The defaults were not remedied, and on January 17, 1940, notice of termination of the lease was served on Shelburne and the bank, and Childs took possession of the property.

Action was brought by Childs against Shelburne to quiet its title, and for a judgment for rent, taxes due and attorney's fees. Childs sought to recover from the bank $3,861.20, representing subrents collected by the bank prior to January 17, 1940, the date Childs took possession, and insurance premiums, prepaid by the bank, which had been refunded to the bank. The bank filed an answer and cross-complaint, claiming the right to keep the rents and refunded premiums it held. Also, it claimed the right to rents collected by Childs, amounting to $2,537.42, which accrued prior to January 17, 1940. Further, the bank asserted that Childs owed it $537.-31 for prepaid insurance premiums on policies transferred by it to Childs on January 17, 1940. The trial court quieted title in Childs and gave judgment against Shelburne for rent, taxes due and attorney's fees. It also gave Childs judgment for $3,861.20, against the bank, and denied the bank any recovery on its cross-complaint. Shelburne did not appeal.

Childs, by virtue of its lease with Shelburne, had a first lien on buildings and improvements on the premises, and on the rents therefrom. In the language of the lease: "* * * the rent reserved in this lease, all taxes and assessments, all other payments whatsoever, relative to said demised property which shall in fact be paid by lessor, but which * * * are to be paid by lessee, * * * shall be and they are each and all of them declared to be a first lien and superior to an incumbrance created by lessee, upon the leasehold or estate hereby granted to lessee, upon all buildings and improvements upon said demised premises erected by lessee, and upon all rents, from all such buildings and improvements situated on said premises during said term and payable to lessee." The trust indenture provided that it "is made subject to the terms, limitations and conditions of the Childs lease hereinbefore referred to."

[1-3] Prior to the time Childs took possession, the bank was an assignee of some of the leases between Shelburne and its subtenants, and a lien holder in possession as to the balance of the subrentals. The bank's possession was established by making Shelburne its agent to collect rents and manage the property. Snyder v. Western Loan & Building Co., 1 Cal.2d 697, 37 P.2d 86; Kershaw v. Squier, 137 Kan. 855, 22 P.2d 468; Reichert v. Guaranty Trust Co., 261 Mich. 315, 246 N.W. 132. There is no reason to make a distinction in this case between the bank's position as assignee and its position as lien holder in possession of the premises. An assignee with notice of claims or equities against his assignor ordinarily obtains no rights greater than those possessed by the assignor, but simply stands in the shoes of the latter, subject to all equities which may be asserted against the assignor. Western Oil, etc., Co. v. Venago Oil Corp., 218 Cal. 733, 24 P.2d 971, 88 A.L.R. 1271; 4 Am.Jur. 304. The bank had notice of Childs' prior lien. The assignment from Shelburne as well as the lien given by Shelburne, was subject to whatever priority Childs obtained by virtue of its first lien.

Three principal questions are presented on this appeal: 1. Is the bank entitled to retain the subrents which had accrued and which it collected prior to the time Childs terminated the lease and took possession of the property? 2. Is Childs entitled to subrents which had accrued but which were uncollected at that time? 3. Is the bank entitled to retain unearned portions of insurance premiums paid for the purpose of insuring its interest as trustee and refunded to the bank upon cancellation of the policies when Childs took possession?

[4-9] We think it clear that the bank is entitled to subrents which accrued and were collected by it before the lessor's lien was perfected. The nature of Child's claim, as lessor, is similar to that of a mortgagee or trustee. It has an equitable lien or security interest which may be enforced against specific property; and, in the absence of provisions in the lease for enforcement, equitable action would be necessary to make the lien operative. Bell v. Pelt, 51 Ark. 433, 11 S.W. 684, 4 L.R.A. 247, 14 Am.St.Rep. 57; 16 Cal.Jur., Liens, sec. 10; 4 Pomeroy, Equity Jurisprudence, 5th Ed., pp. 692, 695. Under California law, a mortgagee also has a security interest in the nature of an equitable lien. Civ. Code, sec. 2920; 16 Cal.Jur. 315; 4 Pomeroy, Equity Jurisprudence, 5th Ed., pp. 544–546, 558, 565, 567. It is settled that where

a mortgage or deed of trust contains a clause which merely includes the rents as a portion of the property pledged to secure a debt, only a security interest passes. And until a mortgagee obtains lawful possession, the mortgagor in possession may collect the rents as they fall due. Or, to put it another way, the mortgagee must actually acquire possession of the mortgaged property by consent or lawful procedure or must secure the appointment of a receiver in order to perfect his claim to the rents. Kinnison v. Guaranty Liquidating Corp., 18 Cal.2d 256, 115 P.2d 450; Freeman v. Campbell, 109 Cal. 360, 42 P. 35; Casey v. Doherty, 116 Cal.App. 42, 2 P.2d 495; Sullivan v. Rosson, 223 N.Y. 217, 119 N.E. 405, 4 A.L.R. 1400; Freedman's Sav. & T. Co. v. Shepherd, 127 U.S. 494, 8 S.Ct. 1250, 32 L.Ed. 163; 4 A.L.R. 1410; 55 A.L.R. 1022; 87 A.L.R. 628; 91 A.L.R. 1221; 2 Jones, Mortgages, 8th Ed., sec. 827. Under the Childs lease neither actual default nor notice of default entitled Childs to possession of the premises. Shelburne had thirty days after notice within which to remedy the default, and only if it was not remedied could Childs elect to take possession. Childs exercised that right on January 17, 1940, and its lien did not become effective until that time.

[10, 11] Childs contends, however, that these rents were assigned to it by virtue of its lease with Shelburne. It is possible, by the terms of a security arrangement, or in a separate agreement, for the parties to provide that immediately on default rents are assigned absolutely. Such an immediate transfer must be distinguished from an ordinary pledge of additional security; it is enforced only when it is the clearly expressed intention of the parties that such an assignment be made: Kinnison v. Guaranty Liquidating Corp., supra. There is no indication in the record that anything more than an ordinary security transaction was contemplated. The trial court found that the lease between Childs and Shelburne gave Childs a first lien superior to any encumbrance created by Shelburne.

[12, 13] Childs also contends that it had an equitable lien on all rentals collected by the bank, and bases its claim on the authority of cases dealing with chattel mortgages. Nau v. Santa Ana Sugar Co., 79 Cal.App. 685, 250 P. 705; Pacific States Corp. v. Pan-American Bank, 213 Cal. 58, 1 P.2d 4, 981; Washington Lumber & M. Co. v. McGuire, 213 Cal. 13, 1 P.2d 437; Stewart v. Leasure, 12 Cal.App.2d 652, 55 P.2d 917. These cases hold that an equitable lien can be created if there is a sufficiently expressed intention to make certain property security for a debt, and that a subsequent encumbrancer with notice takes subject to the equitable lien. There is no question but that Childs had a prior lien, and that it was superior to the rights of the bank. The issue, however, is not whether such a lien was created, but the date on which it became effective as to the rentals. It has been pointed out that, in the absence of specific agreement, the right to rentals does not accrue until the lienor obtains lawful possession of the realty. The bank may keep the subrents it collected.

[14] The second question is whether Childs may retain subrents which had accrued but were uncollected at the time Childs took possession of the property. It is our opinion that after Childs' superior lien was established by lawful possession, it attached to all accrued and uncollected rents. The courts are not in accord as to whether a mortgagee's lien when established attaches to rents then due but uncollected. Mortgagee's lien held effective: New York Life Ins. Co. v. Fulton Development Corp., 265 N.Y. 348, 193 N.E. 169; Stowers v. Wheat, 5 Cir., 78 F.2d 25; White v. Anthony Inv. Co., 119 Fla. 108, 160 So. 881. Contra: Hartford Realization Co. v. Travelers' Ins. Co., 117 Conn. 218, 167 A. 728; Paramount Building & Loan Ass'n v. Sacks, 107 N.J.Eq. 328, 152 A. 457. Even without a contractual lien, however, a lessor has been held to be entitled to subrents in the hands of a subtenant where the lessee is insolvent. City Inv. Co. v. Pringle, 69 Cal.App. 416, 231 P. 355; Otis v. Conway, 114 N.Y. 13, 20 N.E. 628; Kemp v. San Antonio Catering Co., 118 Mo.App. 134, 93 S.W. 342; Young v. Wyatt, 130 Ark. 371, 197 S.W. 575; and see 3 Tiffany, Real Property, 3d Ed., sec. 917; Kanawha-Gauley Coal Co. v. Sharp, 73 W.Va. 427, 80 S.E. 781, 52 L.R.A.,N.S., 968, Ann.Cas.1916E, 826. This equitable principle has been recognized and the lessor allowed to recover subrents when the lessee was in arrears but not insolvent. F. W. Woolworth Co. v. Rice, 114 N.J.Eq. 542, 169 A. 332. In the present case there was a specific agreement for a lien, and the subrents were paid by the subtenants to the lessor. Clearly, it would be inequitable if, after Childs had established its

lien by taking possession of the property, Shelburne were allowed to collect and use the subrents without discharging its obligation to Childs. Such a result would defeat the lien on subrents which was created by the lease for the protection of the lessor. The rights of the bank are no greater than those of Shelburne, and are subject to the prior lien. Moreover, the trust indenture expressly provided that it was subject to the "terms, limitations and conditions" of the Childs' lease. Childs, therefore, is entitled to keep the subrents it collected after it took possession of the realty.

[15] The third question involves the right to insurance premiums. Childs alleged in its complaint that it was entitled to premiums refunded to the bank. The refunded premiums were derived from policies of insurance covering the leased realty. Prior to January 17, 1940, the bank had paid these premiums for the purpose of insuring its interest as indenture trustee. On or about January 17, 1940, when Childs took possession, the policies were cancelled, and the unearned premiums returned to the bank. The trial court found that the premiums had been paid out of rentals collected for the bank by Shelburne, and held that Childs was entitled to this money by virtue of its first lien on rentals. This conclusion is erroneous because as we have held Childs' lien did not entitle it to subrents which accrued and were collected by the bank prior to January 17, 1940.

[16] Other policies upon which the bank had paid premiums remained in effect and were assigned and transferred by the bank to Childs on January 17, 1940. The court found as admitted in the pleadings that Childs agreed in consideration of such assignment to pay the bank the sum of $537.31, being the amount of the unexpired premiums on those policies. The judgment, however, erroneously failed to allow such sum to the bank.

It follows that plaintiff Childs is entitled to recover nothing from defendant bank on its complaint, and that defendant bank is not entitled to recover on its cross-complaint for rentals collected by Childs after January 17, 1940. The defendant bank, however, is entitled to judgment for the sum of $537.31 which plaintiff Childs agreed to pay as consideration for the assignment of the insurance policies.

Judgment is reversed and the cause remanded to the lower court with directions to proceed in accordance with the views expressed herein.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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23 Cal.2d 244

HARDY v. HARDY.

L. A. 18463.

Supreme Court of California.

Dec. 3, 1943.

1. Judgment 🔑185

An action for summary judgment may not be granted except on affidavits in favor of moving party containing facts sufficient to entitle him to judgment in his favor. Code Civ.Proc. § 437c.

2. Judgment 🔑185

In action on property settlement contract which required husband to pay wife $250 per week but, if husband's weekly amount received fell below $1,000 per week, amount payable to wife was to be reduced to one-fourth of amount actually received by husband, husband's affidavit that language of contract, which standing alone imposed an obligation based on husband's actual weekly receipts and not on his average earnings, accurately expressed intention of parties, contained facts sufficient to entitle him to summary judgment. Code Civ.Proc. § 437c.

3. Judgment 🔑185

A defendant's motion for summary judgment must be denied notwithstanding defendant's affidavit contains facts sufficient to entitle him to judgment, if affidavit in opposition establishes a triable issue of fact. Code Civ.Proc. § 437c.

4. Husband and wife 🔑279(1)

A property settlement contract that husband should pay wife $250 per week but, if husband's weekly amount received fell below $1,000 per week, amount payable to wife would be reduced to one-fourth of amount actually received by husband, would be void for uncertainty if husband's obligation was to be regarded in terms of average income.

5. Judgment ⚷185

In action on property settlement contract that husband who was motion picture actor would pay wife $250 per week but, if husband's weekly amount received fell below $1,000 per week, amount payable to wife would be reduced to one-fourth of amount actually received by husband, wife's affidavit that husband's high work week salary was regarded as partly included in low suspension week salary raised no issue of fact as to whether parties intended that husband should pay an average of $250 if husband received an average income of $1,000 per week, and hence summary judgment for husband was properly entered. Code Civ.Proc. § 437c.

In Bank.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Action by Myrtle Lee Hardy against Oliver Norville Hardy to recover money due under a property settlement contract or in the alternative for reformation of such contract. From a summary judgment for defendant, plaintiff appeals.

Affirmed.

Prior opinion, App., 135 P.2d 615.

Roger Marchetti and Bartlett & Kearney, all of Los Angeles, for appellant.

Benjamin W. Shipman, of Los Angeles, for respondent.

TRAYNOR, Justice.

On April 24, 1937, plaintiff Myrtle Hardy and defendant Oliver Hardy executed a property settlement agreement providing that defendant would pay $250 weekly for the support of plaintiff unless his income fell below $1,000 a week in which case he would pay one-quarter of the amount he received. Plaintiff contends that defendant was bound to pay $250 weekly, regardless of his actual receipts in a particular week, if his income averaged over $1,000 a week. Defendant contends that in any week in which his receipts were less than $1,000, he was bound to pay only one-quarter of the amount actually received, without regard to any average. Defendant is a motion picture actor, and his contract with his employer gave him a salary in excess of $1,000 a week for forty weeks in the year. For the other twelve weeks, described as "suspension weeks," defendant received $100 a week. The employer was free to designate as suspension weeks any twelve weeks in the year. Although defendant's annual income averaged more than $1,000 a week, he paid plaintiff for the suspension weeks only one-quarter of the amount he actually received at such times. On April 16, 1941, plaintiff commenced this action for breach of contract, praying alternatively for reformation. Defendant filed an answer denying the allegations of the complaint and moved for summary judgment in his favor. It was stipulated that if defendant correctly interpreted the contract, no issue of fact existed requiring trial. On November 4, 1941, the motion was granted and judgment was entered on March 26, 1942.

[1] A motion for summary judgment may not be granted except on affidavits in favor of the moving party containing facts sufficient to entitle him to judgment in his favor. Code Civ.Proc. sec. 437c. Defendant sets forth the pertinent portion of the contract in his affidavit. It provides that "* * * for the support of first party (plaintiff), second party (defendant) shall pay to first party from this day forward * * * the sum of two hundred fifty dollars ($250.00) per week *but in the event* the weekly amount received by second party from any source whatever, either as income, salary, royalty, commission, bonuses, and/or earnings falls below one thousand dollars ($1000.00) per week, the amount which second party is required to pay to first party during the week or weeks when such income, etc. falls below $1000.00, is to be reduced to one-fourth of the amount so actually received by second party from the said source."

This provision explicitly imposes an obligation determined by the amount actually paid to defendant each week. It refers to a decrease in "the weekly amount *received*" as the basis for reducing defendant's obligation, and specifies that reduced payments shall be "one fourth of the amount *actually received.*" Moreover, the contract provides that payments be reduced in the "week" or "weeks" in which defendant's income falls below $1,000. It could not thus take account of the possibility of a reduction in defendant's income in a single week if it envisaged payments in terms of defendant's average receipts over a longer period.

[2] Since the language of the contract, standing alone, imposes an obligation based on defendant's actual weekly receipts, defendant's affidavit that this language accurately expresses the intention of the parties contains facts sufficient to entitle him to judgment. These facts are set forth with sufficient particularity (Code Civ.Proc. sec. 437c), for defendant stated not only that the writing was consistent with the understanding of the parties, but that the understanding was "that when I received, for any week, the sum of $1000 or more, I paid the plaintiff $250 for such week from such receipts; when I received less than $1000 I paid her 25% of the sum received. * * *" Moreover, defendant set forth another part of the contract which stated that the parties had examined and discussed all of the provisions of the contract with the aid of counsel and fully understood their rights and liabilities under it. In compliance with the code, these facts were set forth as of defendant's knowledge and are matters to which he could testify. Code Civ.Proc. sec. 437c.

[3] It would nevertheless be the trial court's duty to deny the motion for summary judgment if the affidavit in opposition thereto established a triable issue of fact. Walsh v. Walsh, 18 Cal.2d 439, 116 P.2d 62. An affidavit, however, does not raise such an issue unless it sets forth "facts showing that the party has a good and substantial defense to the plaintiff's action * * * or that a good cause of action exists upon the merits." Code Civ. Proc. sec. 437c. Plaintiff contends that her affidavit, as well as a deposition taken of her testimony, contains evidence of the circumstances surrounding the execution of the contract that indicates it was intended that defendant's obligation was to be determined by his average income.

[4, 5] Plaintiff's affidavit sets forth that motion picture actors are paid high salaries in work weeks and low salaries in suspension weeks, that in the motion picture industry such salaries are usually described in terms of the work week level, and that the work week salary is regarded as "partly including the suspension week period." Thus, it would be said that a person who received $1,500 in work weeks and $100 in suspension weeks had a salary of $1,500 a week. In describing the negotiations between plaintiff and defendant, plaintiff's affidavit states that it was the understanding of the parties that defendant was to pay plaintiff $250 a week unless his income fell below $1,000 a week, and that no reference was made to suspension weeks. This evidence does not aid plaintiff. The absence of any reference to suspension weeks in no way suggests that they were to be regarded as work weeks. Whatever the customary view of salaries in the industry, an actor would hardly regard his receipts as $1,500 in a week when he was only paid $100. There is no indication that the parties understood that in suspension weeks "the weekly amount received by second party from any source whatever, either as income, salary, royalty, commission, bonuses, and/or earnings" meant the salary received in work weeks. Nor is there anything to suggest that the "weekly amount *received*" by defendant was to be computed in terms of his average income over a given period. In fact no period is specified for the computation of such an average. Only at the end of such a period could an average be computed, yet defendant is required to make payments each week. In the absence of any agreement as to the basis for computing the amount to be paid each week there would be no way of determining the extent of defendant's obligation if it were regarded in terms of an average income, and the contract would be void for uncertainty. Talmadge v. Arrowhead R. Co., 101 Cal. 367, 35 P. 1000; Wineburgh v. Gay, 27 Cal.App. 603, 150 P. 1003; Sarina v. Pedrotti, 103 Cal.App. 203, 284 P. 472. Since plaintiff's affidavit therefore does not contain facts establishing that she had a cause of action, it is not sufficient to raise an issue of fact, and summary judgment was correctly entered. See Bank of America v. Oil Well Supply Co., 12 Cal. App.2d 265, 55 P.2d 885; Security-First National Bank of L. A. v. Cryer, 39 Cal. App.2d 757, 104 P.2d 66.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and SCHAUER, JJ., concurred.

23 Cal.2d 237

KRUZIE et al. v. SANDERS et al.

L. A. 18357.

Supreme Court of California.

Dec. 2, 1943.

Rehearing Denied Dec. 29, 1943.

1. Automobiles ⚷245(24)

In action for injuries to occupant of automobile which skidded off highway and struck a tree, evidence of negligence of driver in driving at excessive speed on slippery road was sufficient to take case to jury.

2. Automobiles ⚷242(1)

Where occupant suing driver of automobile for injuries received in accident claimed only that defendant was guilty of ordinary negligence, she was required to establish that she did not accept the ride as guest without giving compensation therefor. Vehicle Code, § 403, St.1935, p. 154.

3. Automobiles ⚷181(2)

The designations "passenger" and "guest'" have been adopted for the purpose of distinguishing a person who has given compensation from one carried gratuitously within meaning of statute relating to recovery of damages by person accepting ride as a guest without giving compensation therefor. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest" and "Passenger".

4. Automobiles ⚷181(2)

Benefit to driver other than cash or its equivalent may be "compensation" within statute relating to recovery of damages by person who as a guest accepts ride in vehicle upon the highway without giving compensation therefor. Vehicle Code, § 403, St.1935, p. 154.

See Words and Phrases, Permanent Edition, for all other definitions of "Compensation".

5. Automobiles ⚷244(20)

Evidence that principal purpose of automobile trip, including the furnishing of transportation to plaintiff, was not social but to facilitate defendant's Christmas shopping, did not establish that plaintiff was riding in the automobile without giving "compensation" within the automobile guest statute so as to be barred from recovery from the driver thereof, where plaintiff claimed that the driver was guilty only of ordinary negligence. Vehicle Code, § 403, St.1935, p. 154.

6. Automobiles ⚷181(2)

"Compensation" is given, within the automobile guest statute, if plaintiff accepts a ride in an automobile at behest of the driver to assist the latter in arriving at his destination or fulfilling the object of the journey, or where special benefit to the driver is the motivating influence for furnishing the transportation. Vehicle Code § 403, St.1935, p. 154.

7. Automobiles ⚷181(2)

Although statute defines a "guest" as a person who accepts a ride without giving compensation for such ride, it is not necessary, in order to avoid the prohibition of statute, for plaintiff to establish that compensation received by the driver was given for such ride in sense that plaintiff obtained or purchased transportation for some independent purpose of her own. Vehicle Code, § 403, St.1935, p. 154.

8. Automobiles ⚷181(1)

The guest statute must be interpreted in accordance with intention of the Legislature. Vehicle Code, § 403, St.1935, p. 154.

9. Automobiles ⚷181(1)

Primary purpose underlying guest statute is to prevent recovery for ordinary negligence by guest in an automobile who has accepted the hospitality of the owner or driver. Vehicle Code, § 403, St.1935, p. 154.

10. Automobiles ⚷181(2)

Guest statute was not designed to bar recovery where driver rather than person transported benefited from the trip, nor intended to prevent recovery for negligence of the driver who requested a favor of occupant and furnished a ride merely as a means of obtaining that favor. Vehicle Code, § 403, St.1935, p. 154.

In Bank.

Appeal from Superior Court, Fresno County; H. S. Shaffer, Judge.

Action by Margaret Kruzie and another against Mabel Sanders and another for damages for personal injuries sustained by occupant of an automobile. Judgment of nonsuit, and plaintiffs appeal.

Reversed.

Prior opinion, App., 135 P.2d 710.

Thomas F. Lopez, of Fresno, for appellant.

Chester O. Hansen and John Said, both of Fresno, and Hoge, Pelton & Gunther and A. Dal Thompson, all of San Francisco, for respondent.

GIBSON, Chief Justice.

This is an appeal from a judgment after nonsuit in an action for damages for personal injuries. Plaintiffs are husband and wife, as are defendants. At the time of the accident Margaret Kruzie was riding in an automobile owned by Frank Sanders and driven with his consent by his wife, Mabel Sanders. Two questions are presented on this appeal: (1) Did plaintiff, Margaret Kruzie, accept a ride in the automobile without giving compensation therefor? (2) Was the evidence sufficient to establish the negligence of defendant, Mabel Sanders?

In stating the facts we shall, in accordance with the settled rule in cases of nonsuit, present the evidence most favorable to plaintiffs. The parties had been acquainted for some time, defendants occasionally taking their meals at a cafe operated by plaintiffs in Coalinga. In December, 1940, Mrs. Kruzie (hereafter called plaintiff) was asked by Mrs. Sanders (hereafter called defendant) to go with her to Fresno to assist her with some Christmas shopping. Defendant told plaintiff she wanted her advice in the selection of a ring as a present for Mr. Sanders, and her help in choosing presents for some girls who at one time worked at a cafe formerly owned by Mr. Kruzie. Plaintiff had no special knowledge of the jewelry business but she had good taste and she knew "the sizes and different things" appropriate as presents for the girls. Plaintiff told defendant she could not go, as there was no one to take her place at the cafe. For nearly a week defendant continued to urge plaintiff to accompany her, and finally she consented to go along. Plaintiff had already done her Christmas shopping and she was making the trip solely for the purpose of assisting defendant in the selection of presents and carrying packages. Defendant called for plaintiff at the cafe and they started for Fresno, sixty miles away. The accident occurred on Kearney Boulevard, the main traveled portion of which had an oiled surface and a very high crown. The boulevard is lined on both sides with eucalyptus trees, and on the day of the accident the roadway was wet and slick, its slippery condition being caused in part by sap from the trees. Defendant was driving with a robe wrapped around her legs, and shortly before the accident the car was traveling between 55 and 60 miles per hour. The testimony of plaintiff as to the speed of the car was corroborated by a disinterested witness who, driving in the same direction as defendant, was passed by her car a few minutes before the accident occurred. Plaintiff was frightened and cautioned defendant against driving so fast, and warned her that she had heard that oil from the trees made the roadway slippery. Defendant answered, "Don't worry, Margery, I can handle this car perfectly." Shortly thereafter the car skidded off the road and struck a tree causing serious injuries to plaintiff. A traffic officer who was at the scene of the accident immediately after it happened, testified that "any person who would drive on that [road] over 30 miles an hour would be endangering their lives."

[1] The evidence of negligence was sufficient to take the case to the jury, and the judgment of dismissal cannot be sustained upon the ground of failure to prove lack of due care. The contention of defendants to the contrary is so obviously without merit that it requires no further discussion.

[2-4] Since plaintiff claims that defendant was guilty only of ordinary negligence, she must establish that she did not accept the ride as a guest without giving compensation therefor, within the meaning of section 403 of the Vehicle Code, St.1935, p. 154, which provides: "No person who as a guest accepts a ride in any vehicle upon a highway without giving compensation for such ride, nor any other person, has any right of action for civil damages against the driver of such vehicle or against any other person legally liable for the conduct of such driver on account of personal injury to or the death of such guest during such ride, unless the plaintiff in any such action establishes that such injury or death proximately resulted from the intoxication or wilful misconduct of said driver." The designations "passenger" and "guest" have been adopted for the purpose of distinguishing a person who has given compensation within the meaning of the statute from one carried gratuitously. Cf. Humphreys v. San Francisco Area Council, 22 Cal.2d 436, 441, 139 P.2d 941; McCann v. Hoffman, 9 Cal.2d 279, 282, 70 P.2d 909; Whitechat v. Guyette, 19 Cal.2d

428, 430, 122 P.2d 47. It is settled that benefits to the driver other than cash or its equivalent may be "compensation." Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53; see McCann v. Hoffman, supra, 9 Cal.2d at page 283, 70 P.2d 909; Humphreys v. San Francisco Area Council, supra, 22 Cal.2d at page 452, 139 P.2d 941. In the Druzanich case the sole benefit received by the driver was the promise of the passenger to share in the driving. In Haney v. Takakura, 2 Cal.App.2d 1, 37 P.2d 170, 38 P.2d 160, cited with approval in the Druzanich case, compensation was found where the defendant driver asked the plaintiff to accompany him into town to assist in selling oranges. In the present case the evidence that plaintiff took the trip at defendant's request in order to aid defendant with her Christmas shopping clearly shows a substantial benefit to defendant within the Druzanich and Haney decisions.

[5, 6] Defendant contends that the purpose of the trip was primarily social and that the services to have been rendered by plaintiff were incidental to the relationship of host and guest. She cites McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909, which held that when the purpose of an automobile trip is social or for the joint pleasure of the participants, the exchange of social amenities such as sharing the cost of gasoline and oil is merely incidental and does not constitute compensation. The evidence here, however, contrary to defendant's contention, is sufficient to support a finding that the principal purpose of the trip, including the furnishing of transportation to plaintiff, was not social but was to facilitate defendant's Christmas shopping. As said heretofore, plaintiff had already done her own shopping and went on the trip, leaving her own work, at defendant's repeated urging and solely for the purpose of assisting defendant. Furthermore, as stated in the McCann case, compensation is given if the plaintiff accepts a ride "at the behest of the driver to assist the latter in arriving at his destination or fulfilling the object of the journey" or where a special benefit to defendant is "the motivating influence for furnishing the transportation." 9 Cal.2d at pages 283, 286, 70 P.2d at page 912.

[7-10] Although section 403 of the Vehicle Code defines a guest as a person who accepts a ride "without giving compensation for such ride," it is not necessary, in order to avoid the prohibition of the statute, for plaintiff to establish that the compensation received by the driver was given "for such ride" in the sense that plaintiff obtained or purchased transportation for some independent purpose of her own. Where the trip was not primarily for a social purpose, it is sufficient to show that defendant was to derive a substantial benefit from the transportation of plaintiff, and the fact that plaintiff received no benefit therefrom is immaterial. Guest statutes must be interpreted in accordance with the intention of the Legislature. A primary policy underlying these statutes is to prevent recovery for ordinary negligence by a guest in an automobile who has accepted the hospitality of the owner or driver. See Crawford v. Foster, 110 Cal.App. 81, 87, 293 P. 841; Rocha v. Hulen, 6 Cal.App.2d 245, 251, 44 P.2d 478; Carey v. City of Oakland, 44 Cal.App.2d 503, 507, 508, 112 P.2d 714; Albrecht v. Safeway Stores, 1938, 159 Or. 331, 80 P.2d 62, 65; 26 Cal.L.Rev. (1938), 251, 252; 29 Corn.L.Q. (1943) 87, 90, 91. The statute was not designed to bar recovery where, as here, the driver, rather than the person transported, benefited from the trip. It was not intended to prevent recovery for the negligence of a driver, such as the defendant herein, who requested a favor of plaintiff and furnished the ride merely as a means of obtaining that favor. Cf. Haney v. Takakura, supra, 2 Cal.App.2d 1, 37 P.2d 170, 38 P.2d 160; Carey v. City of Oakland, 44 Cal.App.2d 503, 112 P.2d 714. Many recent decisions in other jurisdictions, construing statutes similar to section 403, have held that a person who accepts a ride solely to perform a gratuitous service for the driver is a passenger giving compensation and not a guest. Goldberg v. Cook, 206 Minn. 450, 289 N.W. 512; Cardinal v. Reinecke, 280 Mich. 15, 273 N.W. 330, 274 N.W. 379; Forsling v. Mickelson, 66 S.D. 366, 283 N.W. 169; Mitchell v. Heaton, 231 Iowa 269, 1 N.W. 2d 284, 138 A.L.R. 832; Scholz v. Leuer, 7 Wash.2d 76, 109 P.2d 294; Albrecht v. Safeway Stores, 159 Or. 331, 80 P.2d 62; Dorn v. Village of North Olmsted, 133 Ohio St. 375, 14 N.E.2d 11; George v. Stanfield, D.C., 33 F.Supp. 486; Van Auker v. Steckley's Hybrid Seed Corn Co., Neb., 8 N.W.2d 451; cf. Holtsinger v. Scarbrough, 69 Ga. App. 117, 24 S.E.2d 869. In the Goldberg case, supra, defendant's mother, without expectation of reward, went on a trip to help take care of defendant's children. The court in affirming a judgment for plaintiff

said (289 N.W. at page 515): "The controlling consideration here is not that plaintiff was not to be compensated for her services or that she was defendant's mother, but that her transportation was a benefit to defendant. * * * [The statute] should be construed as providing that a person transported gratuitously for the benefit of the owner or operator of the automobile is not a guest."

Defendant relies upon Christ v. O'Neil, 28 Cal.App.2d 651, 83 P.2d 96, a case in which plaintiff went on the trip for the purpose of showing defendant where she could buy some baby ducks. A judgment for the plaintiff was reversed on the theory that the case was within the rule announced in McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909, that there was no compensation where "nothing more than the exchange of social amenities" and "reciprocal hospitalities" was involved. See 28 Cal.App.2d at page 653, 83 P.2d 97. Although this is a correct statement of the rule, it is questionable whether the court properly applied it to the facts of the Christ case in holding, as a matter of law, that no compensation was given. Christ v. O'Neil, supra, is therefore disapproved insofar as it may be in conflict with our decision here.

The case should have been submitted to the jury and it was therefore error to grant a nonsuit.

Judgment reversed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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61 Cal.App.2d 701

CHANEY v. LOS ANGELES COUNTY PEACE OFFICERS' RETIREMENT BOARD et al.

Civ. 14057.

District Court of Appeal, Second District, Division 2, California.

Dec. 10, 1943.

1. Appeal and error 🔑1222

A motion by appellants in the Court of Appeal, more than 60 days after issuance of its remittitur, for an order recalling the remittitur and striking therefrom a provision allowing respondent costs on appeal, would be denied, in the absence of inadvertence, fraud, or mistake, and of a petition for rehearing or modification of the judgment.

2. Appeal and error 🔑1222

In the absence of inadvertence, fraud, or mistake, a party dissatisfied with an appellate court's judgment must petition for rehearing or modification of the judgment within the time allowed and before the remittitur has issued.

3. Appeal and error 🔑1222

After a remittitur has regularly issued, an appellate court does not have power to reconsider, alter, or modify its decision in the absence of inadvertence, fraud, or mistake.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceeding by Gladys Beatrice Chaney against the Los Angeles County Peace Officers' Retirement Board, also known as Board of Retirement Commissioners of Los Angeles, and another, for a writ of mandate directing payment of a pension to petitioner. From a judgment granting the writ, defendants appealed, and the judgment was affirmed, 138 P.2d 735. Motion by defendants for an order recalling the remittitur and striking therefrom a provision allowing petitioner costs on appeal.

Motion denied.

J. H. O'Connor, Beach Vasey, and Edward H. Gaylord, all of Los Angeles, for appellants.

Francis A. Cochran, of Los Angeles, for respondent.

McCOMB, Justice.

This is a motion by appellants for an order recalling the remittitur issued herein, and for an order striking from the remittitur the provision allowing respondent (petitioner in the lower court) costs on appeal. The basis of the motion is (1) that the remittitur was inadvertently issued, and (2) that respondent is not entitled to costs on appeal.

The undisputed facts are:

Respondent obtained from the trial court a writ of mandate directing payment to her of a pension of Seventy-five dollars per month as the widow of Albert G. Chaney. From this judgment appellants appealed to this court and after a hearing upon the merits we affirmed the judgment[*] of the lower court on June 26, 1943. Chaney v. L. A. County Peace Officers' Ret. Bd., Cal. App., 138 P.2d 735. An application for a rehearing was not filed by respondent with us. However, on June 28, 1943, appellants filed a petition in the Supreme Court for a hearing, which petition was denied August 23, 1943. On August 26, 1943, remittitur issued from this court to the Superior Court. The present motion was filed November 3, 1943.

This is the sole question necessary for us to determine.

[1-3] *Will this court make an order recalling its remittitur for the purpose of correcting an alleged error in the decision, in the absence of a showing that the same occurred through (1) inadvertence, (2) fraud, or (3) mistake, when the moving party has failed to call the alleged error upon which the motion is based to our attention by way of a petition for rehearing or modification of the judgment?*

This question must be answered in the negative. The law is established that if a party is dissatisfied with the judgment as rendered in an appellate court, his remedy in the absence of inadvertence, fraud or mistake is to petition for a rehearing, or for a modification of the judgment, within the time allowed by law and before the remittitur has issued. (Cf. Heroux v. Atchison, Topeka & Santa Fe Ry. Co., 35 Cal. App.2d 128, 129, 94 P.2d 820.) After a remittitur has regularly issued, an appellate court does not have power to reconsider, alter or modify its decision in the absence of (1) inadvertence, (2) fraud, or (3) mistake. An application for recall of the remittitur to consider an alleged error in the decision comes too late when made after the remittitur has regularly issued. (Isenberg v. Sherman, 1932, 214 Cal. 722, 725, 7 P.2d 1006; Durkee v. Garvey, 1890, 84 Cal. 590, 591, 24 P. 929; Chapman v. St. Stephens Episcopal Church, 1933, 84 A.L.R. 597.)

In the present case, there is an absence of any showing of (1) inadvertence, (2) fraud, or (3) mistake. Therefore, under the above rules, since appellants waited more than sixty days after issuance of the remittitur before seeking the relief they now desire to obtain through the present motion, the application comes too late and must be denied.

Estate of Johnson, 200 Cal. 307, 308, 252 P. 1052, cited by appellants is factually distinguishable from the present case and therefore is inapplicable. In Estate of Johnson the *judgment* did not, as in the present case, award costs to the respondents. The provision permitting respondents to recover costs was inserted in the *remittitur* by the clerk. Therefore, the proper procedure for determining the correctness of the provision for costs in the remittitur was by filing a motion to strike such provision from the remittitur.

The motion is denied.

MOORE, P. J., and W. J. WOOD, J., concur,

61 Cal.App.2d 815

JURI v. JURI.

Civ. 6924.

District Court of Appeal, Third District, California.

Dec. 18, 1943.

1. Divorce ⚷298(6)

The provision of statute pertaining to award of custody of children in divorce cases that, other things being equal, a child of tender years should be given to the mother, is not mandatory and is subject to the basic principle that welfare and best interests of child is of paramount importance. Civ.Code, § 138(1, 2).

2. Divorce ⚷303(3)

Where mother based her petition for change of custody award in part upon alleged fraudulent misrepresentations of father prior to the filing of his complaint in order to procure interlocutory decree without contest, court properly allowed evidence upon matters as they existed at time of uncontested hearing as well as matters occurring thereafter. Civ.Code, § 138(1, 2).

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[*] The opinion of this court in Chaney v. L. A. County, etc., Retirement Board, 59 Cal.App.2d 413, 138 P.2d 735, did not award respondent costs. However, pursuant to the provisions of rule 26-b, Rules on Appeal, the judgment of the court did award costs to respondent. The judgment read in part as follows:

"It is ordered, adjudged and decreed by the Court that the Decree of the Superior Court in and for the County of Los Angeles in the above entitled cause be, and the same hereby is affirmed. Respondent to recover costs on appeal."

3. Divorce ⚷303(3)

Evidence indicating that mother was a fit person to have custody of children, and that award of custody to father contained in interlocutory decree of divorce was procured by fraudulent representations by father to mother by which mother was induced not to contest divorce action, authorized modification of custody order. Civ. Code, § 138(1, 2).

4. Divorce ⚷298(1)

The children involved in a custody proceeding should not be made the pawns of personal desires, either on the part of the contestants or the court, no matter how sincere such desires may be. Civ.Code, § 138(1, 2).

5. Divorce ⚷298(6)

Where trial court found that both father and mother were proper persons to have custody of children, in view of tender years of children and statute setting forth considerations for guidance of court in awarding custody, trial court, in exercise of its discretion, should have awarded custody to the mother. Civ.Code, § 138(1, 2).

6. Divorce ⚷296, 312

In statute providing that as between parents adversely claiming the custody of children, "other things being equal", if child is of tender years, it should be given to the mother, the quoted phrase leaves a large measure of discretion with trial court, the exercise of which will not be disturbed in absence of abuse. Civ.Code, § 138(2).

See Words and Phrases, Permanent Edition, for all other definitions of "Other Things Being Equal".

7. Divorce ⚷312

Where trial court, in exercise of its discretion, impliedly found that, although mother was a fit person to have custody of children of tender years, the best interests of children would be served by dividing their custody between parents, order dividing custody would not be disturbed on appeal. Civ.Code, § 138(1, 2).

◆

Appeal from Superior Court, Calaveras County; J. A. Smith, Judge.

Action by Ernest Juri against Mary Margaret Juri for divorce, wherein an interlocutory decree was entered for plaintiff, among other things, awarding plaintiff custody of the minor children of the parties. From an order modifying the interlocutory decree, defendant appeals and plaintiff cross-appeals.

Affirmed.

Virgil M. Airola, of San Andreas, and C. H. Hogan, of Stockton, for plaintiff-respondent-appellant.

Alfred R. Lowey, of Downieville, for defendant-appellant-respondent.

PEEK, Justice.

This is an appeal by both plaintiff and defendant from an order modifying the interlocutory decree of divorce previously granted to plaintiff.

Under the terms of the original decree the husband was awarded the complete custody of the two minor children of the parties. At the time of the hearing the boy was two years of age and the girl was three.

Four months later the mother moved the court for a modification of the decree, requesting that she be awarded the sole custody of both children. Her affidavit in support thereof alleged, in particular, that due to her illness and the representations of plaintiff that he would care for the children as they had agreed, that she could be with and visit the children at any time, and that as there was no need to seek legal advice, she did not contest the action. She further alleges that plaintiff failed to keep and so provide for the children but placed them under the complete supervision of his mother and sister, who were both unfit and improper persons to train, supervise, or care for the children; that plaintiff was not free to visit the children as agreed, and on occasions when she did visit them, the plaintiff's mother and sister, in the presence of the children, cursed defendant and degraded her and told her she was not wanted at their home.

At the hearing of defendant's petition the court observed that both parents were fit and proper persons to have the custody and control of the children, and made its order modifying the original decree so as to provide that the mother should have the children during the four summer months, and the father should have them during the remaining eight months of each year.

From such order both parties have appealed.

It is the contention of defendant that a mother in a divorce action has an absolute right to the custody of infants of tender years if she is a fit and proper person, while the plaintiff contends that the trial court abused its discretion by modifying the original decree in that it was not shown that there had been a change of circumstances occurring between the time of entry of the interlocutory decree and the hearing on the petition for modification thereof.

Defendant predicates her case upon the provisions of subsections (1) and (2) of section 138 of the Civil Code, which read in part as follows:

"In awarding the custody the court is to be guided by the following considerations:

"(1) By what appears to be for the best interests of the child in respect to its temporal and its mental and moral welfare * * *

"(2) As between parents adversely claiming the custody, neither parent is entitled to it as a matter of right; but other things being equal, if the child is of tender years, it should be given to the mother * * *."

In support of such contention she relies solely upon the case of Washburn v. Washburn, 49 Cal.App.2d 581, 122 P.2d 96, 100, where, in holding that it was error to modify the interlocutory decree of divorce so as to remove the custody of a nine year old girl and a fifteen year old boy from their mother to the father, the court stated: "* * * it is universally recognized, that the mother is the natural custodian of her young. This view proceeds on the well known fact that there is no satisfactory substitute for a mother's love. So true is this that in this state the code exacts that she shall have custody of her child, everything else being equal * * *. In the case of girls it is obvious that they are particularly in need of the sympathy, affection, consideration and tender care which only a mother can give—and so normally they should be in her custody."

[1] However, such decision does not hold that the provisions contained in said subsection (2) of section 138 of the Civil Code are mandatory. On the contrary the court adhered to the basic principle stating that "in custody cases the underlying principle, paramount to all others, is the welfare and best interest of the child," with the added qualification that "each case must be solved upon its own facts."

The court therein further held that as there was not a sufficient showing of changed circumstances occurring subsequent to the original decree which were inimical to the child's welfare the original order giving sole custody to the mother should not have been disturbed.

[2] Here the record discloses that the mother bases her case not alone upon changed circumstances since the original order was made, but also upon the fraudulent misrepresentations of the father, prior to the filing of his complaint, in order to procure the interlocutory decree without contest on her part. Under such conditions the court properly allowed evidence not only in relation to matters occurring subsequent to the uncontested hearing but also upon matters as they existed at the time of the first hearing.

[3] To offset such showing on the part of the defendant, the plaintiff's testimony and that of his mother, sister and brother was almost solely in rebuttal thereto, and that the defendant was inexperienced in and ignorant of the care of children. The defendant's testimony directly refuted such contentions by showing her experience gained in the care of small children which was her sole means of support while attending Teachers' College, and since that time by her activity and experience as an elementary grade teacher, which testimony was corroborated by other witnesses. It cannot be said that defendant has not made a sufficient showing to warrant action by the trial court. The only question is: Was it a proper order under the circumstances?

From the record it is immediately apparent that the primary source of difficulty between the plaintiff and defendant was the strained relationship between the defendant and the plaintiff's family, with whom they lived during their entire married life. Unfortunately for both parties the plaintiff failed to establish a separate home for his family. Living as they did they were under the complete dominance of plaintiff's mother. By virtue of the interlocutory decree and the modification therefor she has been, and for all practical purposes is, the person having the sole care and custody of the children, a condition which can be only a continuing source of aggravation as regards the children and their parents, and a condition not at all conducive to the reconciliation which was suggested by the trial court.

[4] The trial court, by dividing the custody of the children between the parents in accordance with its expressed views that both "plaintiff and defendant were proper persons to have the custody of the children" and that the defendant should not be denied the association and custody of the children for a "portion of the year", undoubtedly was making a conscientious attempt to satisfy all parties. However, the children involved in a custody proceeding should not be made the pawns of the personal desires, either on the part of the contestants or the court, no matter how sincere such desires may be.

In the case of Stever v. Stever, 6 Cal.2d 166, 56 P.2d 1229, the trial court, by an order modifying a previous decree, changed the custody of a minor from its mother to the parents of the father. No finding as to the fitness of the parents was made. Upon appeal the Supreme Court reversed the trial court and held that before the court can deprive the mother of her right to the minor's custody and give her into the charge of strangers there must be a finding that the mother is an unfit person to have the custody of her child, upon the principle that a presumption attaches to all custody proceedings that the best interests of the child will be served by lodging its custody with its parents. Newby v. Newby, 55 Cal.App. 114, 202 P. 891. See also Ex parte White, 54 Cal.App.2d 637, 639, 129 P.2d 706.

It would not be difficult to argue, by analogy from the principle expressed in those cases, that as such a presumption attaches as between parents and strangers to the child then by the plain intent and language of said subsection (2) of said section 138, a like presumption attaches in questions of custody as between parents, and, "other things being equal," that before an order could be made granting custody in derogation of such language there likewise should be a specific finding that either the mother or father, as the case might be, was not a fit person to have custody, or if a proper person, that the welfare of the child would best be served by awarding said custody to the other.

[5] Under the facts and circumstances of the present case and the statement by the trial court that both parties were "proper persons to have the custody of the children," which was in effect a ruling that everything was equal as between the parents, we think that, in view of the provisions of section 138 of the Civil Code, and the tender years of the children, the trial court, in the exercise of its discretion, should have awarded the custody of said children to the mother.

[6, 7] However, this court in the case of Phillips v. Phillips, 48 Cal.App.2d 404, 119 P.2d 736, held that the qualifying clause of subsection (2) of said section 138, "other things being equal," leaves a large measure of discretion with the trial court. Here the trial court, in the exercise of its discretion, has impliedly found that although the mother is a fit and proper person, the best interests of the children will be served by dividing their custody between their parents.

As we are unable to say that said court abused its discretion, we are constrained to sustain the order from which both parents have appealed.

The order is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

61 Cal.App.2d 778

FEAREY v. GOUGH.

Civ. 14086.

District Court of Appeal, Second District,
Division 3, California.
Dec. 15, 1943.

1. Courts 🔑169(1)

An action to recover $1,050, constituting half of proceeds of life insurance policy paid to defendant as named beneficiary on death of insured, who was plaintiff's husband, was on contract implied in law for money had and received, and hence within pecuniary jurisdiction of municipal court not superior court. Code Civ.Proc. § 89.

2. Courts ⚷472(6)

An action for money had and received, though founded on equitable principles, is action at law, of which municipal court alone has jurisdiction, where amount sought does not exceed $2,000. Code Civ.Proc. § 89.

3. Costs ⚷256(2)

Where question of jurisdiction of action for money had and received was not touched on in briefs on appeal from superior court judgment for plaintiff, and since reporter's transcript was not necessary to presentation of such question, appellant, on reversal of judgment with direction to transfer action to municipal court as only court having pecuniary jurisdiction of case, was entitled only to filing fee and expenditures necessary to obtain clerk's transcript as his costs on appeal. Code Civ.Proc. § 89.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Myrtle Fearey against P. G. Gough for half of the proceeds of a life insurance policy paid to defendant. Judgment for plaintiff, and defendant appeals.

Reversed with directions.

Dudley Robinson, of Los Angeles, for appellant.

Hickey, Smallberg & Rosensweig, of Los Angeles, by Alfred J. Smallberg and Oliver M. Hickey, both of Los Angeles, for respondent.

BISHOP, Justice pro tem.

[1, 2] We have reached the conclusion that the trial court had no jurisdiction in this case, in which it rendered a judgment that the plaintiff recover from the defendant all that she sought, that is, $1,050.

Plaintiff brought this action to obtain from the defendant one-half of the proceeds of an insurance policy which had been paid to the defendant, named as the beneficiary of the policy, upon the death of the insured, plaintiff's husband. The theory of plaintiff's case was that the proceeds of the policy were community funds; that the naming of the defendant as beneficiary by plaintiff's husband was without consideration and so amounted to a gift of community property, good, in the absence of plaintiff's consent, only to the extent of one-half of the $2,100 involved. Plaintiff's position, then, was that of the $2,100 which the defendant had received, one-half, or $1,050, was hers, and she sought judgment for this amount. She might well have cited Martinez v. Hudson, 1936, 14 Cal.App.2d 42, 57 P.2d 970, in support of her judgment, for it is a case where a judgment against a beneficiary was affirmed in a situation similar in its theory to that here presented.

Plaintiff's cause of action was one on the contract which is implied in law, not in fact, where one has received money which belongs, and so should be paid, to another. Plaintiff labelled her pleading "Complaint for Money Held in Trust" and in it she referred to "the funds now held in trust by said defendant." But neither the label nor the reference changed the character of the action; it is the familiar one known as an action for money had and received. An action for money had and received, although founded on equitable principles, is an action at law (Jensen v. Harry H. Culver & Co., 1932, 127 Cal.App. Supp. 783, 15 P.2d 907; Philpott v. Superior Court, 1934, 1 Cal.2d 512, 36 P.2d 635, 95 A.L.R. 990) of which the municipal court alone has jurisdiction where the amount sought does not exceed $2,000. Code Civ.Proc. sec. 89; Burnett v. Hoover Ball & Bearing Co., 1942, 51 Cal.App.2d 613, 614, 125 P.2d 572.

[3] The judgment is reversed with directions to the trial court to transfer the action to a municipal court. Inasmuch as the question of jurisdiction was not touched upon in the briefs and the reporter's transcript was not necessary to its presentation, the appellant shall have as his costs on appeal only his filing fee and such expenditures as were necessary to obtain the clerk's transcript.

DESMOND, P.J., and PARKER WOOD, J., concur.

IRVINE v. RECLAMATION DIST. NO. 108 et al.

BEKINS et al. v. RECLAMATION DIST. No. 1500 et al.*

Civ. 6985, 6979.

District Court of Appeal, Third District, California.

Dec. 11, 1943.

Rehearing Denied Jan. 10, 1944.

Hearing Granted Feb. 7, 1944.

1. Waters and water courses ⚷222, 230(6)

Reclamation districts created by statute are agencies of the state, and as such, they are not obligated to pay interest after maturity on their bonds and coupons in absence of statute imposing that liability. Pol.Code, § 3480; Civ.Code, § 3287.

2. Waters and water courses ⚷222, 224, 228½, 230, 230(8)

Reclamation and irrigation districts, organized pursuant to law, are sovereign agencies of the state, and limitations with respect to incurring and payment of obligations applicable to state are applicable to such agencies.

3. Municipal corporations ⚷954
States ⚷167

Neither the state, its legally constituted agencies, nor its political subdivisions is liable for interest on their obligations after maturity or otherwise in absence of statutory provisions or lawful contracts of their agents acting within scope of their authority.

4. Municipal corporations ⚷954
States ⚷167

The statute providing that one entitled to recover damages may recover interest thereon creates no liability against the state or its agencies for payment of interest after maturity on either bonds or their interest-bearing coupons. Civ.Code, § 3287.

5. Waters and water courses ⚷222

Under the statutes pertaining to the issuing and payment of reclamation bonds recovery of interest by holders of reclamation bonds and coupons after maturity is not authorized. Pol.Code, §§ 3480, 3480b.

◆

Appeals from Superior Court, Colusa and Sutter Counties; J. O. Moncur, Judge.

Action by James Irvine against Reclamation District No. 108 and others to recover interest on unpaid principal and interest represented by Reclamation District bonds after their maturity, and separate action for like relief by Reed J. Bekins and Milo W. Bekins, as trustees appointed by the will of Martin Bekins, deceased, against Reclamation District No. 1500 and others. From judgments rendered against the respective plaintiffs after demurrers to the complaints had been sustained without leave to amend, plaintiffs separately appeal. The appeals were consolidated for decision.

Affirmed.

W. Coburn Cook, of Turlock, and A. A. Tiscornia, of San Francisco, for appellants.

Rutledge & Rutledge, of Colusa, Huston, Huston & Huston, of Woodland, Downey, Brand & Seymour, of Sacramento, and Loyd E. Hewitt, of Yuba City, for respondents.

THOMPSON, Justice.

The above entitled actions were consolidated for the purpose of presenting the appeals. Separate appeals were perfected from the judgments which were rendered against the respective plaintiffs after demurrers to the complaints had been sustained without leave to amend the pleadings.

In the Irvine case, the amended complaint alleges that Reclamation District No. 108 was duly organized pursuant to law; that on January 1, 1925, it issued bonds in denominations of $1,000 each, numbered consecutively from 1 to 3142 inclusive, to each of which bonds there was attached coupons bearing interest at the rate of 6% per annum; that plaintiff purchased and is now the owner of thirty-one of said bonds, all of which matured on or before January 1, 1936; that plaintiff's bonds "matured and were unpaid and there were no funds available for payment thereof"; that the plaintiff owns a number of said 6% interest bearing coupons of the denomination of $30 each, attached to sixteen of said consecutively numbered bonds, aggregating the sum of $480, all of which matured prior to January 1, 1936, and each of which remains unpaid; that "said bonds and coupons bear interest at the rate of 7% per annum * * * from the several dates of their maturity until payment of the principal thereof"; that said bonds and interest coupons were presented to the treasurer for payment on October 6, 1938, duly registered and endorsed "Not paid for want of funds." The amended complaint asks for judgment for 7% interest on the principal and interest represented by said bonds and coupons after their maturity.

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* Subsequent opinion 150 P.2d 428.

The Bekins case alleges that Reclamation District No. 1500 was duly organized pursuant to law, and issued *refunding bonds* January 1, 1930, to each of which bonds there was attached coupons bearing 6% interest payable semi-annually; that plaintiffs under the will of Martin Bekins, deceased, were the owners and entitled to payment of five of said refunding bonds of the face value of $1,000 each, together with the interest bearing coupons attached thereto which were subsequently paid, but claim additional interest at the rate of 7% per annum on the aggregate amount of said bonds and coupons from and after the maturity thereof until they were fully paid. It is further alleged that in a mandamus proceeding which was previously filed by plaintiffs in the Superior Court of Sutter County, judgment was rendered in plaintiffs' favor, directing the payment of said bonds and coupons only, but reserving the question of liability of the district for payment of interest after maturity on said bonds and coupons, since that issue was then pending in another appealed action. Bekins v. Heiken, 41 Cal.App.2d 846, 107 P.2d 941.

The complaint in each of the present cases asks for judgment for 7% interest, after maturity, on the amounts specified in the several bonds and coupons owned by the plaintiffs. The recovery of that interest after maturity of the bonds and coupons is the only issue on these appeals.

The respective parties to these consolidated cases concede that the only question to be determined on these appeals is whether or not a reclamation district is obligated to pay interest after maturity on its bonds and interest coupons.

[1] We are firmly convinced the reclamation districts which are involved on these appeals are agencies of the State and that, as such, they are not obligated to pay interest after maturity on their bonds and coupons, since the statute does not authorize that liability. Neither the language of the statute authorizing the issuing of the bonds, nor the language of the bonds or coupons provides for interest after maturity. Section 3480 of the Political Code, which provides the authority for the issuance of said bonds, appears to refute the assertion of the appellants that interest accrues after maturity. The statute contains no machinery authorizing the creation of a fund from which such interest may be paid.

[2] It has been frequently held, and the rule is well established, that reclamation and irrigation districts, organized pursuant to law, are sovereign agencies of the state. The same limitations with respect to the incurring and the payment of obligations apply to both the state and its agencies or subdivisions. People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 382, 103 P. 207; Peterson v. Board of Supervisors of Solano County, 65 Cal.App. 670, 674, 225 P. 28; Nissen v. Cordua Irrigation District, 204 Cal. 542, 269 P. 171.

[3, 4] Neither the state, its legally constituted agencies, nor its political subdivisions, is liable for interest on their obligations after maturity or otherwise, in the absence of statutory provisions or lawful contracts of their agents acting within the scope of their authority. Reclamation District No. 1500 v. Reclamation Board, 197 Cal. 482, 502, 241 P. 552; Engebretson v. City of San Diego, 185 Cal. 475, 479, 197 P. 651; McNutt v. Los Angeles, 187 Cal. 245, 259, 201 P. 592; Savings & Loan Society v. City and County of San Francisco, 131 Cal. 356, 363, 63 P. 665; Hopkins v. Contra Costa County, 106 Cal. 566, 573, 39 P. 933; Sawyer v. Colgan, 102 Cal. 283, 293, 36 P. 580, 583, 834; Molineux v. State of California, 109 Cal. 378, 380, 42 P. 34, 50 Am.St.Rep. 49; Bullard v. Riverside County Drainage Dist., 41 Cal.App.2d 900, 107 P.2d 929, 931. This limitation of liability is based on public policy. Interest allowable as damages for delay in payment of an obligation has no application to the state or its agencies. Section 3287 of the Civil Code creates no liability against the state or its agencies for payment of interest after maturity on either bonds or their interest bearing coupons. Hopkins v. Contra Costa County, supra. The Sawyer case, supra, holds that: "The state is not liable to pay interest on its debts, unless its consent to do so has been manifested by an act of its legislature, or some lawful contract of its executive officers."

In the Bullard case, supra, it was determined in a suit for declaratory relief, based on a similar statute, that the act did not contemplate the payment of interest on bonds after maturity, and that the statute was the measure of the responsibility of the district on its obligations. The court said in that regard: "It is rather clear from the provisions of the act that the legislature intended to provide the machinery for raising sufficient funds to pay the principal and interest on the bonds as they became due and did not contemplate that there would be any defaults in any of these payments so that no question should arise as to interest on any bond after maturity."

The Bullard opinion quoted with approval from the case of Meyer v. City & County of San Francisco, 150 Cal. 131, 88 P. 722, 10 L.R.A.,N.S., 110, stating that the facts of those cases were almost identical, and that the Meyer case was therefore controlling on that issue. For the same reasons, we are of the opinion the Meyer case is controlling of the issues of the present appeals.

[5] Since the reclamation districts which are involved on these appeals are agencies of the state, their liability for payment of interest on their bonds is limited by the provisions of the statute with relation thereto. Reading Section 3480 of the Political Code and the other sections applicable to the issuing and payment of reclamation bonds, we are convinced there is no legislative authority for the payment of interest on either the bonds or their attached coupons after the maturity thereof, and that such interest is therefore not due to these plaintiffs as owners and holders of bonds and coupons.

A critical examination of the statutes applicable to the issuance and payment of reclamation bonds, discloses the fact that (1) no legislative authority for payment of interest after maturity exists, (2) no legislative machinery is provided with which to meet that asserted obligation, and (3) the statutes clearly indicate that no such obligation was contemplated by the legislature.

Practically all of the statutory provisions applicable to the creation of obligations of reclamation districts on their bonds is embodied in Section 3480 of the Political Code. The legislative declaration of those obligations is found in the paragraph of that section which reads: "If a majority of the votes cast at such election are in favor of the issuance of bonds, the board of trustees of the district shall cause bonds in the amount stated in the order for the election to be executed and delivered, together with the assessment list, to the treasurer of said main county. Said bonds shall be of the denomination of not less than one hundred dollars nor more than one thousand dollars each; they shall be signed by the president of the board of trustees of the district and attested by the county auditor of said main county, and shall be numbered consecutively in the order of their maturity, *and shall bear interest at a rate not to exceed six per cent per annum, payable semiannually on the first day of January and the first day of July in each year at the office of said county treasurer upon the presentation of the proper coupons therefor. Coupons for each installment of interest shall be attached to said bonds * * *.*"

The only language contained in the statute which may possibly lend color to the appellants' contention that interest on the bonds, after maturity, was contemplated by the legislature is found in the proposed form of bonds appearing in the paragraph following the preceding quotation. The statute merely states: "Said bonds shall be *substantially* in the following form." The language upon which the appellants rely is the provision that: "Reclamation District No. ———, for value received hereby acknowledges itself indebted to the promisees to pay to the holder hereof * * *, the sum of $———, in gold coin of the United States of America, *with interest thereon in like gold coin from the date hereof until paid, at the rate of ——— per cent, per annum, payable * * * on the first day of January, and the first day of July in each year on presentation and surrender of the interest coupons hereto attached.*"

It will be observed, by reference to the preceding quoted paragraph, that "coupons for each installment of interest", for which the district may become liable "shall be attached to said bonds." The very language in the proposed form of bond, upon which the appellants rely, declares that the interest is payable only "on presentation and surrender, of the interest coupons hereto attached." No other method of collecting interest is provided for. The language of the statute refutes the assertion that the legislature intended to authorize the payment of interest after maturity of the bonds. We assume that the language relied upon by the appellants to the effect that the bonds will be satisfied "with interest thereon * * * from date hereof *until paid,*" means that interest will accrue "until paid" *in the manner* provided by the statute, towit, by presenting the coupons therefor attached to the bonds, and not otherwise. No other method of determining the amount of interest due, or the means of collection is provided. The modus operandi to secure funds for payment of the bonds and interest is limited to the amount due thereon to the time of maturity.

The limitation of liability for the payment of interest to the date of maturity appears to be further indicated by the paragraph of Section 3480, which provides that assessments may be paid either in cash or by means of the bonds "or their interest coupons * * * taken at their face value." That paragraph reads in part: "Said installment may be paid either in cash or in bonds of said district, or their interest coupons, * * * taken at their face value."

If the payment of interest after maturity were contemplated, we see no reason why the owners of bonds should not be entitled to credit on delinquent assessments for the full value of their bonds and accrued interest, both before and after maturity.

The provisions for issuing refunding bonds, found in Section 3480b of the Political Code, confirms our conclusion that interest after maturity was not contemplated by the legislature. The form of refunding bonds provides in part that: "Reclamation District No. ——— * * * is indebted to and promises to pay to the bearer hereof, for value received, the sum of ——— dollars ($———), * * *, with interest thereon at the rate of ——— per cent (———%) per annum from ———, 19——, *to and including the date of maturity of this bond.*"

The bonds which are involved on appeal from the judgment in the Bekins case are in fact refunding bonds.

There appears to be no good reason why the legislature should have specifically limited the liability for payment on refunding bonds to the maturity thereof if the original bonds which they were deemed to replace were not so limited.

The case of Kendall v. Porter, 120 Cal. 106, 45 P. 333, 52 P. 143, upon which the appellants in these cases rely in support of their claim for interest after maturity, is clearly distinguishable from these cases. Justices Beatty, McFarland and Van Fleet rendered able dissenting opinions in that case. The persuasive grounds upon which those dissenting opinions were rendered were substantially incorporated in the later case of Meyer v. City & County of San Francisco [150 Cal. 131, 88 P. 724, 10 L.R.A.,N.S., 110], supra. In the last mentioned case, which is similar to the present actions in every essential respect, the court said: "This statute not only does not expressly authorize a charge of interest on the bonds after their maturity, but its provisions fairly imply that such interest was not to be paid."

In the Meyer case a judgment which was rendered against the City and County of San Francisco for the payment of improvement bonds and interest thereon from a fund created by means of special taxes was reversed. The court said:

"The bonds were to be paid out of a special fund, to be raised * * * by means of a special tax upon the lands within a specified district. * * * The debt was due out of the funds to be raised in accordance with the provisions of the act, and not otherwise. It never became a general obligation of the city, to be enforced by a personal judgment against it. * * *

"We are of the opinion, however, that in giving judgment on the pleadings the court improperly allowed the interest which accrued on the bonds after their maturity. The act in question provided a scheme for a public improvement, the cost of which was to be paid by a special assessment upon the lands in the district specially benefited thereby. * * * The burden imposed cannot exceed that which the terms of the statute, either expressly or by fair implication, authorize. *This statute not only does not expressly authorize a charge of interest on the bonds after their maturity, but its provisions fairly imply that such interest was not to be paid.* * * *

"Coupons for the annual interest, consecutively numbered, were to be attached to each bond in such manner as to be easily removed. It was further provided that a tax should be levied annually upon the lands in the district to pay the interest as it matured, and that the money thus raised was 'to be paid out by said treasurer only in payment of the coupons attached to said bonds, as the same from time to time became due.' * * * There is no provision for the attaching of any coupons for interest accruing after maturity. * * *

There being no provision for the payment of any interest accruing after maturity, the act must be understood as intending that no such interest was to accrue."

The Meyer opinion distinguishes the case of Kendall v. Porter, upon which these appellants chiefly rely, by saying that the bonds in the Kendall action were to be paid out of "the general annual revenues of the city", rather than from a special fund created by statute for a specified limited purpose, which is "the measure of the bondholders' rights." In conclusion the court said: "There being no provision for the payment of any interest accruing after maturity, the act must be understood as intending that no such interest was to accrue."

Likewise in the later case of Engebretson v. City of San Diego, supra [185 Cal. 479, 197 P. 655], a judgment for plaintiff for an agreed contract price of street improvement work under the Vrooman Act, together with interest on account of delayed payment, was reversed. With respect to the limitation of liability of a city to pay interest, the Supreme Court, in accordance with the opinion in the Meyer case, and the dissenting opinions in the Kendall case, said: "In order to recover interest against a municipality there must be some statutory provision authorizing it. The rule is thus stated in Ruling Case Law (15 R.C.L. § 14, p. 17.) 'It is well settled, both on principle and authority, that a state cannot be held to the payment of interest on its debts unless bound by an act of the Legislature or by a lawful contract of its executive officers made within the scope of its duly constituted authority. The principle applies to bonds, claims, judgments and warrants. The theory upon which the rule is based is that, whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to government. It is presumed to be always ready to pay what it owes. The apparently favored position of the government [in this respect] has been declared to be demanded by public policy.' * * * The same reasons apply with equal force to a municipal corporation, although the authorities are not uniform on this subject. 15 R.C.L. § 15, p. 18."

Regardless of whether the previously announced rule applies to municipalities, there is no doubt that it does apply to reclamation districts, which have uniformly been held to be sovereign agencies of the state.

The judgments are affirmed.

PEEK, J., and ADAMS, P. J., concur.

61 Cal.App.2d 628

In re BENZIGER'S ESTATE.

WOOD v. BENZIGER.

Civ. 14211.

District Court of Appeal, Second District, Division 1, California.

Dec. 7, 1943.

Hearing Denied Feb. 3, 1944.

1. Wills ⚷729

Under will directing residue to be converted into cash for purchase of contracts of annuity and insurance whose income was to be paid to testator's two children, or to contingent beneficiaries, one child could not elect to take personalty even if rule giving right of election to a donee of annuity obtained in California, since, under rule, election may only be made when annuity is given without qualification. Probate Code, §§ 160 et seq., 163.

2. Wills ⚷729

Under will directing residue to be converted into cash for purchase of contracts of annuity and insurance whose income was to be paid to testator's two children or to contingent beneficiaries, one child could not elect to take personalty on theory that income to be derived from personalty would greatly exceed income under contracts, and that under doctrine of "virtual representation" such child represented contingent beneficiaries, since contingent beneficiaries' interests conflicted with such child's interest, and income from personalty might diminish. Probate Code, §§ 160 et seq., 163.

See Words and Phrases, Permanent Edition, for all other definitions of "Virtual Representation".

3. Wills ⚿729

Under will directing residue to be converted into cash for purchase of contracts of annuity and insurance whose income was to be paid to testator's two children or to contingent beneficiaries, one child could not elect to take personalty on theory that by "virtual representation" such child represented contingent beneficiaries and their consent to election might be presumed, since the other child was a necessary party. Probate Code, §§ 160 et seq., 163.

◆

Appeal from Superior Court, Los Angeles County; Frank C. Collier, Judge.

In the matter of the estate of Marie F. Benziger, deceased, wherein Frederick A. Wood, as executor of the estate of Marie F. Benziger, deceased, filed a petition for an order directing the sale of personal property of the estate, to which petition Rita Benziger, a beneficiary under the will, filed objections. From an order directing the sale, the objector appeals.

Affirmed.

Meserve, Mumper & Hughes, Edwin A. Meserve, and Roy L. Herndon, all of Los Angeles, for appellant.

Barrick & Wright, of Pasadena, for respondent.

DRAPEAU, Justice pro tem.

In a will before the Probate Court, and now before this court, the testator directed that the residue of his estate be converted into cash and the cash used to purchase insurance contracts or policies in level premium mutual life insurance companies, to pay a life income to the two children of testator. The will further directed that such contracts were to be so drawn that upon the death of either child, the balance of the proceeds thereof should go to the living issue of such child, or if such child died without living issue, to the survivor of said two children, or the then living issue of such surviving child, or in the event of the death of both of testator's children without issue surviving, to a Catholic charity. For these purposes, one-fifth of the residue was to be expended for one child, and four-fifths of the residue for the other child.

Pursuant to this direction, the executor, respondent herein, petitioned the probate court for an order directing the sale of personal property of the estate, consisting in the main of stocks and bonds.

The beneficiary for whom four-fifths of the residue was to be so expended filed written objections denying that the sale of the property would be for the best interest of the estate or those interested therein, and denying also the power of the executor to sell the property for the purpose of purchasing the contracts as directed by the will. Said beneficiary also filed a notice of election to take securities in lieu of annuity. The beneficiary for whom one-fifth of the residue was to be invested, as directed by the will, did not appear, nor did any one appear for contingent beneficiaries, unless the objector may be said to have so appeared as their representative.

Upon the hearing, the probate court made its order directing the sale. From this order the objector has appealed.

The primary question here involved is whether the appellant had the right to elect, and to have distributed from the estate of decedent to trustees, for the use and benefit of appellant and contingent beneficiaries, the personal property which the testator directed to be sold and invested in contracts of annuity and insurance.

Income presently to be derived from the stocks and bonds if so distributed would be greatly in excess of income which could be paid under the insurance contracts. And a computation by appellant of present income therefrom and payments to appellant for an estimated life expectancy indicates that there would be more in the trust for the benefit of contingent beneficiaries if appellant's election were enforced. Assuming that computations of present income will continue undiminished in the future, appellant argues that such distribution will result to the advantage and benefit of the contingent beneficiaries, that therefore under the doctrine of virtual representation appellant represents them, and their consent and concurrence to her election and her representation may be presumed.

As adopted in a few states, the right of election of a donee of an annuity is well stated in the case of Parker v. Cobe, 1911, 208 Mass. 260, 94 N.E. 476, 33 L.R.A.,N.S., 978, 21 Ann.Cas. 1100, and note.

"It is the settled law of England that a bequest of money to be used in the purchase of an annuity gives the legatee a right to the money and he can insist that the annuity shall not be bought. * * *

In the United States there is a decision to the same effect by an inferior court * * *, and, so far as we know, no case to the contrary.

"This rule has found its most frequent application in case of bequests to be laid out in the purchase of annuities. But it is a general rule applicable to a bequest to be laid out in the purchase of any object. * * *

"The reasoning on which the rule is established is that the legatee can sell the particular object as soon as it is bought and the law will not require the performance of a nugatory act. Consequently it is of no consequence that the particular object is to be bought by the executor and not by the legatee." (Cases cited in support of the above proposition are not here repeated.)

Also, see 2 Cal.Jur. 80; 2 Am.J. 833; 69 C.J. 945; 3 C.J.S., Annuities, § 1, p. 1376.

[1] Analyzing the payments to be made under the contracts to be purchased by the executor, it is at once evident that appellant may not sell the particular object so to be purchased, and that the rule of annuitant's election contended for may not in any event take effect under the facts in this case. Before such a sale may be made, all of the contingent beneficiaries must join in it, or be bound by some judicial decree. These contingent beneficiaries would be: (1) Surviving issue of appellant, or (2) the other child of decedent, or (3) living issue of such surviving child, or (4) a charity. The reasoning on which the rule is established is that the donee can sell the annuity as soon as it is bought, and the law will not require the performance of a nugatory act. Parker v. Cobe, supra. But such election may only be made when the annuity is given absolutely and without qualification and the donor directs that a certain sum be laid out in the purchase of it. 3 C.J.S., Annuities, § 8, p. 1384.

Therefore it becomes unnecessary to this decision to determine whether the rule contended for is applicable in California, in view of the concluding section of Chap. VIII, Div. 1, Probate Code, which deals with legacies and annuities, and which provides: "The provisions of this chapter are in all cases to be controlled by a testator's express intention." Probate Code, Sec. 163.

[2, 3] There may be no virtual representation by appellant of contingent beneficiaries for the reason that as between representative and represented there may be no conflict of interest. Mabry v. Scott, 51 Cal.App.2d 245, 253, 124 P.2d 659; Curran v. Pecho Ranch, etc., Co., 95 Cal.App. 555, 273 P. 126; and County of Los Angeles v. Winans, 13 Cal.App. 234, 109 P. 640. To say that income from the personal property would remain constant over a period of years comprising a life expectancy and would thus build up a fund from which to pay an annuity for life and also to pay contingent beneficiaries would be contrary to the experience of mankind. If such income were to fail, in whole or in part, then all of the fund might have to be expended for the life beneficiary, to the complete loss of contingent beneficiaries. In re Estate of Oliver, 10 Cal.App.2d 336, 51 P.2d 1118. And in any event the other child of decedent is a contingent beneficiary and as such a necessary party who did not appear and may not be represented.

The order is affirmed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

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61 Cal.App.2d 644

In re LEVI'S ESTATE.

LEVY v. STURGEON et al.

Civ. 14192.

District Court of Appeal, Second District, Division 2, California.

Dec. 8, 1943.

Hearing Denied Feb. 3, 1944.

1. Insane persons 🔑42(4)

Where daughter by order of superior court was appointed guardian of her incompetent mother, after hearing in presence of son who opposed appointment, and order on son's appeal was affirmed and Supreme Court denied a hearing, record did not support contention that superior court was without jurisdiction to make order settling guardian's account on ground that guardian's appointment was void. Probate Code, § 1 et seq.; Code Civ.Proc. § 372.

2. Guardian and ward ⚷143

The settlement of a guardian's account is a "proceeding in rem".

See Words and Phrases, Permanent Edition, for all other definitions of "Proceeding in Rem".

3. Insane persons ⚷42(1)

Where superior court had jurisdiction to make order settling a guardian's account, there was no abuse of discretion in ordering allowance of fee to the guardian and her attorney, although the incompetent died after the guardian had resigned.

◆

Appeal from Superior Court, Los Angeles County; Carl A. Stutsman, Judge.

Proceeding in the matter of the estate of Carrie P. Levi, incompetent. On petition for settling the first and final account of the guardian Edna L. Sturgeon, petitioner, wherein Ida Wells filed objections. From an order settling the account of the guardian, A. F. Levy, contestant, appeals.

Affirmed.

A. F. Levy, in pro. per.

Spray, Davis & Gould, of Los Angeles, for petitioner-respondent.

Ida Wells, of Los Angeles, in pro. per.

MOORE, Presiding Justice.

The contestant appeals from the order settling the first and final account of the guardian of the incompetent. While the purposes of the appeal are befogged, in extravagant statements and meaningless phrases, we finally discover a belabored contention that the superior court was without jurisdiction to make the order settling the guardian's account, on the ground that the order appointing the guardian was void.

Edna L. Sturgeon, a daughter of the incompetent, was appointed guardian at the request of two sisters as well as of her aged mother. At the time of the hearing, appellant, a son of the incompetent, was present and opposed the appointment. He took an appeal from the order which was affirmed by division three of this court (52 Cal.App.2d 832, 834, 127 P.2d 15) and the supreme court denied a hearing. In that opinion it is recited that three daughters testified that their mother was 89 years of age; that she was unable without assistance to care for her property, etc. Subsequently, appellant filed his petition in the superior court for restoration of the capacity of the incompetent; filed a motion to set aside the judgment appointing a guardian; filed an application for a writ of supersedeas; filed a citation against the guardian to show cause why support money should not be furnished the ward; filed a motion to vacate the appointment of the guardian—all of which were in turn denied. Subsequently the guardian petitioned the court for an order confirming the sale of the real property of the incompetent, the consummation of which sale was defeated by the intervention of appellant who threatened the proposed purchaser with litigation in the event of a sale.

In addition to the proceedings rendered necessary by the aggressive action of appellant, other acts were recited in the first and final account as having required the services of the guardian's counsel. The only records brought to us pursuant to appellant's request for a transcript indicate that the guardian kept accounts; that all receipts and disbursements were properly entered; that they were contained in the first and final account and that each was approved by the order appealed from after a hearing upon the objections of appellant. No criticism is made of the order itself.

In the course of his printed animadversions appellant attempts to express his opposition to the allowance of fees to the guardian and her counsel. He then states that the incompetent was humiliated by the guardian's lawlessness; that she escaped to Oregon and tried to reinstate herself; that the guardian failed to support her ward from the available income from her property but squandered the liquid assets for useless administration expenses; that the guardian failed to acknowledge receipt of a dividend on certain preferred stock of the estate. Each of these remarks is answered by the itemized account supported by substantial evidence and approved by the court after hearing.

[1-3] We have examined all of the authorities cited by appellant (Probate Code; Code Civ.Proc. § 372; In re Allgier, 65 Cal. 228, 3 P. 849; In re Estate of Curtis, 121 Cal. 468, 53 P. 936; In re Estate of Kincaid, 120 Cal. 203, 52 P. 492; In re Talomase's Estate, 98 Okl. 212, 225 P. 156; In re Clanton's Estate, 171 Cal. 381, 384, 153 P. 459; Harriss v. Parks, 77 Okl. 197, 187 P. 470; In re Estate of Livermore, 132 Cal. 99, 64 P. 113, 84 Am.St.Rep. 37; U. S. Constitution), but find nothing in any of them that would tend to nullify the

order. Neither does anything appear in appellant's brief or in the record that might be deemed a fair criticism of the court's judgment. The settlement of the guardian's account is a proceeding in rem. There was no abuse of discretion in ordering the allowance of the fees to the guardian and her attorney. Such fees were properly chargeable in the guardianship proceeding although the incompetent deceased after the guardian had resigned. In re Estate of Clanton, supra.

The order is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

IRVINE et al. v. BOSSEN, County Treasurer, et al. (JULIEN, Intervener).

Civ. 6996.

District Court of Appeal, Third District, California.

Dec. 11, 1943.

Rehearing Denied Jan. 10, 1944.

Hearing Granted Feb. 7, 1944.

1. Limitation of actions 🔑65(1), 67

The payment of reclamation district's matured bonds was not barred by limitations where at no time since their maturity had district ever had funds with which to pay them, no notice of availability of such funds had ever been served on bondholders, and procuring of judgments on such obligations would have been useless. St.1935, p. 994, as amended by St.1937, p. 407; Pol.Code, § 3480.

2. Waters and water courses 🔑222, 224, 228½, 230, 230(6)

Reclamation and irrigation districts are sovereign agencies of the state and as such are strictly limited by terms of the statutes creating them with respect to incurring or payment of obligations. Pol.Code, §§ 3446–3493.

3. Creditors' suit 🔑8(1)
Execution 🔑22

Realty and personalty in possession of reclamation district is held in trust and is not subject to execution or sale by district's creditors. Pol.Code, §§ 3446–3493.

4. Waters and water courses 🔑222

Under statute providing for registration of reclamation district matured bonds with treasurer of the district, even if preferences could be thereby acquired over other matured bonds, payment of registered bonds may not be made to detriment of other registered bonds until after notice has been served upon owners thereof as required by statute. St.1935, p. 994, as amended by St.1937, p. 407; Pol.Code, § 3480.

5. Constitutional law 🔑143
Waters and water courses 🔑216, 222

The statute authorizing preference in payment of reclamation district's bonds in order in which they are registered does not apply to bonds issued prior to enactment of the statute, where neither the bonds nor the act under which they were issued provided for forfeiture because of failure to register the bonds, since the additional burden would result in "impairing obligation of contract". St.1935, p. 994, as amended by St.1937, p. 407; Pol.Code, § 3480.

See Words and Phrases, Permanent Edition, for all other definitions of "Impairing Obligation of Contract".

6. Waters and water courses 🔑222

Material changes in reclamation district's bonds so as to create a preference in payment of matured bonds in order in which they are registered could not be made without consent of the holders of matured bonds, and hence bondholders were entitled to participate pro rata in funds on hand regardless of fact that some of owners had not registered their bonds. St.1935, p. 994, as amended by St.1937, p. 407; Pol.Code, § 3480.

7. Bonds 🔑50

The law pursuant to which bonds are issued constitutes an essential part of contract of the bonds.

8. Constitutional law 🔑143

The express covenants of a bond issued in strict accordance with provisions of law authorizing their issuance may not be materially altered by subsequent statute to detriment of a purchaser for valuable consideration without his acceptance of new terms.

◆

Appeal from Superior Court, Yuba County; J. O. Moncur, Judge.

Mandamus proceeding by James Irvine and another against William C. Bossen, as

Treasurer of the County of Yuba and as Trustee of the Reclamation District No. 784, and others, to compel payment of bonds in full as preferred debts, wherein E. Julien was permitted to intervene. From a judgment, petitioners appeal.

Affirmed.

W. Coburn Cook, of Turlock, for appellants.

Jos. L. Heenan, of Marysville, and Huston, Huston & Huston, of Woodland, for defendant Bossen.

Rich & Weis, of Marysville, for Board of Trustees of Reclamation Dist. No. 784.

Gilbert Moody, of Turlock, for intervener-respondent Julien.

THOMPSON, Justice.

The petitioners, who own seven matured bonds of $1,000 each, together with attached interest bearing coupons, issued by Reclamation District No. 784, which were registered with the treasurer of the district as provided by Statutes of 1935, page 994, as amended by Statutes of 1937, at page 407, and which were reduced to judgment, sought by means of a writ of mandamus to compel payment of the obligations in full as preferred debts, from a limited fund of $9,466.70. The reclamation district answered the petition denying the material allegations thereof, including the asserted estoppel of the statute of limitations. By order of court E. Julien was permitted to intervene, and he alleged that he was the owner of one matured bond of the district, No. 434, in the sum of $1,000, together with attached coupons, for payment of which he claimed the right to participate in said fund, in spite of the fact that his bond was neither registered nor reduced to judgment. He also denied that either his bond or attached coupons were barred by the statute of limitations.

The court adopted findings favorable to the respondents, except that petitioners' bonds and coupons, together with intervener's bond and coupons, were found to be valid obligations which, together with all valid matured bonds and coupons held by other owners thereof and duly presented for payment, after ninety days notice of the availability of said fund of $9,466.70, as provided by statute, shall be paid pro rata by first satisfying the obligations maturing January 1, 1930, and then by distributing the balance of the fund, if any, to the owners of said obligations maturing thereafter. A writ of mandamus was directed to issue in accordance therewith. From that portion of the judgment which directs the pro rata payment of bonds and coupons, and from the determination that the statute of limitations has not expired against the bonds and coupons of owners other than those belonging to petitioners, this appeal was perfected.

The petition alleges and the court found that Reclamation District No. 784 was duly organized in 1907; that bonds of the denomination of $1,000 each in the aggregate sum of $834,000 were issued and sold January 1, 1921; that all of said bonds which matured prior to January 1, 1930, were fully paid; that petitioners' seven bonds and the attached coupons, which matured in 1930 and 1931, were "protected by judgments" and duly presented to the Treasurer for registration, no part of which has been paid except a portion of the interest on the coupons which matured January 1, 1930; that none of said bonds or coupons maturing after January 1, 1930, except bonds in the aggregate sum of $71,000, and petitioners' said seven bonds and coupons, have been protected by judgments or presented to the Treasurer for registration; that the intervener's bond No. 434 was not protected by judgment or registration, and that the aggregate sum of such bonds not so protected amounts to $141,000, all of which matured subsequent to January 1, 1930; that of said unprotected bonds the total sum of $25,000 matured January 1, 1930, and the further sum of $22,000 matured January 1, 1931, no part of which matured bonds has been paid.

The court found that the reclamation district was solvent; that the Treasurer has made all calls for assessments required by the statute "but there has never been sufficient funds on hand to pay all of the outstanding and unpaid bonds"; that there is now on hand only the sum of $9,466.70; that the bondholders have no legal method of enforcing their obligations by judgments or otherwise; that the district has not provided funds with which to meet its obligations, nor has it fulfilled its duties in that respect as required by sections 3446 to 3493 of the Political Code; that no notice of the availability of funds with which to pay its obligations has been served upon any bondholders, and that the statute of limitations has therefore not run against any of said bonds or coupons. Judgment was thereupon rendered as previously stated.

The chief issue raised by the pleadings is the question as to whether the statute of limitations barred recovery on bonds and coupons, other than those which were registered and reduced to judgments.

The appellants claim "that the moneys in the bond fund should be applied to the payment of their bonds in full with interest at 6 per cent per annum on the theory that all other bonds maturing in 1930 and 1931 are barred by the statute of limitations."

[1] We are of the opinion that neither the intervener's bond No. 434, nor the other valid matured and unpaid bonds of the same issue of that district, are barred by the statute of limitations for the reason that at no time since their maturity has the district ever had funds with which to pay them; that no notice of the availability of such fund has ever been served on the bondholders and that the procuring of judgments on those obligations would have been useless and unavailing.

It was stipulated, and the court found, that the Treasurer had made all calls for assessments for payment of the bonds authorized by the statute. It was alleged by petitioners that the Treasurer had in the bond fund "the sum of $10,394.00 and no more." The court found that the Treasurer had in that bond fund only the sum of $9,466.70. Those findings are supported by the evidence. It is conceded that no notice of the availability of funds with which to satisfy the matured and unpaid bonds was served on any of the owners thereof.

[2] Reclamation and irrigation districts are sovereign agencies of the state and as such are strictly limited by the terms of the statutes creating them, with respect to the incurring or payment of obligations. People ex rel. Chapman v. Sacramento Drainage District, 155 Cal. 373, 382, 103 P. 207; Peterson v. Board of Supervisors of Solano County, 65 Cal.App. 670, 674, 225 P. 28; Nissen v. Cordua Irrigation District, 204 Cal. 542, 269 P. 171; Moody v. Provident Irrigation District, 12 Cal.2d 389, 394, 85 P. 2d 128, 131.

Section 3480 of the Political Code provides, with respect to reclamation districts, that: "All moneys collected by any county treasurer upon any assessment upon which bonds shall have been issued, including all moneys derived from sale of land for delinquent installments, or from redemption thereof, or from sale of lands bought by the treasurer at any such sale, shall be by such treasurer forthwith paid into the main county treasury and except as otherwise provided in section 3466a of this code, *shall be credited to the bond fund of such reclamation district and used exclusively for the payment of principal and interest of said bonds issued on such assessment,* and of the principal and interest of any refunding bonds issued thereon, and the expenses of the county treasurer as hereinafter provided." (Italics ours)

[3] In the absence of funds or the statutory authorization for securing funds with which to pay outstanding matured bonds, the securing of judgments by the holders of such bonds would be unavailing and useless. Real and personal property in the possession of the district is held in trust and is not subject to execution or sale by creditors of the district. Moody v. Provident Irrigation District, supra. Under circumstances similar to the facts of this proceeding, it was held in the last mentioned case: "The property of the district, so far as it owns any property, constitutes a public trust and is held by the district for a public use, and, therefore, is not subject to levy and sale upon execution by a creditor of the district. Tulare Irr. Dist. v. Collins, 154 Cal. 440, 97 P. 1124."

In accordance with the preceding declaration of law it follows that since the recproceeding has never possessed funds with which to pay the bonds which matured after January 1, 1930, and that it has made "all calls" for assessments and has exhausted all means provided by law for creating that fund, the mere procuring of judgments on such bonds would be futile, and that the statute of limitations is therefore not a bar to the right of the owners thereof to payment from any funds available therefor. Moody v. Provident Irrigation District, supra; Freehill v. Chamberlain, 65 Cal. 603, 4 P. 646; 37 C.J. 849, § 209. In the Moody case it is said in that regard: "The statute of limitations, under the circumstances disclosed by this case, could never be pleaded by the district until it had the money in its possession to pay the bonds belonging to the plaintiff, and had given notice."

In 37 C.J. 849, § 209, it is said, with respect to the application of the doctrine of the statute of limitations to the enforcement of obligations evidenced by bonds of a state or its agencies, that: "Where it is provided by law that state or county bonds, or the interest coupons thereon, or other municipal obligations, shall be payable out of a particular fund or in a particular manner, the statute of limitations does not begin to run unless it appears that the particular fund has been provided or the method pursued, or until demand for payment is repudiated."

The preceding statement of law is supported by the following citations: City of New Orleans v. Warner, 175 U.S. 120, 20 S.Ct. 44, 44 L.Ed. 96; Lincoln County v. Luning, 133 U.S. 529, 10 S.Ct. 363, 33 L.Ed. 766; King Iron Bridge, etc., Co. v. Otoe County, 124 U.S. 459, 8 S.Ct. 582, 31 L.Ed. 514; Sawyer v. Colgan, 102 Cal. 283, 36 P. 580, 834; Freehill v. Chamberlain, 65 Cal. 603, 4 P. 646; Underhill v. Trustees of City of Sonora, 17 Cal. 172, 173; Little v. Emmett Irrigation District, 45 Idaho 485, 263 P. 40, 56 A.L.R. 822, and by many additional authorities of other jurisdictions.

In support of petitioners' contention that they are entitled to payment in full of their seven bonds, in preference to all other matured bonds, they rely on the fact that they registered their bonds with the Treasurer as provided by Statutes of California of 1935, page 994, which reads:

"Section 1. When any bond or any interest coupon, payable from the funds in the custody of the county treasurer, is presented to the treasurer for payment and is not paid for want of funds, the treasurer must indorse thereon 'Not paid for want of funds', with the date of presentation and the serial number indicating the order of presentation and sign or stamp his name thereon. Such bonds and/or coupons, so indorsed and numbered, are entitled to preference as to payment out of the first moneys received in the treasury properly applicable to the payment thereof, in the order in which they were so presented and registered.

"Sec. 2. Upon receipt of moneys into the treasury applicable to the payment thereof, the treasurer must set apart the same, or so much thereof as is necessary, for the payment of such registered bonds and/or coupons. *He must then give notice by registered mail to the owner or holder of such registered bonds and/or coupons, at the address last filed with the treasurer, stating therein that he is ready to pay such registered bonds and/or coupons.* (Italics ours)

"Sec. 3. Should such registered bonds and/or coupons not be presented for payment within thirty days from the date of mailing notice hereinbefore provided for, the fund set aside for the payment thereof must be applied by the treasurer to unpaid registered bonds and/or coupons next in order until all bonds and/or coupons so registered have been called."

[4] It appears that petitioners' seven bonds, together with several belonging to other bondholders, were presented to the Treasurer and registered pursuant to the foregoing statute, but that notices of such registrations and intention to pay the bonds were not given to the bondholders as required by section two of said statute by registered mail or otherwise, and that no payments were in fact made by the Treasurer upon any of said bonds. It does not appear when said fund of $9,466.70 was acquired by the Treasurer. In construing the foregoing statute as a whole we assume that, even if preferences could be thereby acquired over other matured bonds by virtue of a statute adopted after the obligation vested, without the acceptance of the owners, which we do not concede, payment of registered bonds may not be lawfully made to the detriment of other registered bonds until after notice has been served upon the owners thereof as required by the statute. In the present case it appears that matured bonds, other than those belonging to the petitioners were in fact registered. No such notice has ever been given by the Treasurer to the bondholders.

But the appellants contend that the foregoing statute was amended (Stats.1937, p. 407) by eliminating therefrom sections two and three relating to the necessity of giving notice of the intention of the Treasurer to pay the bonds in the order of their registration. That is true.

[5, 6] We are, nevertheless, of the opinion the petitioners in this case acquired no prior rights to payment of their bonds in full, to the detriment of other matured bonds, merely because they had been registered pursuant to the statute of 1935, as amended in 1937. The obligations of the district and the absolute right of the bondholders to payment at maturity were fixed and determined by the express terms of the bonds construed in the light of the Reclamation District Act under which they were issued and sold. Neither that act nor the terms of the bonds provided for a forfeiture of the right to participate in any fund of the district which might become

available for that purpose on account of a failure to register the bonds. The additional burden, and detriment created by the subsequent enactments of the statutes of 1935 and 1937, result in an impairment of the obligations of the contracts represented by the bonds. Those alterations did not occur until more than four years had elapsed after the maturity of the bonds. There is no evidence that the bondholders ever consented or acquiesced in those changes of their contracts. Such material and detrimental changes of the contracts could not lawfully be made without the consent or acquiescence of the holders of matured bonds. The court therefore correctly determined that the holders of the bonds which matured in 1930 and 1931, were entitled to participate pro rata in the funds on hand, regardless of the fact that some of the owners thereof had not registered their bonds.

[7] The law pursuant to which the bonds were issued constitutes an essential part of the contract of the bonds. In 11 C. J.S., Bonds, p. 420, § 40, subsec. e, it is said in that regard:

"The law at the time of the execution of a statutory bond is a part of it; if it gives to the bond a certain legal effect, it is as much a part of the bond as if in terms incorporated therein. Where a bond is given under the authority of a statute in force when it is executed, in the absence of anything appearing to show a different intention it will be presumed that the intention of the parties was to execute such a bond as the law required, and such statute constitutes a part of the bond as if incorporated in it, and the bond must be construed in connection with the statute and the construction given to the statute by the courts. Such a bond must be given the effect which in reason must have been intended by the statute. Whatever is included in the bond, and is not required by the law, must be read out of it, and whatever is not expressed, and ought to have been incorporated, must be read as if inserted into it; but such rule applies only to matters of substance and not to mere matters of form. Although the terms of the bond may bear a broader construction, the liability of the parties will be confined to the measure of liability as contemplated by the law requiring the bond; but it will not be assumed that the legislative enactment was intended to import to an instrument an effect different from that intended by the parties. * * *

"*Ordinarily, the liability on a bond cannot be affected by a law passed subsequent to its execution;* * * *." (Italics ours)

[8] The foregoing text is supported by numerous authorities. Certainly the express covenants of a bond issued in strict accordance with the provisions of law authorizing their issuance, may not be materially altered by a subsequent statute to the detriment of a purchaser thereof for a valuable consideration, without his acceptance of the new terms or consent to the change of contract.

We conclude that the enactment of the statute of 1935, page 994, as amended by the statute of 1937, page 407, authorizing a preference in payment of bonds in the order in which they are registered, has no application, under the circumstances of this case, to the bonds which matured in 1930 and 1931. The trial court properly directed the payment of such bonds pro rata from the limited fund on hand.

There is nothing in the authorities cited by the appellants in conflict with what we have previously held regarding the statute of limitations or the alleged preference acquired by virtue of registering the bonds for payment.

The judgment is affirmed.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concur.

61 Cal.App.2d 608

PEOPLE v. JONES.

Cr. 3693.

District Court of Appeal, Second District, Division 2, California.

Dec. 6, 1943.

Hearing Denied Jan. 5, 1944.

1. Criminal law ⚷627(2)

To properly accuse a person under existing procedure, accused must be provided with a copy of the testimony heard by grand jury or by committing magistrate. Pen.Code, §§ 951, 952, 959.

2. Larceny ⚷28(1)

An indictment charging in several counts that defendant by artifice had induced certain of complainants to advance to him moneys for purchase of whisky and had induced others to deliver to him their warehouse receipts for whisky sufficiently charged offenses of grand theft. Pen. Code, § 951, 952, 959.

3. Larceny ⚷55

Evidence supported conviction of grand theft based on transactions wherein defendant by artifice induced certain of complainants to advance to him moneys for purchase of whisky and induced others to deliver to him their warehouse receipts for whisky.

4. Criminal law ⚷447

In prosecution for grand theft arising out of transactions wherein defendant allegedly by artifice induced certain of complainants to advance to him moneys for purchase of whisky and induced others to deliver to him their warehouse receipts for whisky, parol evidence of all that occurred was admissible to show defendant's intention.

5. Criminal law ⚷829(1)

Where every phase of the law properly applicable to the issues was presented by an appropriate instruction, it was not incumbent upon trial court to read any instruction offered by defendant.

6. Criminal law ⚷827

Each offered instruction must be appraised according to its own merits and its use must be determined by exigencies obtaining.

7. Criminal law ⚷770(3)

Where defendant was charged with grand theft in each count and under the evidence by which of the methods of committing grand theft, embezzlement, larceny by trick and device or false pretenses, was unimportant, and all theories were explained to jury, refusal to admonish jury that they should agree upon one theory was not error. Pen.Code, §§ 484, 511.

8. Larceny ⚷12

The moment that defendant appropriated funds belonging to his clients to use of his corporation the crimes of grand theft were committed. Pen.Code, § 484.

9. Larceny ⚷70(3)

In order for one accused of grand theft to be entitled to an instruction that he must be adjudged innocent if he took property openly and avowedly under claim of title in good faith, it must reasonably appear from evidence that such defense is made in good faith. Pen.Code, § 484.

10. Larceny ⚷70(3)

In prosecution for grand theft based on transactions whereby defendant allegedly by artifice induced certain persons to advance to him moneys for purchase of whisky and induced others to deliver to him their warehouse receipts for whisky, an instruction that defendant should be adjudged innocent if he took property openly and avowedly and under a claim of title in good faith was not authorized under the evidence. Pen.Code, § 484.

11. Criminal law ⚷815(1)

Trial court must refuse an instruction to acquit a defendant upon one certain phase of the evidence regardless of other proof and of other theories presented.

12. Corporations ⚷324

In prosecution for grand theft, requested instructions that defendant should be acquitted if it appeared that defendant acted as a corporate officer in committing alleged fraudulent acts and it was shown that corporation thereby acquired title to fruits of the acts were properly refused as not stating the law. Pen.Code, § 484.

13. Corporations ⚷1

Where a corporation is under control of one person who violates penal statutes by use of corporate name, the artificial entity will be ignored while the person who actually commits the criminal act will be dealt with as an individual.

14. Criminal law ⚷829(3)

In prosecution for grand theft, where existence of criminal intent was defined as an essential element in each of the instructions given on larceny, embezzlement, and false pretense, with a statement as to time that intent must have entered the mind, refusal of proffered instructions declaring that existence of specific intent to steal was an element of grand theft that was required to be proved was not error. Pen.Code, § 484.

15. Larceny ⚷75(1)

In prosecution for grand theft based on obtaining warehouse receipts for whisky by artifice, where contracts for bottling whisky were merely a part of machinery employed by defendant in perpetrating the trick to gain warehouse receipts for whisky, defendant's requested instructions that nature of his transaction was required to be determined by the bottling contracts was properly refused. Pen.Code, § 484.

16. Larceny ⚷26

In prosecution for grand theft based on obtaining warehouse receipts for whisky by artifice, proof of defendant's ability to replace the receipts would not have entitled him to an acquittal. Pen.Code, §§ 484, 514.

17. Criminal law ⚷755

Requested instructions which contained statements which would have deprived jury of its privilege of finding facts from all of the evidence were properly refused.

18. Criminal law ⚷396(1), 719(1)

In prosecution for grand theft based on obtaining warehouse receipts for whisky by artifice, where proof of financial status of defendant's corporation was rendered necessary by reason of his assertions that the corporations had assets sufficient with which to recompense the complainants, proof adverse to defendant's assertions and argument thereon were proper. Pen.Code, § 484.

19. Criminal law ⚷784(2)

A requested instruction that, if evidence was reasonably susceptible of two interpretations, jury was to adopt the one leading toward innocence, would be applicable only in a case in which proof was all circumstantial.

20. Criminal law ⚷407(2), 741(3)

Silence under accusation of police is evidence tending to prove guilt, and its weight as evidence is for jury.

21. Witnesses ⚷347

In prosecution for grand theft based on obtaining warehouse receipts for whisky by artifice, where jurors might properly have reasoned that, if defendant believed at time of investigation by officers of defendant's acquisition of the receipts that he had merely engaged in civil transactions with complainants, he would have said so to anyone, permitting testimony with reference to defendant's refusal to be interviewed by district attorney as evidence for impeachment purposes was proper. Pen. Code, § 484.

22. Criminal law ⚷783½

Requested instruction denying jury the right to consider as proof a certain letter written by witness to a company and received in evidence as part of res gestae of witness' deal with defendant was properly refused, where letter was some corroboration of witness' testimony.

23. Witnesses ⚷309

Permitting district attorney to ask defendant questions on cross-examination in order to ascertain whether defendant had refused to make a statement to district attorney, on ground that it might tend to incriminate him, was proper for impeachment purposes. Code Civ.Proc. § 2051.

24. Witnesses ⚷309

That defendant, at time he refused to make a statement to district attorney on ground that it might tend to incriminate him, might have been acting upon advice of counsel, did not make evidence as to his refusal inadmissible for impeachment purposes. Code Civ.Proc. § 2051; Const. art. 1, § 13.

25. Criminal law ⚷434

In prosecution for grand theft, admission in evidence of books of account of a corporation controlled by defendant was not error. Pen.Code, § 484; Code Civ.Proc. § 1953f.

26. Criminal law ⚷410

In prosecution for grand theft based on obtaining warehouse receipts for whisky by artifice, where jury were warranted in finding that representations of defendant's salesmen were either first authorized or subsequently approved by defendant, testimony as to salesman's representations was properly admitted.

Appeal from Superior Court, of Los Angeles County; Arthur Crum, Judge.

Roger Evan Jones was convicted of grand theft, and he appeals.

Affirmed.

Robert W. Kenny, Atty. Gen., Bayard Rhone, Deputy Atty. Gen., and Fred Howser, Dist. Atty., and Jere J. Sullivan and Jesse J. Frampton, Deputy Dist. Attys., all of Los Angeles, for plaintiff and respondent.

Morris Lavine, of Los Angeles, for defendant and appellant.

MOORE, Presiding Justice.

Defendant was convicted on seventeen counts of grand theft of which he had been accused by indictment. He was found not guilty on four other counts and was granted a new trial on one. He was sentenced to state prison on each of the sixteen verdicts for a term of years. His seventeen grounds of appeal from each judgment may be reduced to four, namely: (1) The insufficiency of the indictment, (2) the insufficiency of the evidence, (3) the refusal to give instructions offered by defendant, (4) errors in ruling upon offered evidence.

The specific crimes of which he was convicted are that by artifice he induced certain of the complainants to advance to him moneys for the purchase of whiskey; others to deliver to him their warehouse receipts for whiskey, hereinafter referred to as receipts. He commenced his operations about February 14, 1940. In order to expedite the accomplishment of his purposes, defendant stated in substance to each of his contractees that the latter could more readily sell his stored liquor and at a greater profit than by a sale of it in bulk if it were first bottled; that he would have the whiskey bottled and sold on a specified date and the proceeds, less a certain percentage for handling, would be paid to the contractee. It is the theory of the prosecution that as a part of his trick or device to obtain possession of the valued instruments he prepared a form of bottling contract whereby the owner of the receipt ostensibly agreed with R. E. Jones & Co., appellant's corporation, for the purchase of whiskey. One by one the trusting owners of the outlawed merchandise, as well as the other confident investors who during the same period entrusted large sums to defendant for the purchase of whiskey, became convinced that Jones had appropriated their receipts or moneys to his own use. Having heard their several experiences the grand jury returned the indictment. Defendant's criticism of the pleading is (1) that it failed to specify an offense; (2) that the phrase "warehouse receipts" is a conclusion; and (3) the "nature of the offense" is not alleged.

The Indictment Is Sufficient.

[1, 2] An accusation drawn in conformance with statutory requirements is sufficient. Each count contains a statement in ordinary and concise language that the accused has committed a specified public offense without any allegations of matter not essential to be proved. Sec. 952, P.C. It fully informs the accused of the crime charged against him. The reasons for the technical requirements at common law no longer exist. Properly to accuse a person under existing procedure he must be provided with a copy of the testimony heard by the grand jury or by the committing magistrate. By the testimony and the concise accusation he is fully advised. People v. Beesly, 119 Cal.App. 82, 84, 6 P.2d 114, 970. By reason of the repeal in 1927 of subdivisions 6 and 7 of section 959 requiring the act to be "clearly and distinctly set forth * * * in such a manner as to enable a person of common understanding to know what is intended * * *," it must have been the intention of the legislature to make an indictment sufficient if it complies with the remaining provisions of that section and with sections 951 and 952. Section 951 contains a form whereby to accuse one of a public offense. The use of it in drafting an accusation, in the main, disposes of technical criticism. An indictment was held to be sufficient in charging that the accused "unlawfully took the property of one Gabriella Marello consisting of 30 shares of the Bank of Italy stock, Certificate No. B-34,302, of the reasonable value of Sixty three Hundred Dollars, more or less lawful money of the United States." People v. Robinson, 107 Cal.App. 211, 217, 290 P. 470, 473. The case of People v. Davenport, 21 Cal.App. 2d 292, 69 P.2d 862, does not apply. That gentleman was accused of violating the Corporate Securities Act in that he sold an "investment contract," without having obtained a permit from the Division of Corporations. The vice of the Davenport information lay in the fact that the term "investment contract" was a conclusion of

the pleader. Since there was neither pleading nor evidence before this court of the nature of the contract, it could not be determined whether or not "investment contract" fell within the provisions of the Corporate Securities Act. Under that situation it behooved this court to assume that the contract was one which could lawfully be sold without a permit.

The Evidence Was Sufficient.

Most of the "sellers" of receipts were former clients of the Jones Company. Some of them had bought their receipts as investments. Past association had begotten a degree of confidence. But Jones did not rely altogether upon such confidence in proceeding with his new venture. He resorted to an effective strategy more completely to overcome resistance. Taking his cue from a proposal made to him by the United Bottling and Distributing Company of Chicago, which had sought to engage Jones to assist in obtaining for that corporation the receipts of the Jones' clients, defendant prepared a form for a bottling contract between his own corporation and the owners of receipts. Such form as used in the first transaction is as follows:

"R. E. Jones & Co., Inc.
"315 West Ninth Street
"Los Angeles, California
"Contract

"Frank G. Lilygreen, 2650 Flower Street, Huntington Park, California, hereinafter called the Seller, and R. E. Jones & Co., Inc., hereinafter called the Buyer, contract and agree by and between themselves unto the following:

"1. The Seller hereby sells and assigns to the Buyer the following whiskey:

Number of Barrels	Description
35	Bernheim, January & February 1936 distillation Above whiskey to be bottled in August, 1941.

Title to pass upon delivery to the Buyer from the Seller of appropriate whiskey warehouse receipts and execution of this agreement.

"2. The Buyer intends to have said whiskey bottled after the same has reached four years of age or over and will offer the bottled goods for sale. Within thirty days after said whiskey has been bottled for sale the Buyer shall pay to the Seller such amount which the Buyer receives from the sale of said bottled goods (such sale to be made at the then prevailing Chicago market price), less all taxes, costs, expenses advanced or incurred by the Buyer in connection with the withdrawal of the whiskey from storage, transportation, bottling, stamping, labeling and $1.50 per case (Buyer's selling expense and profit). The Buyer reserves the right to have bottled and pay for (as herein contemplated) portions of the said whiskey from time to time as it reaches four years of age or over.

"3. The Seller vouches himself to be the true and lawful owner of the said goods with full right and authority to dispose of the same in the manner aforesaid and further agrees to warrant and defend the said goods to the said Buyer against all claims and demands. Accepted at the Office of the R. E. Jones & Co., Inc., Los Angeles, California.

"Dated February 14, 1940
"Frank G. Lilygreen (Seller)
"R. E. Jones & Co., Inc.,
"By Roger E. Jones (Buyer)"

By the use of this form and by his simultaneous declarations and promises defendant persuaded his clients to execute contracts and thereby gained possession of their receipts. The value of the receipts of each of the complainants was established by expert testimony and by proof of the sums received from actual sales of the whiskey in bulk. Those values ranged from $202.00 to $4,645. Instead of placing each warehouse receipt in a trust or escrow, as he had promised each party, to wait until the time for bottling should arrive, he made a sale of the whiskey represented by the receipt within two weeks after obtaining it. In one or two of the transactions the Jones Company was indebted to the vendee, in which event the proceeds of the sale of the liquor represented by the receipt were credited by the vendee to the account of R. E. Jones and Co. Following all of the other sales the money received by the defendant was deposited in the bank account of appellant's corporation at Los Angeles and was thereafter checked out by defendant in payment of the operating expenses of that company and of the expense of developing a mine at Downieville, California.

The criminal intent of defendant was further shown in that prior to the fall of 1939 the only source of income of the Jones Company was the sale of receipts. Commencing with January, 1940, that corporation transacted none of its customary business. For the year 1939, it had sustained a loss of $9,669. But from January, 1940, until May, 1941, it received $23,137 from the sales of the receipts taken from the complainants, and the further sum of $13,182 taken from three investors for the purpose of purchasing whiskey for them. Thus the total sum from both sources was in excess of $36,300, $30,439 of which was expended in the development of the mine.

Prior to 1940, Jones had associated with him in buying and selling receipts one Jasper, each owning fifty per cent of the Jones Company stock. They organized the Caledonia Development Company, hereinafter referred to as the Caledonia, to exploit and develop their mining property and veritably flooded its stock, which, with its water, was carried on the corporate books at a grossly exaggerated value. They had 200,000 shares issued to themselves for the mine of a book value of $9,560. Jones and his company controlled the Caledonia. Besides these worthless Caledonia stocks the Jones Company carried on its books at grossly exaggerated values a number of worthless accounts.

Upon the decline of the whiskey market and of investments in whiskey warehouse receipts in the fall of 1939, appellant sent Jasper to Downieville to supervise the mining operations while he remained in the Los Angeles office of the two corporations. Before January, 1940, Jasper had returned to Los Angeles to urge upon Jones the need of a Trommell screen and of additional money with which to operate the mine. Defendant told him to procure the needed equipment: that the money would be available. Jasper returned to the mine and soon deposits began, and continued, to be made at Downieville until the $30,439 had been received and expended. Prior to April, 1941, defendant had consummated all of the transactions which furnished the basis of his indictment in May, 1942. While Jones was negotiating for the receipts the books of both corporations were kept in his office by the same bookkeeper, and defendant from time to time examined them. At appellant's request Jasper severed his connection with both corporations in September, 1940.

Defendant argues that the deal with each "seller" was a civil transaction; that there was no proof of the existence of any warehouse receipts or of the inability or indisposition of defendant to fulfill them; that there was no proof of the value of the receipts; or of a breach of the bottling contracts. But established facts show that by the time appellant's business of dealing in receipts had failed to produce a profit he had become enamored of the mining venture, needed money to develop it and perceived that the whiskey business offered no legitimate channel whereby to gain the necessary funds. With his imagination lilting with visions of fortunes from gold, he launched his campaign to gain possession of the receipts of his erstwhile patrons. Cloaked in the draperies of his corporation and pretending to act in its behalf, he boldly approached his unsuspecting victims. He assured them that he would not only save them from loss, but would make them profits. Viewing his scheme most charitably and conceding that he intended ultimately to repurchase the whiskey, bottle and sell it and remit to the owners, yet he could have planned to do no less than to gain possession of the receipts, convert them promptly into cash and utilize the proceeds in developing his mine. He may have intended there to make a "cleanup," return and repurchase the receipts. But no such design was divulged to his victims. He caused them to believe that their receipts would be held in an escrow until the whiskey should be removed from storage to be bottled and sold for their accounts. After months had passed he lethalized them with his false reassurances that their receipts were being held by a Chicago firm and that they would suffer the loss of much money if the whiskey were bottled on the date he had originally designated. So eager was he to acquire the funds needed for his favorite enterprise that he bargained with a Mr. Bailey to purchase and bottle 300 barrels at a cost of $10,500, $8,000 of which sum was actually paid to defendant in small, semi-monthly installments. He consummated a similar transaction with the witness Williams, who paid a total of $2,008.36 for forty five barrels. When that gentleman made final payment of $800 in February, 1941, he received the bottling contract but never obtained the 45 barrels or a warehouse receipt or the money he had paid to defendant. Of the sixteen complainants whose losses support the judgments, not one received any portion of the sum advanced, with the sole exception of Mrs. Lundquist, to whom Jones repaid $200 of the $3,263.42 advanced by her on the purchase of 150 barrels of whiskey. When she offered to pay the balance of the $4,500 he advised her that he had sold her receipts and that the $200 was a partial payment.

[3, 4] Upon proof of such facts the jury was amply warranted in returning the verdicts. The bottling contract and the false representations and promises of defendant constituted a trick and device by which defendant gained possession of the receipts while his victims did not intend to part with title. He dissipated the moneys thus garnered on his two corporations, in which not a complainant had the slightest interest. This was done by his checking the funds out of the bank in which he had deposited them to the account of the Jones company. Although each deal in its incipiency bore the color and trappings of a normal, civil contract, yet when subjected to a post mortem it exhaled the stench and disclosed the carcass of a fraud. People v. Epstein, 118 Cal.App. 7, 10, 4 P.2d 555. There appears no sign of good faith at any turn. Each taking and appropriation was a grand theft. The use of the corporate name and the promises made in accomplishing his purpose were a camouflage of such common variety that no excess of genius was required to discern the fraud. Parol evidence of all that occurred was admissible to show the intention of defendant. People v. Robinson, 107 Cal.App. 211, 221, 290 P. 470. Not one contractee suspected at the time of receiving his contract that before the next change of the moon his receipt would have passed to some stranger.

The contention that there was no proof of the existence of the receipts is without support. Each complainant testified that he had delivered his receipts to Jones, who testified himself that he had received them under a bottling contract and thereafter sold the liquor in bulk. Their profert could have added nothing to the sum total of the evidence of their theft. Their existence at the time of their acquisition and embezzlement was firmly established. Their exact language was collateral and therefore immaterial.

Appellant insists that there was no proof that he breached his contracts. But to each contractee he promised to "have said whiskey bottled" and sold and the proceeds less specified deductions remitted to "seller." He did not assume the payment of any charges subsisting or to accrue against the whiskey but only the right to deduct any such tax or other expense as he might have been required to pay. In all of the sales by Jones of the whiskeys represented by the receipts taken from complainants the purchasers assumed all obligations which constituted liens on the stored merchandise. Furthermore, the contention that there was no proof that Jones breached his contract is immaterial. Despite the language of the bottling contracts, the jury were justified in finding that those contracts and appellant's promise to escrow them were a snare, or an artifice, or a trick, for procuring possession of the coveted receipts, and that they were promptly sold and the proceeds dissipated by defendant. His subsequent deceitful statement that to sell the whiskey at a still later date would be more profitable than to bottle and sell it at the time originally promised was made to calm the fears of his victims and to induce them to feel secure while he negotiated with fate for the continuance of his liberty.

It is not to be concluded that the case was tried upon the theory that whiskey was stolen because the prosecutor at times asked a complainant while testifying whether he had told defendant that he might sell his whiskey in bulk. The very contracts issued to complainants on which appellant places reliance as proof of his innocence provided for delivery of "appropriate whiskey warehouse receipts." Each complainant testified in effect that he delivered his receipts to Jones at his office, and got in turn a bottling contract. By the preliminary questions concerning the whiskey owned or with reference to its value it was not intended to adopt "theft of the whiskey" as the theory of the prosecution. The receipts were negotiable. They were delivered to appellant who in turn passed them along to his vendees. In its instructions the court advised the jury that if the thing stolen is a written instrument "the value of the property the title to which is shown thereby * * * is the value of the thing stolen." See 492, P.C. Such facts indicate clearly that theft of the receipts or the embezzlement of the moneys received for them was the theory of the prosecution.

There Was No Prejudicial Error in the Instructions.

[5, 6] Every phase of the law properly applicable to the issues was presented by an appropriate instruction. It was therefore not incumbent upon the court to read any instruction offered by defendant. His complaint that he offered 100 instructions not one of which was accepted is without merit. Actually he submitted 84. The availability of an offered instruction is not determined by the size of the volume of which it is a part. Each must be appraised according to its own merits and its use must be determined by the exigencies obtaining.

[7, 8] The assignment as error that the jury were not properly advised that they must agree upon which of the three theories of theft as defined in section 484 of the Penal Code was committed is without support. Such instruction was unnecessary. People v. Caldwell, 55 Cal.App.2d 238, 255, 130 P.2d 495. In each count defendant was accused of grand theft. The jury were privileged to determine as to each count only whether that crime had been committed. By which of the methods of the committing grand theft, embezzlement, larceny by trick and device, or false pretenses was unimportant. All of the theories of theft were properly defined to the jury and the elements of each were named. Also, there was the added instruction that they must find, beyond a reasonable doubt under any theory, that he appropriated the receipt, or the money entrusted to him for investment, feloniously with intent to steal and that he gained possession of the receipts or money by false pretense or by trick and device. If they did so find with reference to the warehouse receipts or the moneys advanced it was inconsistent with a taking "openly and avowedly, and under a claim of title preferred in good faith. * * *" Section 511, P.C. Had the jury believed defendant, the instructions given were sufficient authority to acquit him. The moment he appropriated the funds belonging to his clients to the use of his corporations the crimes of grand theft were committed. People v. Talbot, 220 Cal. 3, 28 P.2d 1057.

[9, 10] Four of the refused instructions bore upon the good faith of defendant. For an accused to be entitled to an instruction that he must be adjudged innocent if he took the property openly and avowedly and under a claim of title in good faith, it must reasonably appear from the evidence that such defense is made in good faith. People v. Photo, 45 Cal.App.2d 345, 353, 114 P.2d 71. The record discloses no honest purpose of Jones but only his zeal to acquire and promptly sell the receipts and to appropriate the proceeds. The contracts alone evince a purpose to outsharp the "seller." Nothing was paid. No obligation of the owner was assumed. In November 1941 appellant wrote eastern dealers for prices on bottling whiskey he "controlled," whereas the whiskey had been sold months before. Moreover, the sales of the whiskey while he held the receipts in trust dispels at once all right to assert a claim of title in good faith. People v. Steffner, 67 Cal.App. 23, 227 P. 699. That he might have intended to regain the receipts from his vendees is no defense or evidence of good faith if in fact he did not do so. People v. Bracklis, 54 Cal.App. 40, 200 P. 1062.

[11-13] Defendant submitted to the court some 24 instructions to acquit him of responsibility because the transactions of the "sellers" were with the Jones Company. By this host of instructions defendant sought to make the corporation alone civilly liable for the conversion of the receipts. They constitute a series of arguments to persuade the jury that the bottling contracts vested title to the receipts in the Jones Company, an "artificial creature," distinct from its officers; that the latter may act as corporate agents and not be personally liable; that inasmuch as Jones, as such agent, received the receipts for the corporation, which sold them, he should be acquitted; that unless the contracts bound Jones personally, he is not criminally liable; that if Jones entered into the contracts on behalf of the corporation, he must be acquitted. These instructions assume that the corporation was an innocent creature, and had no knowledge of the fraudulent device of its master who must be without guilt because of the innocence of his artificial agent. Number 24 would absolve corporate officers from fraud if committed in acquiring property for the corporation; number 25 was an attempt to order an acquittal upon the mere finding that the transfer of the receipts passed title. Both omitted all reference to the fraud practiced or to the artifice executed upon the owners of the receipts. It is the duty of the trial court to refuse an instruction to acquit a defendant upon one certain phase of the evidence regard-

less of other proof and of other theories presented. People v. Clark, 145 Cal. 727, 729, 79 P. 434. The remainder of this group of defendant's rejected instructions (26, 27, 29, 34, 35, 36, 37, 40, 41, 48, 49, 50, 51, 81) constitutes a series of declarations which in effect acquit a corporate officer of fraudulent acts if it be shown that the corporation thereby acquired title to the fruits of his crimes. Such is not the law. Where a corporation is under the control of one person who violates penal statutes by use of the corporate name, the artificial entity will be ignored while the person who actually commits the criminal act will be dealt with as an individual. People v. Epstein, 118 Cal.App. 7, 10, 4 P.2d 555.

[14] Five rejected instructions (1–A, 1–C, 2, 5, and 30) all in effect declare that the existence of a specific intent to steal is an element of grand theft that must be proved. In each of the instructions given on larceny, embezzlement, and false pretense, the existence of the criminal intent was defined as an essential element with a statement as to the time that intent must have entered the mind. It was therefore not error to refuse the proffered instructions on that feature of the law. People v. Robinson, 107 Cal.App. 211, 228, 290 P. 470.

[15] Nine offered instructions (6, 7, 8, 14, 44, 45, 62, 73 and 79) would have advised the jury that the nature of defendant's transactions must be determined by the bottling contracts. Such is an erroneous concept of the law. The state was not a signatory to those instruments (People v. Robinson, supra, 107 Cal.App. at page 221, 290 P. 470) and was not bound thereby. The contracts were merely a part of the machinery employed in perpetrating the trick to gain the receipts. People v. Martin, 102 Cal. 558, 568, 36 P. 952.

[16] With reference to 33 of the proffered instructions bearing upon theft, 12 of them (10, 42, 53, 59, 63, 63A, 65, 70, 71, 72, 86, 87) are attempts to state the law which was correctly given by the court. The remaining 21 contain either misstatements of the law or they omitted essential elements. The ability of defendant to replace the receipts would not have entitled him to an acquittal as declared in number 11. Sec. 514, P.C; People v. Talbot, 220 Cal. 3, 16, 28 P.2d 1057. Number 12 would have imposed upon the state the burden of proving the existence of the merchandise represented by the receipts. The whiskey might have been burned or removed by burglars after its storage. All such instructions would have stultified defendant in view of his own testimony that he had sold the whiskey for his corporation. Number 13 omits to say that continued possession may be inferred from the issuance of the receipt. Sec. 1858, Civ. Code. Number 17 omits all reference to the question of the alleged fraud, or trick used in gaining possession of the receipts, but merely states that title may be passed as in the case of any negotiable instrument. In like manner we might continue with the other instructions on theft by showing their several erroneous contents or fatal omissions, but the discussion would be mere repetition. Most of them demonstrate an attempt on the part of defendant to effectuate a favorable verdict by a consideration of the bottling contracts only to the exclusion of the deceptive arts practiced by him. It was not incumbent upon the state to prove that the whiskey was in storage at the date of trial. Defendant testified that he had already sold it in bulk.

[17, 18] Many of the rejected instructions contain statements which would have deprived the jury of its privilege of finding the facts from all of the evidence. Proof of the financial status of defendant's corporations was rendered necessary by reason of his assertions in court that the Jones company and the Caledonia had assets sufficient with which to recompense the complainants. Such proof, adverse to defendant's assertions, and the argument thereon were proper, and the instruction (89) to disregard them would have been error. Moreover, that instruction declared postively that there was no evidence that the stock of either corporation was watered.

[19] Finally, the five proposed instructions (66, 67, 80, 88, 90) bearing upon the evidence are either repetitious or they are in themselves erroneous. Morover, 66 is argumentative. Number 67 in effect says that the evidence is reasonably susceptible of two interpretations and that the jury are to adopt the one leading toward innocence. Such an instruction would be applicable only in a case in which the proof is all circumstantial. People v. Marvich, 44 Cal.App.2d 858, 861, 113 P.2d 223.

[20-22] Number 88 is neither more nor less than an argument in justification of

defendant's refusal to make a statement to the district attorney when that officer was investigating defendant's acquisition of the receipts. It does not correctly state the law. Silence under accusation of the police is evidence tending to prove guilt. People v. Sanchez, 35 Cal.App.2d 231, 235, 95 P.2d 169. Its weight as evidence is for the jury. The jurors might properly have reasoned that if defendant believed at the time of the investigation he had merely engaged in civil transactions with complainants, he would have said so to anyone. The court instructed the jury that the testimony with reference to Jones' refusal to be interviewed by the district attorney should be considered as evidence of impeachment only. Number 90 would have denied the jury the right to consider as proof a certain letter written by witness Smith to the United Bottling Co. and received in evidence as a part of the res gestae of Smith's deal with defendant. The letter was some corroboration of the testimony of Smith, who had written the letter to United Bottling Co. after appellant had falsely told Smith that he had sent Smith's receipts to that company.

No Prejudicial Error in Rulings on Offered Evidence.

[23, 24] While under cross-examination appellant was asked certain questions "in order to ascertain whether he had not refused to make a statement to the District Attorney on March 18, 1942, relative to his connection with the Jones Company on the ground that it might tend to incriminate him. The basis of the objection to each question was that it was not proper cross-examination. It is true that on his direct examination nothing had been asked him by his own counsel concerning such statement. But the question was not asked to gain proof of guilt but, as the court stated, "by way of impeachment only." The court's ruling did not impair appellant's constitutional privilege of declining to discuss the matters under investigation. People v. Kynette, 15 Cal.2d 731, 749, 104 P.2d 794. Therefore, it was proper for impeachment purposes. Sec. 2051, Code Civ. Proc. That he may at that time have acted upon the advice of counsel did not make it inadmissible. People v. Graney, 48 Cal.App. 773, 192 P. 460; Sec. 13, Art. I Constitution.

[25] Defendant next assigns as error the admission in evidence of the books of account of the Jones company. This ruling was correct. Sec. 1953f, Code Civ.Proc. The books were kept in the company's office and were posted from "items which Mr. Jones handed back" to the bookkeeper who was directly employed by him. Appellant had continuous access to the records, frequently inspected them and showed clients their accounts. On closing his office he took the records with him. But in view of appellant's testimony that he had made the bottling contracts, received the warehouse receipts and sold the whiskey, there was no occasion whereby appellant could have been prejudiced by any books. Whether he had sold it in good faith for his corporation or fraudulently for his personal benefit was a question for the jury's determination.

[26] The testimony of the salesmen of appellant was properly admitted. Each of them was directed by Jones to call upon the clients of the Jones company to induce them to exchange their receipts for bottling contracts. They were to be paid $1.50 for each barrel of whiskey acquired. All "sellers" talked with Jones either before or after delivery of their receipts. The jury were warranted in finding that the representations of the salesmen were either first authorized or subsequently approved by appellant. People v. Robinson, supra, 107 Cal.App. at page 226, 290 P. 470; People v. Bryant, 101 Cal.App. 84, 89, 281 P. 404.

Much of the briefs of appellant contain arguments properly addressed to triers of fact. They are of no concern to the appellate court where there is substantial evidence to support the verdict. In re Estate of Winzeler, 42 Cal.App.2d 246, 248, 108 P.2d 720.

The judgments are affirmed.

W. J. WOOD and McCOMB, JJ., concur.

61 Cal.App.2d 755

ELLIS et al. v. NAVARRO et al.
Civ. 14153.

District Court of Appeal, Second District, Division 2, California.
Dec. 14, 1943.
Hearing Denied Feb. 10, 1944.

1. Partnership ⚷139

Where plaintiff and partner contracted with defendants for transfer of part of partnership property and business, and during plaintiff's absence partner signed agreement, under defendants' inducement, purportedly relieving all parties from original contract, but on condition that it should be satisfactory to plaintiff, and defendants remained in possession of business and property transferred, the purported contract signed by the partner was not binding on plaintiff. Civ.Code, § 2403(2).

2. Conspiracy ⚷14
Partnership ⚷199

Where plaintiff-partner allegedly had been deprived of possession of partnership business and property through conspiracy between copartner and others, it was not necessary that action be brought in name of partnership or that it be limited to accounting between partners.

3. Conspiracy ⚷14

A partner who is deprived of possession of business through a conspiracy between copartner and third persons may sue the copartner and the third persons for damages on the conspiracy or he may sue third persons alone.

4. Conspiracy ⚷20

In partner's action for damages resulting from conspiracy between copartner and others whereby partner was deprived of possession of partnership business and property, measure of damages was amount which would compensate for all detriment proximately caused regardless of whether it could have been anticipated. Civ.Code, § 3333.

5. Conspiracy ⚷20

In partner's action for damages resulting from conspiracy between copartner and others whereby partner was deprived of possession of partnership business and property, partner was not limited to actual value of property of which he was deprived, but he was also entitled to prospective profits which he lost as natural and direct consequence of the wrongful conduct of defendants. Civ.Code, § 3333.

6. Conspiracy ⚷19

In partner's action for damages resulting from conspiracy between copartner and others whereby partner was deprived of possession of partnership business and property, evidence of profits, both past and present, was admissible to determine compensation to which partner was entitled.

7. Evidence ⚷20(2)

It is common knowledge that a loan on property could not be obtained from financial institution unless property was worth far more than amount of loan.

8. Conspiracy ⚷19, 20

In partner's action for damages resulting from conspiracy between copartner and others whereby partner was deprived of possession of partnership business and property, evidence sustained finding that defendants converted partner's business and property to their own use, and that partner was damaged in amount of $10,332.24. Civ.Code, § 3333.

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Louis Ellis and Rite Products Company, consisting of Louis Ellis and Norman E. Glover, against Frank B. Navarro, Jean J. Minthorne, and another for damages for conversion of plaintiffs' business and property. From an adverse judgment, the named defendants appeal.

Affirmed.

Benjamin J. Goodman, of Los Angeles, for respondents.

Donald Kolts, Oral Finch, and McLaughlin & McGinley, all of Los Angeles, for appellants.

W. J. WOOD, Justice.

A judgment in the sum of $10,332.24 was entered in favor of plaintiff and against defendants Frank B. Navarro, Jean Minthorne and Norman E. Glover. The two defendants first named have appealed.

Prior to July 7, 1941, plaintiff and defendant Glover were partners doing business under the name, Rite Products Co. They owned coin operated phonographs which they placed in various locations throughout Southern California under arrangements whereby the income from the machines was divided between the owners of the locations and Rite Products Co. Defendant Navarro was engaged in the same kind of business, which he conducted in direct competition with Rite Products Co. In addition to the phonograph business referred to, Rite Products Co. owned and operated marble game machines which were placed in various locations under arrangements similar to those under which the phonographs were operated. Rite Products Co. also owned a retail record store.

A contract in writing was signed on July 7, 1941, by Ellis, Glover, Navarro and Minthorne by which it was agreed that the phonograph business which had been conducted by Rite Products Co. should be transferred to Beacon Music Co., a corporation which had previously been organized by Navarro and Minthorne for some other purpose. No stock in Beacon Music Co. theretofore had been issued and the corporation was not engaged in any business. By the terms of the contract 150 shares of the capital stock of Beacon Music Co. were to be issued to Navarro, 150 shares to Minthorne and 150 shares to Ellis. It was set forth in the contract that Ellis and Glover had "an equity" in the phonographs, records and other personal property, an inventory of which was attached to the contract; that the property described in the inventory was incumbered by contracts upon which there was a balance due of approximately $14,500 and that the reasonable loan value of the equity of Ellis in the personal property described in the inventory was estimated to be $14,500. The 450 shares of stock were to be issued "to the extent of the reasonable loan value of the equity of Ellis * * *". It was provided in the contract that Navarro and Minthorne should arrange for the refinancing of the existing indebtedness on the personal property and should procure a loan from the Morris Plan Bank of San Francisco for this purpose, they agreeing to guarantee the loan if necessary. It was provided that the salaries to be drawn from the corporation by Navarro, Minthorne and Ellis were to be equal but that none of them should be required to devote full time and attention to the business of Beacon Music Co. The exemption of the marble game business of Rite Products Co. from the contract was recognized by a provision that Ellis could occupy a portion of the premises of the corporation for his marble game business and pay one-third of the rent therefor. The contract recognized the fact that Navarro was engaged in a similar business for his own account and a provision was inserted therein that he should "not take any of the business or spots of the Beacon Music Co. and the Beacon Music Co. will not take any of the business or spots of Navarro".

As soon as the contract was signed, Navarro and Minthorne took possession of the phonograph machines and equipment of Rite Products Co. Ellis left the state on vacation and did not return until September 23, 1941. Navarro and Minthorne claimed that during the absence of Ellis it developed that the total liabilities of Rite Products Co. were in excess of $17,000 and that it would be impossible to transfer the assets of Rite Products Co. to Beacon Music Co. without discharging the liabilities in excess of the $14,500 loan which had been procured. They complained of the absence of Ellis from California and on September 5, 1941, induced Glover to sign an agreement, purportedly on behalf of Ellis as well as himself, whereby all of the parties were relieved from the obligations of the contract of July 7, 1941. Ellis and Glover were to refrain from engaging in the record or phonograph business in Los Angeles county for a period of three years. Navarro and Minthorne remained in control of the phonograph business and the personal property which had been transferred. The sum of $1,000 was paid to Glover for Rite Products Co.

Upon his return to Los Angeles Ellis repudiated the deal made by Glover and commenced this action, claiming that Navarro, Minthorne and Glover had conspired against him and had converted his personal property and business. The main contentions made on this appeal are that the evidence is insufficient to sustain the findings of the trial court that Ellis' property and business were converted and that the damages suffered were much less than the sum awarded.

Respondent points to a number of breaches of the contract of July 7 by appellants, notably the failure to have any stock of Beacon Music Co. issued; the appropriation by appellants of receipts from the business to their own use; the refusal of appellants to permit him to use any part of the premises for his own business; and the improper use of service locations of Rite Products Co. for Navarro's private business. Aside from these charges, it is thoroughly established that respondent has been ousted from his business without justification. It was especially provided in the contract that the parties would not be required to devote full time to the business, each having a separate business of his own. The lengthy vacation taken by respondent, while perhaps subject to criticism, did not justify appellants in ousting him from the business. The record contains evidence that the claims against the property mentioned in the agreement of July 7 were discounted and were settled for the sum of $11,336.64. The trial court was justified in concluding that the total indebtedness of Rite Products Co. was not more than the amount of the loan procured in accordance with the agreement of the parties. Moreover, it was not stated in the agreement that Rite Products Co. was free from debts, the representation being that the personal property to be conveyed to Beacon Music Co. was encumbered by contracts upon which there was a balance due of approximately $14,500.

[1] The court properly held that the purported contract of September 5, 1941, was not binding upon respondent. The instrument was not signed by appellants, and Glover signed it on the condition that it should be satisfactory to respondent. Glover testified:

"Q. And what else was said? A. Well, I told him at the time when they told me to sign that agreement that I couldn't sign without Mr. Ellis and that the agreement would be cancelled if it wasn't entirely satisfactory to Mr. Ellis, and I would also have to have Mr. Minthorne's signature on it.

"Q. What did they say about that? A. They said they would get both signatures on it and if it wasn't—if the document wasn't satisfactory to all parties it would go back the way it was originally intended.

"The Court: Whose were the 'both signatures'? A. Mr. Minthorne and Mr. Ellis."

Moreover, Glover had no authority to cancel respondent's rights under the agreement of July 7 or to dispose of his interest in the partnership property. "An act of a partner which is not apparently for carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners." Sec. 2403, subd. (2), Civil Code. It is apparent from the testimony quoted and from other testimony in the record that Glover was not authorized to execute the document dated September 5 and that appellants were aware of his lack of authority.

[2, 3] It was not necessary that the action be brought in the name of Rite Products Co. or that it be limited to an accounting between partners. A partner who is deprived of possession of the business through a conspiracy between a co-partner and a third person may sue the partner and the third party for damages on the conspiracy or he may sue the third person alone. Sterman v. Ziem, 17 Cal.App.2d 414, 420, 62 P.2d 160.

[4-7] Appellants charge that the damages awarded are excessive. In such an action as the present one the measure of damages is the amount which will compensate for all the detriment proximately caused whether it could have been anticipated or not. Civil Code, sec. 3333; Moropoulos v. C. H. & O. B. Fuller Co., 186 Cal. 679, 200 P. 601. Respondent is not limited to the actual value of the property of which he was deprived but he is also entitled to prospective profits which he lost as the natural and direct consequence of the wrongful conduct of appellants. Evidence of profits, both past and present, is admissible to determine the compensation to which he is entitled. Caspary v. Moore, 21 Cal.App.2d 694, 696, 70 P.2d 224, and cases there cited. In the agreement of July 7, signed by all of the parties, it is stated that Ellis and Glover had an "equity" in the personal property in the sum of $14,500. Of this sum two-thirds was owned by Ellis and one-third by Glover. It is provided in the agreement that a loan should be obtained from the Morris Plan Bank on this property in the sum of $14,500. It is common knowledge that such a loan could not be obtained unless the property was worth far more than the amount of the loan. During the period from July 7, to October 23, appellants collected from the coin operated phonograph machines the sum of $10,307.97. They did not present their records to show what part of this sum should be taken out for expenses but it is reasonable to conclude that the business was quite profitable. The court found upon sufficient evidence that appellants also had received the sum of

$967.43 as additional proceeds from the operation of the business. There is also evidence that respondent is entitled to the sum of $540 for the loss of the use of trucks improperly taken by appellants. We cannot hold that the amount of damages allowed by the trial court is unreasonable.

[8] The evidence is ample to sustain the findings of the court both as to the conversion of respondent's business and property and as to the amount of the damages suffered.

The judgment is affirmed.

MOORE, P. J., and McCOMB, J., concur.

61 Cal.App.2d 658

HOLLYWOOD GARMENT CORPORATION v. J. BECKERMAN, Inc.

Civ. 14197.

District Court of Appeal, Second District, Division 2, California.

Dec. 9, 1943.

1. Corporations 🔑52, 668(1)

A corporation is a resident of state in which it is created, and process of court of another state cannot reach the corporation so long as it confines the exercise of its corporate business within state of its residence.

2. Judgment 🔑141

Where defendant corporation filed affidavit in support of its motion to vacate default judgment which had been entered after service of process under statute upon Secretary of State in which it stated that it had at no time conducted any business in state, and no counter-affidavit was filed, defendant's motion was properly granted. Civ. Code, §§ 406, 406a.

3. Judgment 🔑135, 159, 518

A motion to set aside default judgment on ground that court had no jurisdiction over defendant was a "direct" and not a "collateral attack" upon the judgment, and trial court properly received defendant's affidavit in support of its motion to vacate.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack" and "Direct Attack".

4. Judgment 🔑147, 153(2)

Defendant did not forfeit its right to object to jurisdiction of the court by its failure to appear before entry of default judgment, and was limited only by rule that its motion to vacate must be made within a reasonable time. Code Civ.Proc. § 473.

5. Judgment 🔑153(2)

The standard for determining whether a motion to vacate a default judgment is made within a reasonable time is the period of six months fixed by statute. Code Civ. Proc. § 473.

6. Judgment 🔑159

Corporate defendant was not required to state in its affidavit in support of motion to vacate default judgment on ground that it was a foreign corporation not doing business in state, and that therefore courts of California had no jurisdiction over it, that it had a meritorious defense, since, if motion was granted, defendant could not be compelled to make a defense on the merits. Civ.Code, §§ 406, 406a.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Hollywood Garment Corporation against J. Beckerman, Inc., for alleged breach of a written contract to deliver merchandise. From an order setting aside a default judgment against defendant, the plaintiff appeals.

Affirmed.

Erwin P. Werner and Nathan Goldberg, both of Los Angeles, for appellant.

Simon & Garbus, of Beverly Hills, for respondent.

W. J. WOOD, Justice.

Plaintiff has appealed from an order setting aside a default judgment against defendant.

It is alleged in the complaint, filed on October 27, 1941, in which a cause of action is set forth for the alleged breach of a written contract to deliver merchandise, that defendant is a foreign corporation and that at all times mentioned in the complaint it "did business in the State of California". An affidavit was filed on August 28, 1942, by plaintiff's attorney in support of an application for an order for service of summons under section 406a of the Civil Code. In this affidavit it is stated that defendant is a foreign corporation with its principal offices at 152 Madison Avenue, New York City, that no agent had been designated upon whom process could be served and that after due search no agent or other officer of defendant corporation could be found in California. Thereupon an order was made by the superior court authorizing service of summons upon the Secretary of State in accordance with the terms of section 406a of the Civil Code. The default of defendant was entered on October 27, 1942, and on the same date judgment was entered in favor of plaintiff in the sum of $10,000. On March 11, 1943, defendant gave notice that it would on March 19, 1943, appear specially and move for an order to vacate and set aside the default and the default judgment upon the grounds that the court had no jurisdiction over defendant and that defendant was a foreign corporation which had not at any time done business in the State of California. An affidavit of the president of defendant corporation was filed with the notice of motion. The motion of defendant was granted on April 23, 1943.

[1, 2] A corporation is a resident of the state in which it is created. The process of the court of another state cannot reach a New York corporation so long as it confines the exercise of its corporate business within the state of New York. But it is generally provided by statute that when a corporation conducts business in a state other than that of its creation it is amenable to the process of the courts in the states where it conducts business. Jameson v. Simonds Saw Co., 2 Cal.App. 582, 84 P. 289. In California secs. 406 and 406a of the Civil Code provide for the designation of an agent by a foreign corporation doing business in the state and for the service of process on a corporation doing business within the state which has failed to designate an agent for such purpose. Although plaintiff alleged in the complaint that defendant was doing business in California, this allegation was subject to refutation by defendant. In the affidavit filed in support of the motion to vacate the judgment it is positively stated that defendant corporation at no time maintained an office or show room in the State of California or conducted any business therein and that the transactions referred to in plaintiff's complaint were consummated in the states of New York and Pennsylvania. The issue was thus fairly presented to the court and plaintiff had the opportunity to prove its allegation that defendant was doing business in California. But no counter affidavit was filed. Under the circumstances the court properly granted defendant's motion.

[3-6] Plaintiff argues that since defendant's motion was made after the entry of the default of defendant, a collateral attack is being made upon plaintiff's judgment. In this plaintiff is in error. Defendant made a direct attack upon the judgment and the trial court properly received its affidavit in support of the motion to vacate. Shelley v. Case De Oro, Ltd., 133 Cal.App. 720, 722, 24 P.2d 900. Defendant did not forfeit its right to object to the jurisdiction of the court by its failure to appear before the entry of the default and was limited only by the rule that its motion to vacate must be made within a reasonable time. It has been held that the standard for determining whether such a motion is made within a reasonable time is the period of six months fixed by section 473 of the Code of Civil Procedure. Smith v. Jones, 174 Cal. 513, 516, 163 P. 890. Defendant's motion was presented well within the six month period. It was not necessary for defendant to state in its affidavit that it had a meritorious defense, for, the courts of California not having jurisdiction to enter the judgment, defendant could not be compelled to make a defense on the merits.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.

61 Cal.App.2d 788

DAVIS v. WOOD et al.

Civ. 6997.

District Court of Appeal, Third District, California.

Dec. 16, 1943.

1. Libel and slander ⚷139

Property involved in action for slander of title need not be described in complaint with same degree of particularity required in action to quiet title, all that is required being that plaintiff describe property and his title thereto so that it might be shown wherein defendant had done him injury.

2. Libel and slander ⚷139

Description of property, in complaint for slander of title, as a certain leasehold known as the "Portuguese Mine" and as the same property covered by notices of location recorded by defendants, was sufficient as against general demurrer.

3. Appeal and error ⚷917(1)

On appeal from judgment for defendant pursuant to order sustaining demurrer to amended complaint without leave to amend, the reviewing court must take allegations of amended complaint at their face value; the sufficiency of the complaint only being involved.

4. Libel and slander ⚷139

Complaint, in action for slander of title involving leasehold and mining property, alleging that notices of locations on same property were recorded by defendants maliciously and with knowledge that claims were false, negatived any privilege of defendants to record such notices of location and thereby disparage plaintiff's title to extent necessary to establish their own claims.

5. Libel and slander ⚷139

Elements of damage for slander of title are loss caused by impairment of vendibility and the cost of clearing the title.

6. Libel and slander ⚷139

Complaint, in action for slander of title, alleging that by reason of recording of notice of location of mining property, the leasehold interest of plaintiff was greatly depreciated in value and rendered unmarketable, stated ultimate fact of damages and was sufficient as against a general demurrer.

7. Pleading ⚷225(1)

Trial judge should not sustain a demurrer without leave to amend, where complaint is merely defective for uncertainty.

8. Pleading ⚷225(1)

Plaintiff should not be denied a trial upon merits of his action because some of grounds of demurrer may be well taken if ambiguities can be corrected by amendment.

◆

Appeal from Superior Court, Siskiyou County; Albert F. Ross, Judge.

Action by Stanley Davis against Margaret Wood and others for slander of title to real property. Judgment for defendants, and plaintiff appeals.

Reversed.

Ralph Bancroft, of San Francisco, for appellant.

Charles E. Johnson, of Yreka, Mark M. Brawman, of Yreka, in pro. per., and Chester E. Ross, of Hollister, for respondents.

SCHOTTKY, Justice pro tem.

Appellant commenced an action against respondent for slander of title to real property. The court below made an order sustaining respondents' demurrers to appellant's third amended complaint without leave to amend, and this appeal is from the judgment entered in favor of respondents on such order.

In view of the fact that the entire question involved upon this appeal is whether or not the trial court erred in sustaining respondents' demurrers without leave to amend, we deem it proper to set forth the allegations of the complaint, which are:

"II. That on or about the 29th day of May, 1935, plaintiff herein and one J. Henry Wood, made and executed a certain agreement in writing by the terms and provisions of which the said J. Henry Wood leased and let unto plaintiff herein and plaintiff hired and took possession from said J. Henry Wood, all that certain real estate with the equipment thereon situate in Siskiyou County, State of California, which property is mining property and known as the Portuguese Mine, which said lease was recorded in the office of the County Recorder of Siskiyou County in Vol. 49 of official records, page 203 and said lease is still in full force and effect and plaintiff is the leasehold owner in possession of said real property and equipment.

"III. That during the months of January and February, 1941, all and each of said defendants unjustly, maliciously and unlawfully conspired together to obtain plaintiff's real property hereinbefore described, and that in pursuance of said conspiracy on the part of said defendants and in order to carry out said conspiracy to the injury of plaintiff the said defendants falsely represented and pretended that they had some valid claim upon the land hereinbefore described; and thereupon said defendants prepared or caused to be prepared what purported to be notices of Location of Mining Claims covering and describing the same real property hereinbefore described and so leased to plaintiff, and thereafter and on or about the 19th day of February, 1941, said defendants maliciously caused said purported notices of locations of mining claims to be recorded in the office of the County Recorder of Siskiyou County, State of California, and the same have ever since remained of record in said county and apparently in full force and effect and a cloud upon plaintiff's title.

"IV. That the pretense of said defendants in making said purported notices of location of mining claims and placing the same on record in said county was to create a cloud upon and claim against the property of plaintiff hereinbefore described when in truth and in fact said defendants and each of them well knew and had notice that said land was leased to said plaintiff and well knew and had notice that plaintiff was in actual possession of said land at said time and was actually and honestly working said mining ground in compliance with the terms of said lease and the defendants well knew and had notice that the annual work was done thereon as provided by law and the mining regulations; that defendants or any of them had no interest in the lands above described and the statements made in said notices of locations of mining claims were wholly false and known to be so by each and all of said defendants at the time said notices of locations of mining claims were made and filed with the County Recorder of Siskiyou County; that by reason of said conspiracy, representations, pretenses and false claims of said defendants, the plaintiff has been greatly embarrassed in the free enjoyment, use and disposition of his aforesaid property and the interest of the plaintiff has been and now is greatly depreciated and plaintiff greatly damaged by reason of the said pretended claims of said defendants resulting from and growing out of said conspiracy and said false and fraudulent claims.

"V. That the defendants never had and have not now any interest, right, title or claim directly or indirectly to said land herein before described or any part thereof and that these defendants in recording said instruments acted maliciously and in order to vex and harass plaintiff herein.

"VI. That said defendants, in recording said instruments, cast a cloud upon and a slander upon plaintiff's title to the lands described herein; that the recording of said notices of locations of mining claims by defendants decreased the value of said leasehold interests and rendered it unmarketable, all to the damage of said real estate and to plaintiff in the sum of Ten Thousand dollars.

"VII. That the acts of said defendants, and each of them, as herein alleged, have been actuated by malice, and that said defendants and each of them have been guilty of oppression and malice in their actions, as aforesaid; that this is a proper case for punitive damages and this plaintiff has sustained exemplary or punitive damages in the sum of Five Thousand dollars."

Respondents Brawman and Johnson filed general demurrers and the remaining respondents filed both general and special demurrers. The grounds of demurrer, in addition to the general demurrer, so far as necessary to note here, may be briefly summarized as follows: 1, that the complaint does not state a cause of action in that it does not describe the real property involved with such certainty that the same may be determined from the face of the complaint; 2, that the complaint is uncertain in that it cannot be ascertained therefrom what real property plaintiff claims to hold as a leasehold, what the term of the lease is, and whether it is still in force; 3, that the complaint is uncertain in that it does not appear what interest Wood, from whom appellant leased the property, had in the property; 4, that the complaint is uncertain in that it does not appear therefrom how the recording of said notice of location embarrassed appellant in the use and enjoyment of said property, or decreased the value of his interest, or rendered it unmarketable.

In its ruling upon the demurrer the trial court stated:

"I have also delayed the matter to permit reading the decision of the California Supreme Court in Gudger v. Manton, 21 Cal. 2d 537, 134 P.2d 217.

"In the instant case no pleading of malice or of facts indicating actual or implied malice exists, and, above all, no pleading of proper damages is made. There is absolutely no showing in the complaints, as variously amended, that any deal of plaintiff was interfered with nor any other matter that would justify damages in a slander of title action.

"As the complaint has been amended many times herein, and the issue can now be taken up for appeal if the parties desire, I hereby sustain the demurrers to the third amended complaint without leave to amend."

Appellant in his opening brief states: "It is obvious from the ruling on demurrer that the lower Court based its decision upon the case of Gudger v. Manton, 21 Cal.2d 537, 134 P.2d 217. Appellant will therefore confine his argument to that particular decision." Appellant then proceeds to discuss the question whether it was necessary to allege in his complaint that some pending sale was interfered with, and ignores the other grounds of demurrer. No closing brief was filed by appellant. Respondents in support of the judgment make the following points: (1) The complaint is insufficient because of its failure to describe any real property; (2) defendants are rival claimants to the real property and are privileged to disparage plaintiff's title to the extent necessary to establish their own claims thereto, and (3) the complaint contains no proper allegations of damages. We believe the questions involved upon this appeal can be discussed in a more orderly manner by first taking up the contentions made by respondents.

In support of their first contention, respondents point out that the complaint merely alleges that appellant leased from one Wood certain real property situated in Siskiyou county, and known as the Portuguese Mine, and that the lease was recorded in the office of the County Recorder. Respondents cite the following language from the case of Burkett v. Griffith, 90 Cal. 532 at page 541, 27 P. 527, at page 529, 13 L.R.A. 707, 25 Am.St.Rep. 151: "It was necessary for the plaintiff to set forth and describe in his complaint the property respecting which the defamatory statements had been made, as well as to aver his title thereto, so that it might be shown wherein the defendant had done him any injury."

Respondents also upon this point cite the case of Aalwyn's Law Institute v. Martin, 173 Cal. 21, 159 P. 158, which was an action to quiet title in which the complaint described the property as "rights of way, terminal lands, and all the property known as the 'Ocean Shore Railway property,' more particularly described", giving the volume and number of a page of the public records. Upon appeal the court held that the description was insufficient even upon a general demurrer.

[1, 2] We do not believe that either reason or authority require that in an action involving slander of title, the property involved need be described in the complaint with the same degree of particularity as is necessary in an action to quiet title. As stated in the above quotation from Burkett v. Griffith, supra, all that is required is that plaintiff described the property and his title thereto "so that it might be shown wherein the defendant had done him injury." The complaint in the instant case described the property as "all that certain real estate with the equipment thereon, situate in Siskiyou county, which property is mining property and known as the Portuguese Mine", and set forth that appellant had leased said property from one Wood, which lease was recorded and was in full force and effect, and that appellant was the leasehold owner of said property. The said complaint further alleged that respondents had caused to be prepared and recorded notices of location covering and describing the same real property. It is therefore apparent from the complaint that the property which appellant alleged he was the leasehold owner of, namely, the mining property known as the "Portuguese Mine", was the same property covered by the Notices of Location recorded by respondents. While appellant might well have set forth the description of said property and his interest therein with greater particularity, we do not believe that under the advanced and more liberal and less technical rules of pleading that have been established in recent years, it can reasonably be held that in an action for slander of title, the description of the property and appellant's interest was either insufficient or uncertain.

While a trial court might be justified in requiring an amendment enlarging upon said description, it would not, in our opinion, be justified in sustaining a general demurrer upon that ground; and in fairness to the trial court there is nothing in the record here to indicate that the court's ruling was based upon the alleged insufficiency of the description.

Respondents' second contention in support of the judgment is that defendants are rival claimants to the real property and are privileged to disparage appellant's title to the extent necessary to establish their own claims thereto. In support of this contention respondents quote the following language from Gudger v. Manton, 21 Cal.2d 537 at page 545, 134 P.2d 217, at page 222: "A rival claimant of property is conditionally privileged to disparage or justified in disparaging another's property in land by an honest and good-faith assertion of an inconsistent legally protected interest in himself. See Thompson v. White, 70 Cal. 135, 11 P. 564; Restatement of Torts, § 647. The levy of an execution is an assertion of a claim to an interest in that it is a lien on the property levied upon. Therefore, if in the instant case defendants acted in good faith, that privilege defeats plaintiff's action. Actual malice has a bearing upon the question of good faith."

[3, 4] Respondents assert that the property in question was mining property which was owned by the federal government and would be open to location if the prior locator failed to do the annual assessment work as required by the mining laws, and that if they were in good faith asserting a claim adverse to the appellant they were privileged to disparage the title of the appellant to the extent that was necessary to effect said location. Respondents have apparently overlooked the fact that the complaint alleges that said notices of location were recorded by respondents maliciously and with knowledge that their claims were wholly false. Taking such allegations at their face value, as we must upon this appeal, where only the sufficiency of the complaint is involved, they clearly negative any privilege on the part of the respondents to record said notices of location.

Respondents' final and principal contention in support of the judgment is that the complaint contains no proper allegation of damages, and this appears also to have been the principal ground upon which the trial court sustained the demurrers.

The allegations of the complaint as to damages are in paragraphs IV and VI thereof and have been hereinbefore set forth. Respondents assert that said allegations of damages are insufficient, and the trial court stated that there "was no showing that any deal of plaintiff was interfered with nor any other matter that would justify damages in a slander of title action." The trial court also stated that he had delayed ruling upon the demurrer to permit his reading the decision in Gudger v. Manton, supra, and it is evident that the trial court regarded that decision as determinative of the insufficiency of the allegations as to damages.

In view of the frequent reference to Gudger v. Manton, supra, we think it may be helpful to briefly analyze that case. In 1932, defendant Manton obtained a judgment in New York against plaintiff's wife arising out of a pre-marital tort. In 1935, an action upon said judgment was commenced in California, and a default judgment entered against plaintiff's wife. In 1938 defendant levied and recorded a writ of execution upon all interest of plaintiff's wife in certain described real property standing in plaintiff's name. Plaintiff's wife had no interest in the property, it being plaintiff's separate property. Plaintiff commenced an action to quiet title and for damages and was awarded compensatory damages in the sum of $16,000. The execution was released after the commencement of the action. There was evidence that plaintiff had had two bona fide offers for the property but that the prospective purchasers had withdrawn the offers upon learning of the recording of the execution. The Supreme Court in an exhaustive and well considered opinion held that a finding of damages was sustained by such evidence. The court said at page 554 of 21 Cal.2d, at page 227 of 134 P.2d: "Where, as here, there have been losses of sales and a decline in the market value of property thereafter during the continuance of the disparagement of title (the execution lien here), defendant has not been injured when the court in fixing the damages selects the difference between the amount offered at the sales and the value of the property at the time the execution was released. That rule takes into consideration the effect of the defect in the plaintiff's title with relation to the fluctuation in the value during that time. Those principles have been applied in wrongful attachment cases. See Keystone Pipe & Supply Co. v. Crabtree, 174 Okl. 562, 50 P.2d 1086; Nixon v. First State Bank, 60 Tex.Civ.App. 7, 127 S.W. 882; Hoover v. First Nat. Bank, Tex.Civ.App., 192 S.W. 1149; 7 C.J.S., Attachment, § 559. In Heath v. Lent, 1 Cal. 410, there was no loss of sales by reason of the wrongful attachment and the court seems to reason that the wrong did not cause the depreciation in the value of the property, and there being nothing to show that plaintiff's loss of his opportunity to sell during the continuance of the levy had affected him. In the tort in question the proper measure of damages is the amount which will compensate for all detriment proximately caused thereby. Civ. Code, § 3333."

However, there is nothing in the case of Gudger v. Manton which requires a complaint to show that any pending deal or sale was interfered with, but it was held in that case that evidence that a pending sale was interfered with sustained a finding of damages. Respondents evidently did not take the pains to examine the complaint in Gudger v. Manton or they would not have made the statement contained on page 14 of their brief that appellant "tries to distinguish the case of Gudger v. Manton *where the definite allegations of damages concerned a loss of sales.*" (Italics ours) We have examined that complaint and find that the allegations therein as to damages are much less specific than those in the complaint in the instant case, and are as follows: "That said defendants, and each of them, in causing levy of execution to be made under said writ, cast a cloud and a slander upon plaintiff's title in and to said real property and that the levying of said writ and the maintenance thereof by the refusal of defendants, and each of them, to cause said levy to be discharged and released, decreased the value of said real estate and renders it unmarketable, all to the damage of said real estate and said plaintiff, * * *."

It is, of course, true that the question of the sufficiency of the complaint was not involved or discussed in the Gudger v. Manton case, but it is worthy of note that a judgment for $16,000 based upon a complaint with substantially the same allegations as to damages as are contained in the complaint in the instant case was not attacked either in the District Court of Appeal or in the Supreme Court upon the ground that the complaint was insufficient.

The court, in Gudger v. Manton, quoted with approval Section 624 of Restatement of Torts, as follows: "One who, without a privilege to do so, publishes matter which is untrue and disparaging to another's property in land, chattels or intangible things under such circumstances as would lead a reasonable man to foresee that the conduct of a third person as purchaser or lessee thereof might be determined thereby is liable for pecuniary loss resulting to the other from the impairment of vendibility thus caused."

Section 633 of the same work reads as follows:

"The pecuniary loss for which a publisher of disparaging matter is liable under the rules stated in Sections 624 and 626–627 is restricted to

"(a) that pecuniary loss which directly and immediately results from the impairment of the vendibility of the thing in question caused by publication of the disparaging matter, and

"(b) the expense of litigation reasonably necessary to remove the doubt cast by the disparagement upon the other's property in the thing or upon the quality thereof."

In the comment on said section 633 it is stated:

"b. *Loss caused by prevention of a particular sale.* The most usual manner in which a third person's reliance upon disparaging matter causes pecuniary loss is by preventing a sale to a particular purchaser. The disparaging matter may prevent a sale by causing a purchaser to break an agreement already entered into for the purchase of the thing."

"f. *Loss caused by prevention of a sale to unknown purchasers.* The disparaging matter may, if widely disseminated, cause pecuniary loss by depriving its possessor of a market in which, but for the disparagement, his land or other thing might with reasonable certainty have found a purchaser. In such case the impossibility or the great difficulty of showing the identity of the particular person or persons who were dissuaded from purchasing the thing by the publication of the disparaging matter makes evidence of the owner's inability to avail himself of a ready market for the thing in question sufficient proof of the loss and often of its extent; indeed, this inability to dispose of readily marketable things is also sufficient evidence that the defamatory matter has come to the knowledge of unknown possible purchasers and has led them to refrain from buying."

And, as already quoted, the court in Gudger v. Manton, said at page 555 of 21 Cal. 2d, at page 227 of 134 P.2d: "In the tort in question the proper measure of damages is the amount which will compensate for all detriment proximately caused thereby. Civ. Code § 3333."

[5, 6] From the foregoing statements of the law relating to damages for slander of title, or, to state it more accurately, for wrongful disparagement of title, it is apparent that the elements of damages are the loss caused by the impairment of vendibility and the cost of clearing the title. Therefore, in our opinion, a complaint which alleges that by reason of the recording of a notice of location by respondents the leasehold interest of appellant was greatly depreciated in value and was rendered unmarketable, to appellant's damage in the sum of $10,000, states the ultimate fact of damages and is sufficient as against a general demurrer. And while a trial court might be justified in sustaining a special demurrer and in requiring plaintiff to set forth his damages with greater particularity, we believe that the court below erred in sustaining respondents' demurrer without leave to amend.

For, as was stated by Chief Justice Gibson in the recent case of Wennerholm v. Stanford University School of Medicine, 20 Cal.2d 713, 718, 720, 128 P.2d 522, 525, 141 A.L.R. 358, a case in which the Supreme Court reversed a judgment based on an order sustaining a demurrer to the fifth amended complaint without leave to amend:

"Where a complaint is sufficient against a general demurrer, however, and any uncertainties or ambiguities in the pleading can be corrected by amendment, it is apparent that denial of leave to amend results in a disposition of the cause upon technical grounds alone. The plaintiff who has stated a cause of action in such a case is denied a trial on the merits of his action if any of the grounds of special demurrer are well taken, despite the fact that the deficiencies can be corrected. It has been held, under such circumstances, that denial of leave to amend constitutes an abuse of discretion even though it be conceded that the trial court had authority to sustain the special demurrer because of defects in the form of the pleading. Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 104, 114 P.2d 1; Olivera v. Grace, 19 Cal.2d 570, 579, 122 P.2d 564 [140 A.L.R. 1328]; and cases cited therein. * * *

"We therefore hold that it was an abuse of discretion for the trial court to sustain the demurrer without leave to amend. We do not decide, however, that the complaint was not subject to special demurrer, and the trial court may in its discretion require the clarification of uncertainties or ambiguities in the complaint. Guilliams v. Hollywood Hospital, supra, 18 Cal.2d page 104, 114 P.2d 1."

[7, 8] We believe that as a matter of sound public policy litigation should be disposed of upon substantial rather than upon technical grounds, and that the trial judge should not sustain a demurrer without leave to amend where it is merely defective for uncertainty. It is true that there must be an end to litigation and a court might be justified in sustaining a demurrer without leave to amend in a case where a plaintiff had failed to make amendments suggested by the court. But it must not be lost sight of, as pointed out in the recent case of Estate of Dupont, 60 Cal.App.2d —, 140 P.2d 866, 873, that "a judge is not a mere umpire presiding over a contest of wits between professional opponents, but a judicial officer entrusted with the grave task of determining where justice lies under the law and the facts between the parties who have sought the protection of our courts." A plaintiff should not be denied a trial upon the merits of his action because some of the grounds of special demurrer may be well taken if the uncertainties or ambiguities can be corrected by amendment.

In view of the foregoing we conclude that the trial court abused its discretion in sustaining respondents' demurrer without leave to amend. We do not decide, however, that the complaint was not subject to special demurrer, and the trial court may, in its discretion, require the clarification of any uncertainties or ambiguities therein.

The judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

61 Cal.App.2d 731

RUNSVOLD v. RUNSVOLD.

Civ. 14212.

District Court of Appeal, Second District, Division 2, California.

Dec. 13, 1943.

Rehearing Denied Dec. 30, 1943.

Hearing Denied Feb. 10, 1944.

1. Infants ⚷19

In proceedings involving the custody of minor children, the paramount consideration is their welfare.

2. Divorce ⚷296

In divorce actions, trial court is authorized to make such orders as it may deem necessary and proper for custody of the children, and solely from the standpoint of the child without being constrained by the complaint.

3. Divorce ⚷296, 312

The trial court is vested with a very expensive discretion in fixing the custody of children of divorced parents, and in absence of a showing of manifest abuse of discretion will not be interfered with upon appeal. Civ.Code, § 138.

4. Divorce ⚷312

Every presumption supports the reasonableness of a decree fixing the custody of children of divorced parents. Probate Code, § 1406.

5. Divorce ⚷296

The trial court did not as matter of law abuse its discretion in finding that wife, to whom divorce was granted on ground of cruelty, was, and that husband was not, fit to have custody of the parties' minor children, and that husband was not entitled to visit the children for six months from date of judgment and then upon order of court after hearing, notwithstanding judgment deprived husband of a natural common law right, and complaint specifically requested that husband be accorded the right reasonably to visit with the children.

6. Divorce ⚷301

Evidence did not establish that trial court abused its discretion in finding that husband from whom divorce was granted on ground of cruelty was unfit to have custody of the parties' minor children, that the wife was fit to have such custody, and forbidding husband to visit the children for six months from date of judgment and then only upon order of court after hearing.

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Lydia Margaret Runsvold against Gerhard Oscar Runsvold for divorce. From an adverse decree, defendant appeals.

Affirmed.

Edward C. Purpus and John W. Preston, both of Los Angeles, for appellant.

Abbott C. Bernay, of Los Angeles, for respondent.

MOORE, Presiding Justice.

Defendant appeals from an interlocutory decree of divorce which, he asserts, is too harsh to be just. He makes two assignments, towit: (1) The court erred in finding that plaintiff is a fit and proper person to have the custody of the minor children, ages two and six, and that defendant is not a fit and proper person to have such custody; (2) the court erred in its conclusion and the ensuing judgment that defendant is not entitled, nor shall he be permitted, to visit the minor children for a period of six months from date hereof, and then only upon order of court after hearing.

[1-4] In proceedings where the custody of the minor children is involved the paramount consideration is the welfare of such children. Beyerle v. Beyerle, 155 Cal. 266, 100 P. 702. In divorce actions the court is authorized to make such orders as it may deem necessary and proper for the custody of the children, and solely from the standpoint of the child, without being constrained by the complaint. The court is vested with a very expansive discretion and with a very large measure of power in fixing the custody of the children, and in the absence of a showing of a manifest abuse of discretion will not be interfered with upon appeal. Civ.Code, sec. 138; Browning v. Browning, 111 Cal.App. 99, 102, 295 P. 360; Bancroft v. Bancroft, 178 Cal. 352, 173 P. 582; Taber v. Taber, 209 Cal. 755, 290 P. 36; Young v. Young, 132 Cal.App. 301, 302, 22 P.2d 564; Prouty v. Prouty, 16 Cal.2d 190, 191, 105 P.2d 295; Black v. Black, 149 Cal. 224, 226, 86 P. 505. Every presumption supports the reasonableness of the decree. Gavel v. Gavel, 123 Cal.App. 589, 11 P.2d 654. See Probate Code, sec. 1406.

[5] Appellant contends, however, that because the judgment deprives him of a natural, a common law right, as a matter

of law, the court abused its discretion; the judgment is too harsh; the complaint specifically requested that defendant be accorded the right reasonably to visit with his children, and he should not be deprived thereof because he is convicted of cruelty toward his wife, in the absence of proof of his moral unfitness. Citing 27 C.J.S., Divorce, § 312, p. 1177; Wand v. Wand, 14 Cal. 512; Kettelle v. Kettelle, 110 Cal. App. 310, 294 P. 453; Fay v. Fay, 12 Cal.2d 279, 83 P.2d 716; 9 Cal.Jur. 794, sec. 137. Nothing appears in any of these authorities to indicate an abuse of discretion. He further contends that under the evidence the court abused its discretion in finding as a fact that defendant is morally unfit to have the custody, and directs our attention to the testimony of nine witnesses. The substance of such testimony is that in the presence of those witnesses appellant was a gentleman, considerate of his wife and kind to his children. But such testimony is in its nature negative and is contradicted by competent proof of an affirmative variety. Against appellant's character as patterned by his selected witnesses there is ample proof that he is possessed of an inordinate temper, is at times cruel to his children and on occasion exhibits a ruthless disregard for the rights of others. The trial judge obviously deemed such behavior in a parent harmful to the susceptible nature of childhood. The wife testified to numerous cruelties committed by appellant in the presence of the children: He threatened to kill her and she was afraid he would shoot her; on one occasion he came to her home and tried to force his entrance and was found by police to have a monkey wrench in his pocket; he was warned by the city attorney to desist from disturbing respondent; he struck respondent and accused her of illicit relations; he used vile and opprobrious epithets in the presence of the children; he struck respondent in the presence of the children and caused them to be frightened and to cry; he called women of the neighborhood dirty names on the street; and threatened the witnesses Mrs. Senz and Mrs. Monson that they would regret it and would answer to him afterward if they testified against him. There was evidence that the police were called to respondent's home on numerous occasions because of appellant's disturbances; that he made repeated accusations of infidelity against his wife to strangers in the neighborhood, which activity caused a petition to be signed by the neighbors protesting his misconduct; that on one occasion without justification he pulled the five-year-old son down the hallway by the ear and administered severe punishment to him in the bathroom; that on one occasion he broke into respondent's home and beat her.

[6] This is a portion of the proof which impelled the finding complained of. The court had the additional advantage of the judicial audience. We cannot say that its discretion was abused in finding the unfitness of appellant and in restricting his parental privileges in the premises.

The judgment is affirmed.

W. J. WOOD and McCOMB, JJ., concur.

61 Cal.App.2d 748

PEOPLE v. DIAZ.

Cr. No. 3743.

District Court of Appeal, Second District,
Division 1, California.

Dec. 14, 1943.

1. Criminal law 🔑552(3), 561(1)

The law makes no distinction between direct and circumstantial evidence as to the degree of proof required for conviction, and all that is required is that evidence of one kind or the other, or both, establishes guilt beyond reasonable doubt.

2. Homicide 🔑253(1)

Evidence was sufficient to sustain conviction of first degree murder.

3. Criminal law 🔑993, 1183

The power of trial court or of District Court of Appeal to modify judgment by reducing degree of offense without granting new trial is contingent upon there being in record some evidence tending to prove that defendant, if he is guilty of any crime, is guilty of crime of lesser degree than crime of which he stands convicted. Pen.Code, § 1181, subd. 6.

4. Homicide 🔑347

Where evidence conclusively proved that slaying was unprovoked, cold-blooded and resulted in death of an inoffensive man and was sufficient to sustain first degree murder conviction, District Court of Appeal could not reduce conviction to manslaughter. Pen.Code, § 1181, subd. 6.

5. Criminal law ⟹814(8, 13)

In first degree murder prosecution, the giving of instruction regarding burden of proof and justification was improper, where defendant did not set up any defense by way of excuse for or justification of the alleged slaying, but sole defense was denial that he committed the homicide. Pen.Code, § 1105.

6. Criminal law ⟹1172(6)

Prejudice or injury must be shown to have ensued from erroneous giving of an instruction containing a correct abstract principle before a reversal is authorized.

7. Criminal law ⟹1172(6)

In first degree murder prosecution, the giving of inapplicable instruction containing correct abstract principle regarding burden of proof and justification was not prejudicial error. Pen.Code, § 1105; Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

Amador Diaz was convicted of murder in the first degree, and he appeals.

Affirmed.

Philip S. Schutz, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

WHITE, Justice.

In an information filed by the district attorney of Los Angeles County defendant was accused of the crime of murder, to which charge he entered a plea of not guilty. Following a trial the jury returned a verdict finding the defendant guilty of murder in the first degree and fixed the punishment at life imprisonment. A motion for a new trial was denied, and this appeal is prosecuted by defendant from the judgment of conviction and from the order by which his motion for a new trial was denied.

Briefly, the record discloses that both defendant and the decedent were married men, the fathers respectively of several children, and residing in the same neighborhood. The transcript on appeal discloses no evidence of any feeling of ill will or animosity between them, and at the trial it was testified that on the day of the homicide they had consumed some refreshments together. On the day decedent met his death the defendant was building a fence upon his premises, starting such work about ten o'clock and continuing until about 5 p. m., except for about an hour at noon when he ate his lunch. Defendant testified that during the day he and his helper consumed approximately seven quarts of beer. He further testified that when he quit working on the fence and went to feed his livestock about 5:30 o'clock, he was "about half drunk or drunk". After consuming his supper, at which he did not drink any liquor, he went to the Amapola Cafe located a few blocks from his home, where he consumed another quart of beer. He returned home and about 8:30 p. m., went back to the cafe where he consumed two more quarts of beer. According to the defendant, while he was in the cafe at about ten o'clock there was a quarrel or disturbance outside in connection with which several bottles were hurled and considerable noise made. During the evening and at about the time of the riotous conduct outside the cafe, a man by the name of Acosta was stabbed and taken to the hospital. To an officer defendant stated that he was angered because his friend had been attacked. According to the testimony of the defendant, he then went home, removed the handle from a pick and returned to the cafe where, he explained, that he had taken this action to protect himself against those who throughout the trial were designated and referred to as "pachucos". The record advises us that the word "pachuco" originated in El Paso and was used to describe those who wore peculiar clothing comparable to that worn by "zoot suiters". However, in contradiction of the defendant's testimony that he went home and secured a pick handle, two witnesses who testified they were in front of defendant's home between 10:30 and 11 o'clock on the night of the homicide, said they saw the defendant come out of his house with a .22 rifle; that they engaged him in conversation about it and in response to their query as to what he was going to do with it, the defendant replied that he was going to "take the hell out of a pachuco". There is testimony that the defendant proceeded from his home toward the Amapola Cafe. Shortly thereafter one Isadora Garcia and the deceased met at the cafe. They had been friends since 1923 or 1924. Finally they determined that each would go to his respective home. It was drizzling rain on the evening in question. Garcia and the decedent were walking away from the cafe, the latter being about two feet in front of the former. Suddenly, Garcia heard a shot and the decedent dropped to the street and started to moan. When Garcia attempted to assist the decedent he found that the latter had been wounded, whereupon the witness rushed to the cafe and called for help. Another witness testified that he had known the defendant in the neighborhood for five or six years and was also acquainted with the decedent; that shortly after midnight on the date in question the defendant came to the front door of the home of this witness just as the latter was about to retire. The witness went to the door where he accosted the defendant standing there with a rifle, and in the course of a short conversation during which the defendant "seemed excited", the latter declared "I just killed a pachuco". Another witness testified that while en route to the scene of the shooting in company with a neighbor, the latter, when they encountered the defendant, asked what had happened. At the trial the witness testified "He (defendant) said he had killed a pachuco". At the time this statement was made by the defendant he had a rifle in his hand. Another witness testified that she had retired and upon hearing the shot she, her mother and sister, started for the scene of the shooting; that they passed within three feet of the defendant who was carrying a rifle at that time, and upon being questioned as to what had happened, he replied "Somebody shot Eskil Naranjo". Still another witness testified that about 10:30 p. m., he was in front of defendant's house and saw the latter coming out with a .22 rifle. After the defendant had been arrested and while this witness was standing near him, the defendant cursed the witness for mentioning the rifle. Another witness testified that he knew the defendant and that in January, 1941, had loaned him a .22 rifle, the loan of which the defendant requested to enable him to kill animals that were molesting his rabbits. Up to the time of the homicide the rifle had not been returned. Deputy sheriffs, who arrested the defendant about 3:15 a. m., on the morning following the shooting, testified that he was not intoxicated, as did another deputy sheriff who interrogated him at about 4 o'clock on the same morning. At the time the defendant was placed in the police car, a son of the decedent was standing alongside when the defendant exclaimed, "Naranjo, you son of a bitch, I'm going to get out of this thing and I'll kill you when I get back".

At the trial the defendant testified in his own behalf, during the course of which testimony he denied all knowledge of and connection with the crime. He testified that he was friendly with the deceased, did not see the latter on the night of the homicide and in general denied all of the conversations hereinbefore narrated concerning "pachucos". He also denied that he had a .22 rifle at any time either upon his person or at his home. It might here be noted that a .22 rifle bullet was removed from the body of the deceased. The only other witness for the defense was defendant's wife, who testified that he was home about 11 o'clock on the night in question, was in bed at the time of the killing; that he had been drinking that day and was very drunk when he retired that evening.

[1-4] For a first ground of appeal it is urged that the evidence is insufficient to sustain defendant's conviction of the crime of murder of the first degree. In this regard it is argued that when viewed in a light most favorable to the prosecution the evidence fails to show beyond a reasonable doubt that the defendant committed the homicide charged against him. This claim cannot be upheld. It is true the evidence was circumstantial, but the law makes no distinction between direct and circumstantial evidence as to the degree of proof required for conviction. All that is required is that evidence of the one kind or the other, or both, establishes guilt beyond a reasonable doubt. We have narrated the evidence more or less in detail because we are satisfied that the inferences and deductions which the jury was entitled to draw therefrom point unerringly to defendant's guilt. His possession of the .22 rifle; his declarations, and, in fact, his entire course of conduct on the evening of the homicide, all generate the conclusion that the evidence is sufficient to satisfy both the reason and judgment of one bound to act conscientiously thereon, that it was the defendant who fired the fatal shot. There is also present the added fact that the defendant was thoroughly impeached as a witness

in his own behalf in connection with the matters about which he testified wherein he denied possession of a rifle as well as the declaration of his intention to "take the hell out of a pachuco"; and his admission, following the slaying, that "he had killed a pachuco". Next, we are urged, should we conclude that the evidence is sufficient to connect the defendant with the commission of the crime, to invoke the provisions of subdivision 6, section 1181 of the Penal Code, and modify the judgment of conviction by reducing the same to manslaughter. People v. Kelly, 208 Cal. 387, 281 P. 609; People v. Howard, 211 Cal. 322, 295 P. 333, 71 A.L.R. 1385; People v. LaFleur, 42 Cal.App.2d 50, 108 P.2d 99; People v. Castro, 37 Cal.App.2d 311, 99 P. 2d 374. This we cannot do in the instant case because the power of the trial court or of this court to thus modify the judgment without granting or ordering a new trial is contingent upon there being in the record some evidence tending to prove that the defendant, if he is guilty of any crime, is guilty of a crime of a lesser degree than the crime of which he stands convicted. People v. Madison, 3 Cal.2d 668, 679, 46 P.2d 159. We find in the record before us no such evidence, and indeed, none was offered, for the defendant steadfastly denied any knowledge of or participation in the homicide. The evidence conclusively proves that the slaying was unprovoked, cold-blooded and resulted in the death of an inoffensive man who was quietly wending his way homeward along a public sidewalk.

Passing from the contention that the testimony is insufficient to support the verdict, appellant alleges prejudicial error in the giving of an instruction on the burden of proof and justification. In response to a request by the prosecution, the court gave as one of its instructions to the jury the following: "Upon the trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter or that the defendant was justifiable or excusable. While the burden of showing the circumstances under which the act is justified or excused devolves upon the defendant, he is only bound under this rule to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged." This instruction is predicated on section 1105 of the Penal Code.

[5-7] The questioned instruction should not have been given because the defendant did not set up any defense by way of excuse for or justification of the alleged slaying, but on the contrary his sole defense was a denial that he committed the homicide. It does not follow, however, that in every case wherein such an instruction, containing as it does, a correct abstract principle, is erroneously given, that a judgment will be reversed. It is elementary that prejudice or injury must be shown to have ensued from the giving of the instruction before a reversal is authorized. Appellant places great reliance upon the case of People v. Tapia, 131 Cal. 647, 63 P. 1001, 1003. However, in that case the court held that under the circumstances there present it was likely that the jury would infer from the instruction that the commission of the homicide by the defendant had been proved, when the evidence upon that issue was characterized by the trial judge on hearing of the motion for a new trial as "unreliable" and "unsatisfactory", and wherein the Supreme Court said: "* * * we cannot avoid a somewhat strong impression that the defendant had been wrongfully convicted of the high crime of murder in the first degree; and as, in such a case, a very slight error of law committed during the trial might have improperly influenced the jury * * *." No such circumstances prevail in the case at bar. It is also noteworthy that in concluding its decision in the Tapia case the Supreme Court said, "In conclusion we desire to say that this decision is based upon the very peculiar features of this case as above shown, and that in many cases the errors above noticed would not call for a reversal."

Another reason why it does not necessarily follow that because the instruction was inapplicable and therefore erroneous, that a reversal must ensue is that the case of People v. Tapia, supra, was decided prior to the adoption of section 4½, Article VI, of our State Constitution, coupled with the fact that under the holding in People v. Perez, 19 Cal.App.2d 472, 65 P. 2d 1319, decided March 9, 1937, and cases therein cited, it would appear that under circumstances such as confront us in the instant case, the giving of the challenged instruction was not prejudicial.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are and each is affirmed.

YORK, P. J., and DORAN, J., concur.

COLLINS v. CAMINETTI.
Civ. 14205.

District Court of Appeal, Second District, Division 2, California.

Dec. 13, 1943.

Hearing Granted Feb. 10, 1944.

1. Mandamus 🔑187(9)

On appeal from order denying an application for a writ of mandate, evidence must be viewed in the light most favorable to defendant.

2. Appeal and error 🔑989

When a fact finding is attacked on ground that there is no substantial evidence to sustain it, the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding.

3. Mandamus 🔑168(4)

Evidence sustained order denying application for writ of mandate directing insurance commissioner to annul order suspending petitioner's license as a life insurance agent for six months on ground that petitioner had made misrepresentations relative to the condition of a company for which he was agent, for the purpose of inducing policyholders to surrender their policies in such company and to take out policies in other companies. St.1935, pp. 518, 519, §§ 781, 783.

◆

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

Application by Orville H. Collins against A. Caminetti, Jr., for a writ of mandate directing defendant as Insurance Commissioner of the State of California to annul an order suspending petitioner's license to act as a life insurance agent for six months. From an order denying the application, petitioner appeals.

Affirmed.

Sherman & Sherman and Chas. R. Thompson, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and John L. Nourse, Deputy Atty. Gen., for respondent.

McCOMB, Justice.

From an order denying petitioner's application for a writ of mandate directing the Insurance Commissioner of the State of California to annul his order suspending petitioner's license to act as a life insurance agent for the period of six months, petitioner appeals.

[1] The evidence being viewed in the light most favorable to respondent, the essential facts are:

Petitioner had been engaged for approximately thirty years in the business of a life insurance agent and was licensed by the Insurance Commissioner of California to act as such agent. He was an agent for the Great States Life Insurance Company, which company had previously been placed in conservatorship, and was also an agent for the Pacific National Life Insurance Company. Petitioner was charged with having made misrepresentations relative to the condition of the Great States Life Insurance Company to various policyholders of that company for the purpose of inducing such policyholders to surrender or lapse their policies in the Great States Life Insurance Company and take out policies in other life insurance companies, and he was ordered to show cause why his license should not be revoked.

Petitioner urges reversal of the judgment on the ground that *there is not any substantial evidence to sustain the charge that he made misrepresentations relative to the condition of the Great States Life Insurance Company for the purpose of inducing policyholders to surrender their policies in such company and take out policies in other insurance companies.*

This proposition is untenable and is governed by this rule of law:

[2] When a finding of fact is attacked on the ground that there is not any sub-

stantial evidence to sustain it, the power of an appellate court *begins* and *ends* with a determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact. (Estate of Winzeler, 42 Cal.App.2d 246, 248, 108 P.2d 720; 2 McK.Dig.(1930), page 701, Appeal and Error, sec. 1235.)

Applying the foregoing rule to the facts in the instant case, an examination of the record discloses substantial evidence together with inferences which the trial judge may have reasonably drawn therefrom to sustain the questioned findings and each and every finding upon which the judgment was necessarily predicated. For example, it is conceded that on August 15, 1940, the Insurance Commissioner was appointed conservator of the Great States Life Insurance Company and as a result of the Commissioner's operation of the company expenditures were reduced approximately 40 per cent and the company showed a profit of approximately $3,000 for the year of 1941 after paying about $10,000 in dividends to policyholders.

Mr. Larson testified that about July 20, 1941, petitioner told him that the Great States Life Insurance Company was "on the rocks" or "about done"; that the man who was the head of both the Great States Life Insurance Company and the Pacific National Life Insurance Company was switching his clients to the Pacific National Life Insurance Company "for their protection"; that as a result of such statement, he (Mr. Larson) surrendered his policy in the Great States Life Insurance Company and applied for a policy in the Pacific National Life Insurance Company.

Mr. A. G. Matlick testified that he held an accident and health insurance policy in the Great States Life Insurance Company, also that he held a life insurance policy in the same company on the life of his ward, Clifford A. Jones, aged 13 years; that on May 14, 1941, petitioner told him that the Great States Life Insurance Company "was not what it should be at all" and that he should take other policies on the boy; that he would get no more dividends on the policy and probably would get nothing at all out of the policy; that as a result of these representations he (Mr. Matlick) dropped the two insurance policies in the Great States Life Insurance Company, and took one out in the Pacific National Life Insurance Company on the life of his ward.

[3] Clearly the foregoing facts and testimony constituted substantial evidence to sustain the findings which are attacked as unsupported by the evidence.

Since section 781 of the Insurance Code, St.1935, p. 518, forbids the making of misrepresentations to a policyholder for the purpose of inducing him to lapse, surrender or forfeit his policy, and section 783 of the Insurance Code authorizes the Commissioner to suspend for not more than three years the license of an agent who has knowingly violated the provisions of section 781 of the Insurance Code, the Commissioner was justified in suspending petitioner's license for six months. The trial court, in view of the above evidence, properly refused to issue a writ of mandate directing the Insurance Commissioner to annul his order.

For the foregoing reasons, the judgment is affirmed.

MOORE, P. J., and W. J. WOOD, J., concur.

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61 Cal.App.2d 661

HERBERT v. CASSINELLI et al.

Civ. 6923.

District Court of Appeal, Third District, California.

Dec. 9, 1943.

Rehearing Denied Jan. 7, 1944.

Hearing Denied Feb. 3, 1944.

1. Automobiles ⚷192(1)

Under statute imposing upon automobile owner liability for negligent operation of vehicle with express or implied permission of owner, owner should not be permitted to avoid consequences of operator's negligence by secret restrictions limiting right to use motor vehicle. Vehicle Code, § 402, St.1937, p. 2353.

2. Automobiles ⚷192(7)

Where owner gave possession of pickup truck to one to try out with thought of selling vehicle to him, and such person thereafter permitted a third person to drive truck, owner was liable for injuries to one caused by negligent operation of truck by third person even though one to whom owner gave possession of truck violated restriction placed upon its use by owner in allowing third person to use it. Vehicle Code, § 402, St.1937, p. 2353.

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Action by Otto Harry Herbert against P. L. Cassinelli, George Susmon, and another, for injuries arising out of automobile collision. From a judgment in favor of the defendant George Susmon, the plaintiff appeals.

Reversed.

Frank E. Kilpatrick, of Oakland, and Henry & Bedeau, of Sacramento, for appellant.

Van Dyke & Harris, of Sacramento, for respondent.

PEEK, Justice.

This is an appeal by plaintiff from a judgment in favor of the defendant Susmon. The action was one for personal injuries arising out of a collision between a car operated by plaintiff and one owned by said defendant but driven by the defendant Morris.

At the outset of the trial the action was dismissed as to the defendant Cassinelli; service of process on the defendant Morris could not be made within the State of California, and the action proceeded against Susmon alone.

The evidence discloses that one Smith had his car stolen and wrecked and was in need of another car; that he talked with the defendant Susmon, who operated a garage, and as an outgrowth of such conversation borrowed a Chevrolet pickup from him. According to Susmon's testimony the pickup was given to Smith for his personal use to try out with the thought of selling the vehicle to him. Smith testified to the same effect and added that the pickup was for his personal use and also for transporting personal supplies to and from the sawmill where he worked; that if the car proved satisfactory he would buy it. The record discloses no specific instructions by Susmon limiting the use of the car by Smith. Susmon's testimony that "* * * I gave it to him to use personally * * * I never gave him the car with the intention of anybody else using it", creates nothing more than an inference that there existed an assumption of personal use by Smith only. No greater weight can be attached thereto.

The court found that the accident was due solely to the negligent operation of the car by Morris, and that plaintiff's operation for his car contributed in no way to the accident. The court further found that the defendant Susmon did not know of the operation of the car by Morris, and that such operation was without either his express or implied permission.

There is no disagreement presented herein concerning the facts surrounding the accident nor the finding of the court in that regard. Therefore, the decision in this appeal must be predicated upon the provisions of Section 402 of the Vehicle Code, St.1937, p. 2353, which provides in part as follows: "Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages."

It is readily apparent from a reading of said section that if the owner Susmon can be held liable for the damages sustained by the plaintiff, such liability, if any, must find its support in the determination of the sole question of the use and operation being made of the car by Morris at the time of the accident, i.e. whether he was "using or operating" the pickup with the "permission express or implied" of the owner.

[1] The clear and unambiguous language of that section indicates that the legislature intended to hold an owner liable for the damages or injuries caused by the negligence of anyone who had permission to use or operate the car, whether such permission was "express or implied." The difficulty which has plagued the courts has been in interpreting what is meant by the phrase "with the permission, express or implied, of such owner". In the case of Bayless v. Mull, 50 Cal.App.2d 66, 122 P.2d 608, 612, the District Court of Appeal reviewed the historical background of that section and observed that as the owner could avoid liability either by refusal to

permit another to use his car or by procuring insurance to cover possible liabilities, he therefore should not be permitted to avoid the consequences of the operator's negligence and escape liability by secret restrictions limiting the right to use the motor vehicle. The court therein further stated: "The legislature did not intend by the language it used to permit an owner to show any and all restrictions he may have placed on the use of his car and thus escape liability."

Until the recent cases of Souza v. Corti, 22 Cal.2d 454, 139 P.2d 645, and Hobbs v. Transport Motor Co., 22 Cal.2d 773, 141 P.2d 738, there has been a decided contrariety of opinion upon the question herein presented.

In the first case the owner of the car loaned it to his son with the instructions: "Don't lend the car to anyone else." The son allowed a friend to drive the car, and while it was being so driven an accident occurred, causing damage to the plaintiff. The trial court found for the owner, but on appeal the judgment was reversed.

The Supreme Court, after carefully reviewing all of the comparable statutory provisions in other jurisdictions, reasoned that the son was "using" the car within the provisions of the act, and stated: "* * * the use which was being made of the borrowed car at the time of the accident was the use which was contemplated by the owner. Any secret restrictions imposed by him on the manner of its use do not negative the controlling fact that it was being used with the owner's permission at the time of the accident. Violations of such restrictions may not be said to cause a revocation of the permission. Liability of the defendant owner in this case pursuant to section 402 of the Vehicle Code is therefore established."

Mr. Justice Schauer in his concurring opinion added the further thought that: "When the usage which the bailee makes of a borrowed vehicle does not amount to a conversion of it, his mere disobedience of admonitions as to his personal conduct in the operation of the automobile within the scope of the authorized use should not exculpate the owner from the liability otherwise imposed by the statute."

In the later case of Hobbs v. Transport Motor Co., supra, relied upon by respondent, a prospective purchaser was given permission by one of the defendant's salesmen to try out the car with the idea of purchase if his own car could not be properly adjusted. An accident occurred while he was using the borrowed car to test a battery which he had removed from his own car. The District Court of Appeal held that the evidence showed a deviation from the purpose for which the car had been borrowed, and reversed the judgment of the trial court against the owner. It is upon such decision that respondent relies as the latest expression of opinion on the question herein presented. However, the Supreme Court reversed the District Court of Appeal and affirmed the judgment of the trial court on the ground that the permission to use the car was such as would impose liability on the owner under the imputed negligence rule of section 402 of the Vehicle Code.

The case of Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059, likewise relied upon by respondent, is not in point, for as stated in the Souza case, supra, this case was concerned with violations of restrictions placed upon the borrower as to the purpose for and the time within which the car was to be used.

In the present case Susmon did not specifically restrict the borrower as did the lender in the Engstrom case, nor did the trial court so find. The lending appears to have been for a general use by the borrower for an indefinite time coupled with an assumption or intendment that only he would use it.

[2] Assuming that Smith violated the restrictions placed upon the use and operation of the pickup by the owner Susmon in allowing Morris to use it, under the rule in the Souza case, it was, nevertheless, the use which was contemplated by the owner with his permission, and a violation of such restrictions could not cause a revocation of such permission.

From the carefully studied memorandum opinion of the trial court, printed in full in respondent's brief, it is apparent that a further case, Howland v. Doyle, 6 Cal.App.2d 311, 44 P.2d 453, which involved questions very similar to those presented herein, and which was also cited and relied upon by respondent, was of paramount consideration in its determination of the present case. However, since the trial judge filed his opinion, the Supreme Court has handed down its decision in the Souza case, which decision specifically states that if there was anything stated in the Howland case "which is not in harmony with the views expressed herein, it is necessarily disapproved."

It therefore becomes obvious that the judgment of the trial court in the present case cannot be sustained.

The judgment is reversed.

ADAMS, P.J., and THOMPSON, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

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61 Cal.App.2d 810

PEOPLE v. COLEY.

Cr. No. 1850.

District Court of Appeal, Third District, California.

Dec. 17, 1943.

1. Criminal law 🔑1159(4)

Appellate court can reject positive testimony of a witness only when testimony is inherently improbable, but to do so court must act on what is the equivalent to judicial notice.

2. Criminal law 🔑1159(4)

The inherent improbability of the uncorroborated testimony of a complaining witness which will authorize an appellate court to reject such testimony must so plainly appear that appellate court must find in record full justification for believing that verdict was expression of passion and prejudice rather than deliberate judgment.

3. Criminal law 🔑1159(5)

In prosecution for robbery and grand theft where defendant had worked for complaining witness, testimony of complaining witness that he identified one of the men who robbed him and who stole his automobile as defendant by his general build, his shoulders, way he moved, and by a tattoo mark between thumb and index finger on defendant's left hand, although robber was masked, was not so inherently improbable as to require appellate court to disregard such testimony.

4. Criminal law 🔑566

It is not necessary that witness called to identify the accused should have seen accused's face if identification based on other peculiarities is reasonably sure.

5. Criminal law 🔑1159(5)

An appellate court cannot interfere with or invade province of jury in weighing evidence as to identification of accused where the evidence is legally sufficient, even though appellate court may feel that identification evidence is not strong.

6. Robbery 🔑24(3)

Evidence that defendant, prior to time of robbery, frequently visited at the home of his parents and at ranch of complaining witness, both in Stanislaus county, and reported regularly to state parole officer, and after the robbery and until his arrest defendant did not return to Stanislaus county or report to parole officer, supported, as against charge of inherent improbability, complaining witness' identification of defendant as the robber, notwithstanding that robber wore a mask.

7. Criminal law 🔑438

Where two witnesses, in trial of robbery charge 2½ years after the robbery, testified that on the morning of the robbery they had given directions to two men whom they could no longer describe, but that a day or two after the robbery they were shown pictures of a number of people by the deputy sheriff and identified one of the pictures as being a picture of one of the two men they had directed, deputy sheriff was properly permitted to point out the picture of defendant as the one the witnesses had identified.

◆

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Von Coley was convicted of robbery and of grand theft, and he appeals.

Affirmed.

Gumpert & Mazzera, of Stockton, for appellant.

Robert W. Kenny, Atty. Gen., and Thomas G. Negrich, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice pro tem.

Defendant and appellant was convicted in the Superior Court of Stanislaus County on two counts, one of robbery and the other of grand theft. No motion for a new trial was made by appellant, and this appeal is from the judgment pronounced in accordance with the verdict of the jury.

Appellant makes only two points upon this appeal. The first is that the verdict and judgment are not sustained by the evidence; and the second is that the trial court erred in admitting a certain picture.

In support of his first point, appellant contends that the identification of defendant by Dan Spencer, the victim of the asserted crime, without which there was insufficient evidence to convict appellant with the crime, was so inherently improbable that it could not rationally be believed.

We shall, therefore, very briefly summarize the testimony of Spencer as it fairly appears in the record. Dan Spencer, who, under another name, had served a term in San Quentin, from which institution he had been released in 1929, operated a twenty-acre dairy farm south and west of the City of Turlock in Stanislaus County. On the morning of January 5, 1941, at about 5 A. M., while he was still in bed in the room in which he slept on said farm, although he was awake and his lamp was lighted, two men clad in yellow raincoats, not wearing hats and with white handkerchiefs as masks over their faces, pushed the door open and pounced on Spencer and commenced to choke and brutally beat him. They brought with them a lantern which came from the cow barn where Spencer's milker had also been attacked and left tied up, which lantern they placed upon the floor of Spencer's room. Spencer resisted vigorously and the unequal struggle lasted a half hour, according to Spencer, when the two men succeeded in subduing Spencer and on tying his hands and feet with strips made from Spencer's blanket, took $150 belonging to Spencer, part of which was in a billfold in his short jacket and part of which was in a pocket book at the head of the bed. The men then left and Spencer managed to get to his front porch and saw the men run into the garage and get his automobile and drive out of the barnyard into the road and in the direction of the Crow's Landing Road. Just as they were going out of the gate he saw a hat blow out of the automobile and lie in the road, which hat, he later testified, was one he had previous to this date seen defendant wearing. Spencer testified that the man who held him while the other beat him was appellant, whom he had known well for more than ten years and who worked for him on several occasions, the last being for a period of twelve days in the month preceding, when appellant painted Spencer's house and lived on the premises with Spencer and thus became familiar with the times Spencer received his cream checks and with the fact that Spencer kept no bank account but cashed the checks and used the cash to buy additional cows and feed. He testified, "Well, I knew him just as soon as he come into the room, I could tell him right away, just as soon as he opened the door, by his general build, his shoulders, the way he moved. I knew him right away." Spencer testified further that appellant did not speak at any time during the attack but that the other man called appellant "Frank", which was appellant's nickname. He testified further that appellant had a tattoo mark on his left hand between his thumb and index finger and that he observed the tattoo mark during the attack.

[1, 2] Such in brief is the testimony which appellant contends is inherently improbable and unbelievable per se. There was, of course, the testimony of many other witnesses both for the people and the defendant, but it may be conceded that without the identification of appellant by Spencer there is not sufficient evidence to connect appellant with the crime.

As is stated in 8 California Jurisprudence, page 590, section 582: "A question at law is presented which authorizes an appellate court in setting aside a verdict, if the testimony relied upon by the prosecution is apparently so improbable or false as to be incredible and to amount to no evidence at all. If it is of this character, the court is justified in assuming that the verdict obtained was the result of passion or prejudice rather than of a calm and dispassionate consideration of the evidence. To authorize a reversal under this rule, the improbability must appear very plainly. It has been said that the conclusions of the jury will be overruled only where the uncorroborated testimony of the complaining witness is so obviously and so inherently improbable as to leave no recourse, without self-stultification, except to reverse the judgment."

As was said in People v. Collier, 111 Cal.App. 215, 295 P. 898, 902: "Where the testimony is such that within the knowledge of reasonable men it cannot be said to be true the appellate court might assume that knowledge and hold the testimony legally insufficient; but to do so the court must act on what is the equivalent to judicial notice."

And as was said by this court in People v. Lewis, 18 Cal.App. 359, 123 P. 232, 234: "We must assume, in the absence of something in the record upon which to base a contrary opinion that the jury reached a verdict with full realization of their sworn duty, free from passion and prejudice. We must also assume that the learned trial judge was satisfied with the verdict or he would have granted the motion for a new trial. Cases have occurred—some are cited —where the appellate court has felt itself constrained, in the interest of justice, to override the conclusions of jury and trial court, but such cases are rare, and occur only where the uncorroborated testimony of the complaining witness is so obviously and so inherently improbable as to leave the court no recourse, without self-stultification, except to reverse the judgment. But this obvious and inherent improbability must, however, very plainly appear before the reviewing court should assume the functions of the trial jury. * * * We must find in the record full justification for believing that the verdict was the expression of passion and prejudice, rather than deliberate judgment, before we should interfere. We cannot say that such a condition is here shown."

This well-established rule is also set forth in other cases too numerous to require citation.

[3-5] Taking into consideration the rule as stated and taking the testimony of Dan Spencer as hereinbefore set forth, we are unable to find any merit whatever in appellant's contention that Spencer's testimony is inherently improbable. It is not necessary for a witness to observe the features of a person charged with crime in order to identify him. There may well be other physical characteristics that are sufficient for identification such as detailed by Spencer who said he could identify appellant by his general build, his shoulders, the way he moved and by the tattoo mark between the thumb and index finger of his left hand. Appellant was before the jury and testified in the case and the jury had the opportunity of weighing Spencer's testimony along with their observation of appellant. The jury is the sole judge of the facts and of the weight to be given to testimony, and even though an appellate court may feel that the identification evidence is not too strong, yet it cannot interfere with or invade the province of the jury where the evidence is legally sufficient.

As was said in People v. Wilson, 76 Cal. App. 688, 245 P. 781, 785: "It is not necessary that any of the witnesses called to identify the accused should have seen his face. 'Identification,' says the court in State v. Mason, 152 Minn. 306, 189 N.W. 452, 'may be sufficient, though the person making it cannot remember the face. Identification based upon other peculiarities may be reasonably sure.' There the Minnesota Supreme Court held that the identification may be sufficient though the witnesses say that they could not identify the accused from his face, the crime having been committed in the dark, but that they can identify him from his size, his general appearance, his talk and his walk."

See, also, People v. Glab, 15 Cal.App.2d 120, 59 P.2d 195; People v. Bealey, 81 Cal. App. 648, 254 P. 628.

[6] It should perhaps be added, in order to more readily understand the verdict of the jury, that although the home of appellant's parents was in Stanislaus County and he frequently visited at their home and at Spencer's ranch prior to the happenings of January 5, 1941, he did not return to Stanislaus County again until he was arrested and brought back on May 1, 1943. Furthermore, it appeared from the evidence that appellant, who had served two prison terms, was a parolee at the time of the alleged crime, and had for some time previous reported each month to the State Parole Officer, did not report thereafter to said officer.

We conclude, therefore, that appellant's contention that Spencer's testimony is either insufficient or inherently improbable is not supported by the record or the law.

[7] Appellant's second contention requires only brief mention. Two of the People's witnesses testified that on the morning of January 5, 1941, they had seen two men in Newman who asked the direction to Tracy and wanted to get there. At the trial, which occurred more than two and a half years after the crime, these witnesses could not describe them but stated that a day or two after the crime they had been shown some pictures of a number of people by a deputy sheriff and that they had identified one of the pictures as being a picture of one of the men they had seen in Newman the morning of the crime. The deputy sheriff was permitted over the objection of appellant's counsel to point out the picture of appellant as the one the witnesses had identified when he showed same to them in Newman as the man they had seen in Newman the morning of the crime. This, appellant contends, was error, but he cites no authority upon the point. The evidence was clearly admissible and its weight was for the jury to determine.

From a reading of the record it appears that appellant was defended at the trial by one of the ablest and most experienced members of the Stanislaus County bar, that the record is singularly free from error, that appellant was convicted by the jury upon sufficient evidence, and that the judgment should be and the same is hereby affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

PEOPLE v. RALPH et al. (two cases).

Cr. 3724, 3725.

District Court of Appeal, Second District, Division 1, California.

Dec. 14, 1943.

Rehearing Denied Dec. 22, 1943.

Hearing Granted Jan. 13, 1944.

1. Criminal law ⇨1216(1)

An indeterminate sentence is, in legal effect, a sentence for the maximum term. Pen.Code, § 1168.

2. Infants ⇨69

The Youth Authority Act is an extension of the same principles which motivated the adoption of the indeterminate sentence as a measure of penal reform, and it is the duty of the courts to give effect to the expressed intent in so far as it is legally possible so to do. Pen. Code, § 1168; St. 1941, pp. 2522-2533, §§ 1700–1783.

3. Infants ⇨69

The statute excluding from the provisions of the Youth Authority Act, a person "sentenced to imprisonment for life" does not attempt to draw a distinction between "actual sentence" of life imprisonment and a sentence which in "legal effect" is a sentence for life. Pen.Code, § 1168; St.1941, p. 2526, §§ 1731.5(b), 1732.

4. Infants ⇨69

Minor defendants who were convicted of robbery in the first degree, the minimum punishment for which is five years and the maximum life imprisonment, and were given indeterminate sentences of not less than five years were "sentenced to imprisonment for life" within provision excluding from Youth Authority Act a person sentenced to imprisonment for life. Pen.Code, §§ 213, 1168; St.1941, p. 2526, §§ 1731.5(b), 1732.

See Words and Phrases, Permanent Edition, for all other definitions of "Sentenced to Imprisonment for Life".

Appeals from Superior Court, Los Angeles County; Arthur Crum, Judge.

Edsel Gray Ralph, Clyde Dempsey Chandler and Raymond James Cantlon were convicted of robbery in the first degree, their motions to be committed to the Youth Correction Authority were denied, and they appeal.

Affirmed.

Frederic H. Vercoe, Public Defender, and William B. Neeley, Deputy Public Defender, both of Los Angeles, for appellant Raymond James Cantlon.

Gladys Towles Root, of Los Angeles, for appellants Edsel Gray Ralph and Clyde Dempsey Chandler.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Upon their pleas of guilty appellants were convicted of robbery in the first degree. Appellants are all under the age of twenty-three years; and a motion was made on behalf of each appellant that his case be certified to the Youth Correction Authority, now known as the Youth Authority (Stats. 1943, ch. 690, p. 2442), because of the provisions of the Youth Correction Authority Act (Stats.1941, ch. 937, p. 2522), now known as the Youth Authority Act (Stats.1943, supra), being Division 2.5, comprising Chapter I, Sections 1700 to 1783, inclusive, of the Welfare and Institutions Code (Stats.1941, supra). The motions of appellants were denied. All of the appellants admitted being armed with a deadly weapon at the time of the commission of the offense charged. It has been stipulated that the decision upon the appeals herein may be made upon the briefs filed on behalf of appellant Cantlon. Appellants Ralph and Chandler gave oral notice of appeal from the order denying the motion to be certified to the Youth Correction Authority. These defendants later filed a written notice of appeal from the order denying them a new trial and from the judgments of conviction. Appellant Cantlon appeals from the judgment of conviction. However, the appeal in each instance is based upon the sole ground that the refusal of the trial court to commit the defendant to the Youth Correction Authority was error.

Appellants contend that under the provisions of the Youth Authority Act the trial court upon conviction was bound to commit appellants to the Youth Authority. Section 1731 of the act in question reads in part as follows: "When in any criminal proceeding in a court of this State a person has been convicted of a public offense for which the court has power under this chapter to commit to the Authority, the court shall determine whether the person was less than 23 years of age at the time of the apprehension from which the criminal proceeding resulted." Section 1731.5 of the act provides: "After certification to the Governor as provided in this article and until January 1, 1944, a court shall commit to the Authority any person convicted of a public offense whom the Authority believes can be materially benefited by the procedure herein provided for, and for whose care and maintenance there exists, in the opinion of the Authority, proper and adequate facilities, and who (a) Is found to be less than 23 years of age at the time of apprehension (b) Is not sentenced to death, imprisonment for life, imprisonment for not more than 90 days, or the payment of a fine." Section 1732 of the act provides that except as otherwise provided in this chapter the court shall commit to the Authority every person convicted of a public offense after January 1, 1944, who is found to be less than 23 years of age at the time of apprehension, and is not sentenced as set forth in (b) of section 1731.5, above quoted, and who is not granted probation. At the time of the conviction of appellants the Youth Authority had already certified to the Governor that it was ready for the proper discharge of its duties and functions, as provided in subdivision (a) of section 1730 of the act; and no contention to the contrary is here made. The proceedings herein occurred before the effective date of the amendments to the act in question in 1943. Appellants' position is based upon the language of section 1731.5, above quoted, wherein it is provided that the court "shall" commit to the Youth Authority any person convicted of a public offense, who otherwise meets the conditions for commitment. Appellants argue that the use of the word "shall" makes the provisions of the section mandatory upon the court; and that the trial court has no discretion in the matter but must commit to the Authority every person meeting the requisite conditions.

Respondent does not dispute this contention, but claims that, having been adjudged guilty of robbery in the first degree, which under section 213 of the Penal Code is punishable by imprisonment in the state prison for not less than five years, no maximum punishment being provided, appellants were sentenced for life and, consequently, their case comes within the exception provided by subdivision (b) of section 1731.5 of the Youth Authority Act. Appellants were actually sentenced to imprisonment in the state prison "for the term prescribed by law", which sentence is in accord with the provisions of section 1168 of the Penal Code, which reads: "Every person convicted of a public offense, for which imprisonment in any reformatory or State prison is now prescribed by law shall, unless such convicted person be placed on probation, a new trial granted, or the imposing of sentence suspended, be sentenced to be imprisoned in a State prison, but the court in imposing the sentence shall not fix the term or duration of the period of imprisonment." Respondent's contention that appellants were sentenced for life is based upon the authorities which hold that under an indeterminate sentence law a statute which prescribes a minimum sentence, with no maximum, is in law a life sentence until and unless a court or executive board charged with the duty of fixing prison terms remits a portion of the life term. People v. Jones, 6 Cal.2d 554, 59 P.2d 89; People v. McNabb, 3 Cal.2d 441, 45 P.2d 334. In reply to respondent's contention appellants state that the exception to the provisions of section 1731.5 of the Youth Authority Act only refers to those cases wherein the court has actually sentenced the defendant to life imprisonment. Appellants argue that there is a distinction between the "legal effect" of a sentence and an actual sentence. In this connection appellants state: "Persons convicted of burglary of the first degree, robbery of either the first or second degree * * * and other offenses which prescribe no maximum sentence, and who are sentenced to state prison are *not* sentenced for life. They are sentenced to the term prescribed by law and the *legal effect* of such a sentence is to place them under the control of the Parole Board for the possible maximum term, to wit, life imprisonment. There has, however, been no *sentence* to life imprisonment and sentence is an essential element of the exception stated in section 1732." (Italics included.)

[1] The question of the effect of an indeterminate sentence, as provided by section 1168 of the Penal Code, was settled in this state by In re Lee, 1918, 177 Cal. 690, 171 P. 958, 959. It is there stated: "In determining this question and the other questions raised by the petitioner it is necessary to consider the nature and purposes of the indeterminate sentence law. It is generally recognized by the courts and by modern penologists that the purpose of the indeterminate sentence law, like other modern laws in relation to the administration of the criminal law, is to mitigate the punishment which would otherwise be imposed upon the offender. These laws place emphasis upon the reformation of the offender. They seek to make the punishment fit the criminal rather than the crime. They endeavor to put before the prisoner great incentive to well-doing in order that his will to do well should be strengthened and confirmed by the habit of well-doing. Instead of trying to break the will of the offender and make him submissive, the purpose is to strengthen his will to do right and lessen his temptation to do wrong. If the purpose of the law is to mitigate the punishment, the law is not ex post facto, unless it can clearly be seen, that notwithstanding the beneficence of the law it may result in the individual case in depriving the prisoner of some well-defined right. It has uniformly been held that the indeterminate sentence is in legal effect a sentence for the maximum term. It is on this basis that such sentences have been held to be certain and definite, and therefore not void for uncertainty." In passing, it should be pointed out that the reason for holding an indeterminate sentence to be a sentence for the maximum term was obviously to give validity to section 1168 and to avoid the objection to its validity on the ground of uncertainty.

The purpose of the Youth Authority Act is expressly set forth in section 1700 of the Welfare and Institutions Code (Stats. 1941, supra). That section reads as follows: "The purpose of this chapter is to protect society more effectively by substituting for retributive punishment methods of training and treatment directed toward the correction and rehabilitation of young persons found guilty of public offenses. To this end it is the intent of the Legislature that the chapter be liberally interpreted in conformity with its declared purpose." With regard to the purpose of this act the Supreme Court has recently stated, in the case of In re Herrera, 143 P.2d 345, 346, upholding the constitutionality of the Youth Authority Act: "By establishing the Authority as a central state agency to cooperate with hitherto uncoordinated public and private agencies in the reformation of socially dangerous persons, the act provides for a unified program of correctional treatment."

[2] The purpose and intent of the legislature in creating the Youth Authority has thus been clearly expressed; and it is not within the province of the courts to question the feasibility or practicability of the measure. It is rather the duty of the courts to give effect to the expressed purpose and intent in so far as it is legally possible so to do. It is at once apparent that the Youth Authority Act is an extension of the same principles and policies which motivated the adoption of the indeterminate sentence (section 1168, Pen. Code) as a measure of penal reform in the first instance.

[3] In that connection, there is but one reasonable interpretation which can be given to the language of subdivision (b) of section 1731.5, supra, excluding from the provisions of the Youth Authority Act a person "sentenced to * * * imprisonment for life". To attempt to distinguish between the "legal effect of a sentence" and an "actual sentence" is to draw

a distinction without a difference. It is the legal effect of a sentence pronounced by the court which gives it meaning and significance. The fallacy of appellants' reasoning in this respect is well illustrated by a quotation from the briefs, for example: "With respect to the distinction between 'legal effect' of a sentence and a 'sentence' may we suggest that if a defendant 95 years of age were sentenced to state prison for the offense of grand theft with a prior felony (minimum of five years and maximum of ten years) it might well be said that the legal effect of the decision was life imprisonment though certainly there was no such sentence." The reasoning here employed results from a confusion of the "legal effect" of a sentence with the actual result of such sentence. The legal effect of an indeterminate sentence by the court for an offense wherein the prescribed punishment is from five to ten years imprisonment is to sentence the defendant to the maximum term of ten years. In re Lee, supra. The *practical* or *actual result* of such a sentence, imposed upon a 95 year old defendant, might well be the incarceration of the defendant for the rest of his natural life. The age of a defendant might well determine the actual result of the sentence imposed but it can have no bearing upon the legal effect of the sentence.

The distinction between the sentence imposed by the court and the term of imprisonment as fixed by the board of prison terms and paroles may be illustrated from the following quotation from People v. Hayes, 9 Cal.App.2d 157, at page 160, 49 P.2d 288, at page 289: "While it is true, as said in the cases of In re Lee, [supra], In re Wignall, 193 Cal. 387, 224 P. 452, and In re Daniels, 106 Cal.App. 43, 288 P. 1109, that when a sentence is imposed under the Indeterminate Sentence Law (section 1168, Pen.Code), the term of imprisonment is for the maximum period provided by law as the penalty for the offense in question, this is true only to the extent that the term of imprisonment is the maximum provided by law until action is taken by the board of prison terms and paroles, which may and is required to fix the period of imprisonment at a period between the maximum and minimum penalties, and when so fixed the term of imprisonment is the period fixed by order of that board."

[4] The distinction is thus made clear between the *sentence* of imprisonment imposed by the court and the *term* of imprisonment fixed by the board of prison terms and paroles. Subdivision (b) of section 1731.5, supra, speaks of a *sentence* to life imprisonment. As has already been pointed out, the sentence imposed by the court upon appellants was in legal effect one to imprisonment for life. At the time of pronouncement of sentence the board of prison terms and paroles had not of course fixed appellants' terms; and at such time it would not be possible to determine what the respective terms of imprisonment would actually be. It should be pointed out that at the time sentence is pronounced by the court it is never possible to determine what the actual term of imprisonment will be under the provisions of section 1168 of the Penal Code, except in those cases where a maximum term of imprisonment has alone been prescribed by law. See In re Heath, 49 Cal.App. 657, 194 P. 68; Ex parte Heath, 193 Cal. 192, 223 P. 546. If the legislature had intended that the exception noted under subdivision (b) of section 1731.5, supra, was to apply strictly to offenses punishable by life imprisonment only, it is reasonable, in view of the state of the law with regard to indeterminate sentences, to assume that the legislature would have been thus specific. In the absence of any such qualification as to the exception in question, the only reasonable construction to place upon subdivision (b) of section 1731.5, supra, is that whereby all persons whose sentence by the court is in legal effect a sentence to imprisonment for life are excluded from the provisions of the Youth Authority Act. It may be stated that offenses for which a minimum term only has been prescribed, and for which the maximum punishment is therefore life imprisonment, are all grave offenses.

The trial court was therefore correct in refusing to certify appellants to the Youth Authority; and the respective judgments and orders are, and each of them is affirmed.

YORK, P. J., and WHITE, J., concur.

PEOPLE v. PAY LESS DRUG STORE et al.

Civ. 12156.

District Court of Appeal, First District,
Division 1, California.

Dec. 10, 1943.

Hearing Granted Feb. 7, 1944.

1. Trade-marks and trade-names and unfair competition ⇨68(2)

The Unfair Practices Act, as amended in 1937, is constitutional as within state's "police power" and condemning practices tending to stifle free and open competition, though amendments were not adopted as urgency measures. Gen.Laws 1937, Act 8781.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

2. Constitutional law ⇨47

In determining whether statute is constitutional as urgency measure, character of situation sought to be remedied thereby, rather than its abruptness, is governing factor.

3. Trade-marks and trade-names and unfair competition ⇨68(2)

Retail grocers' sales of articles at prices above invoice cost thereof, plus cost of doing business, after deducting advertising allowances from cost price, were not violations of Unfair Practices Act. Gen.Laws 1937, Act 8781, § 3.

4. Trade-marks and trade-names and unfair competition ⇨93(2)

In suit to enjoin retail grocers from violating Unfair Practices Act by selling certain products below cost for purpose of injuring competitors, evidence of decline in volume of competitors' business was admissible as reasonably warranting inference of loss of profits by them, in view of evidence of highly competitive nature of retail grocery business and resulting small margins of profit therein. Gen.Laws 1937, Act 8781, § 3.

5. Trade-marks and trade-names and unfair competition ⇨68(2)

The Unfair Practices Act does not prohibit all sales of articles below cost, but only such sales as are accompanied by requisite intent to injure seller's competitors or destroy competition. Gen.Laws 1937, Act 8781, § 3.

6. Evidence ⇨108

Intent is intangible matter, which may be proved by inferences based on reasonable probabilities.

7. Trade-marks and trade-names and unfair competition ⇨93(3)

In suit to enjoin retail grocers from violating Unfair Practices Act by selling certain articles below cost, evidence *held* to warrant reasonable inference by trial court that such sales were made with intent to injure defendants' competitors or destroy competition. Gen.Laws 1937, Act 8781, § 3.

8. Trade-marks and trade-names and unfair competition ⇨93(1)

In suit to enjoin retail grocers from violating Unfair Practices Act by selling articles below cost with intent to injure competitors, burden was on plaintiff to prove that sales were not within any of permitted statutory categories of close-out sales, sales of perishable goods to prevent spoilage, sales of damaged goods, sales by officers under court orders, and sales in good faith endeavor to meet competitors' legal prices. Gen.Laws 1937, Act 8781, §§ 3, 6.

9. Constitutional law ⇨311

The validity of statutory presumption depends on whether there is natural and rational evidentiary relation between fact proved and fact to be presumed or manifest disparity in convenience of proof and opportunity for knowledge and whether shifting of burden places undue hardship on party adversely affected.

10. Evidence ⇨87

A presumption is "evidence" and may itself create a conflict with evidence produced by adverse party.

See Words and Phrases, Permanent Edition, for all other definitions of "Evidence".

11. Trade-marks and trade-names and unfair competition ⇨68(2)

The provision of Unfair Practices Act that proof of sales of articles below cost, together with proof of injurious effect of such sales, shall be presumptive evidence of purpose or intent to injure competitors or destroy competition, is invalid. Gen.Laws 1937, Act 8781, § 5.

12. Evidence ⇨87, 89

A presumption creates a conflict with adverse testimony and is sufficient to support a finding, but an inference may be rebutted by clear, positive, and uncontradicted evidence of such nature that it cannot rationally be disbelieved.

13. Evidence 🔑89

When testimony rebutting inference is of such nature that minds of reasonable men cannot differ on subject, trier of facts cannot indulge in such inference.

14. Trade-marks and trade-names and unfair competition 🔑93(1)

A merchant may reasonably assume that price fixed by his competitor is legal price within provision of Unfair Practices Act permitting sales below cost in good-faith attempt to meet competitor's legal prices, and burden is on party prosecuting merchant for, or seeking injunction against his violation of such act to prove that competitor's price was not legal. Gen. Laws 1937, Act 8781, §§ 3, 6(d).

15. Appeal and error 🔑909(1)

In suit to enjoin sales of articles below cost, in violation of Unfair Practices Act, by retail grocers, who set up defense that sales were made in good-faith attempt to meet competitors' legal prices, as permitted by statute, where neither side proved competitors' legal prices as to all articles involved, appellate court may assume, on defendants' appeal, that competitors' prices were legal. Gen.Code 1937, Act 8781, §§ 3, 6(d).

16. Appeal and error 🔑994(3)

In suit to enjoin retail grocers from selling articles below cost with intent to injure competitors, credibility of oral testimony of defendants' store manager that store never sold articles below cost unless competitors first lowered prices, and that all sales below cost were made in good-faith attempt to meet competitors' prices, was for trier of facts. Gen.Laws 1937, Act 8781, §§ 3, 6(d).

17. Trade-marks and trade-names and unfair competition 🔑93(3)

In suit to enjoin retail grocers from selling articles below cost with intent to injure competitors, in violation of statute, evidence justified finding that defendants' sales below cost were not made in good-faith attempt to meet competitors' prices for same articles or articles of equal quality, as disclosed by newspaper advertisements published three or four weeks before sales complained of. Gen.Laws 1937, Act 8781, §§ 3, 6(d).

18. Statutes 🔑47

The phrases, "legal prices of a competitor" and "same article or product", in provision of Unfair Practices Act excepting from prohibitions thereof sales below cost in good-faith endeavor to meet legal prices of competitor selling same article or product in same locality or trade area, are not so indefinite and uncertain as to render such provision and statute unconstitutional. Gen.Laws 1937, Act 8781, § 6(d).

19. Statutes 🔑47

The phrase, "same locality or trade area", in provision of Unfair Practices Act, excepting from prohibitions thereof sales below cost in good-faith endeavor to meet legal prices of competitor selling same articles in same locality or trade area, is not invalid as too vague. Gen.Laws 1937, Act 8781, § 6(d).

20. Statutes 🔑49

Mere difficulty of application of statute in processes of litigation is insufficient to enable court to declare statute unconstitutional.

21. Trade-marks and trade-names and unfair competition 🔑100

A decree, enjoining retail grocers from selling articles below cost, as defined in Unfair Practices Act, for purpose of injuring competitors or destroying competition, and from using any products as loss leaders to divert trade from or injure competitors, but expressly providing that it does not apply to sales of articles below cost under statutory subdivisions excepting such sales from prohibitions of act under certain circumstances, is not void for uncertainty. Gen.Laws 1937, Act 8781, §§ 3, 6.

◆

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by the People against the Pay Less Drug Store, a copartnership, and others, for violations of the Unfair Practices Act and injunction against future violations thereof. Judgment for plaintiff, and defendants appeal.

Affirmed.

Appelbaum & Mitchell and W. R. Griswold, all of Oakland, for appellants.

Ralph E. Hoyt, Dist. Atty., J. F. Coakley, Chief Asst. Dist. Atty., R. Robert Hunter, Asst. Dist. Atty., and J. D. Cooper, Deputy Dist. Atty., all of Oakland, for respondent.

PETERS, Presiding Justice.

The defendants, operators of a cash and carry grocery store located at 19th Street and Telegraph Avenue in the city of Oakland, appeal from a judgment determining that they violated the provisions of § 3 of the Unfair Practices Act as amended in 1937 (Deering's General Laws of 1937, p. 4157, Act 8781) in that they sold, or offered for sale, certain merchandise at less than cost, as defined in the act, and used certain articles as "loss leaders" in violation of the act, and enjoining them from future violations.

The complaint charges that on certain specified dates in January, February and March of 1940 defendants sold, or offered to sell, certain designated products at prices set forth in the complaint, which prices, it is charged, were less than the cost price of such articles, as cost is defined in the act. The complaint sets forth nearly 400 transactions alleged to be in violation of the act. By their answer defendants admitted selling, or offering for sale, the various articles enumerated in the complaint at the prices there set forth but they denied that such prices were less than cost as that term is defined in the act. By special defenses they challenged the constitutionality of the statute in certain respects, and in other respects alleged that the act is too vague, uncertain and indefinite to be enforceable. So far as the charge in relation to the use of "loss leaders" is concerned, defendants admit making some sales below cost, but they allege that such sales were made to meet competition, and were used as a valid form of advertising.

The trial court found that defendants had as competitors various merchants in Oakland, Berkeley and elsewhere; that defendants did offer for sale, and sell at retail, certain goods at less than cost, as cost is defined in the act; that some such sales were less than the invoice or replacement cost of defendants, and some at less than such cost, plus the cost of doing business, which the court found to be 8.03%; that such sales were made for the purpose of injuring competitors or destroying competition; that such sales were not made for any of the purposes permitted by § 6 of the act; and that "loss leaders" were employed for the purpose of diverting trade from competitors and to injure competitors, but the use of such "loss leaders" did not, in fact, mislead purchasers.

At the trial, and on this appeal, defendants freely admit that they made various sales below cost. They admit that some such sales were below either their invoice or replacement cost, and some such sales were below such cost plus their cost of doing business, if such cost of doing business is 8.03%. Their main argument is that the record shows, as a matter of law, that such sales were made in a good faith attempt to meet the legal prices of their competitors, and that the finding that such sales were made with intent to injure their competitors or to destroy competition is totally unsupported by the evidence. In this connection they particularly attack § 5 of the act which purports, under certain circumstances therein set forth, to create a presumption that such sales were made with the intent to injure competitors or to destroy competition. They also attack the constitutionality of the act in certain respects, and challenge other provisions as being uncertain and indefinite.

[1, 2] The Unfair Practices Act, in substantially its present form, was adopted in 1935 as an urgency measure. Stats. 1935, Chap. 477, p. 1546. Its constitutionality as then enacted has been upheld in a series of recent cases. Wholesale T. Dealers v. National, etc., Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486; People v. Kahn, 19 Cal. App.2d Supp. 758, 60 P.2d 596; People v. Black's Food Store, 16 Cal.2d 59, 105 P.2d 361; Dunnell v. Shelley, 38 Cal.App.2d 118, 100 P.2d 830; Green v. Grimes-Stassforth S. Co., 39 Cal.App.2d 52, 102 P.2d 452; see, also, annotations 118 A.L.R. 506, and 128 A.L.R. 1126, where cases from many states are collected and commented upon; for other California cases upholding somewhat similar regulatory statutes, see Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177; Agricultural Prorate Comm. v. Superior Ct., 5 Cal.2d 550, 55 P.2d 495; Jersey Maid Milk Products Co. v. Brock, 13 Cal.2d 620, 91 P.2d 577; In re Fuller, 15 Cal.2d 425, 102 P.2d 321; International, etc., Workers v. Landowitz, 20 Cal.2d 418, 126 P.2d 609; People v. McEntyre, 32 Cal. App.2d Supp. 752, 84 P.2d 560. These cases dispose of most of appellants' constitutional arguments, which need not be further considered.

Appellants contend that because the 1937 amendments to the act were not adopted as urgency measures, the main basis for upholding the constitutionality of the 1935 act no longer exists. This contention is without merit. In the basic case of Wholesale T. Dealers v. National, etc., Co., supra, the Supreme Court upheld the act on the ground that the adoption of such regulatory statutes was within the police power of the state, and that the legislature acted well within its powers in determining that the practices condemned by the statute tend toward the stifling of free and open competition, and are injurious to the consuming public. The urgency nature of the 1935 act was merely part of the background of the statute. As was held in the Wholesale T. Dealers v. National, etc., Co. case, supra, 11 Cal.2d at page 654, 82 P.2d at page 15, 118 A.L.R. 486: "In determining judicial action, however, the character of the situation sought to be remedied rather than its abruptness is the governing factor."

Section 3 of the act is the section that defendants are charged with violating. So far as pertinent here, it provides that: "It shall be unlawful for any person engaged in business within this State, to sell any article or product at less than the cost thereof to such vendor, or give away any article or product, for the purpose of injuring competitors or destroying competition * * *." The 1935 act had required that the requisite intent must be to injure competitors "and" to destroy competition. In 1937 the "and" was changed to "or." The same section defines "cost" to a distributor as "the invoice or replacement cost, whichever is lower, * * * plus the cost of doing business by said distributor." "Cost of doing business" is defined "as all costs of doing business incurred in the conduct of such business and must include without limitation the following items of expense: Labor (including salaries of executives and officers), rent, interest on borrowed capital, depreciation, selling cost, maintenance of equipment, delivery costs, credit losses, all types of licenses, taxes, insurance and advertising." In 1937 a specific prohibition against the use of "loss leaders" was added to the section, and "loss leaders" were defined as "any article or product sold at less than cost as herein defined to induce, promote or encourage, the purchase of other merchandise, or which may have the tendency or capacity to mislead or deceive purchasers or prospective purchasers, or which diverts trade from or otherwise injures competitors."

Section 5, as originally enacted, and as it now provides, permits the use of established cost surveys in proving the costs of the person charged with a violation. In 1937 the following provision was added to § 5: "In all actions brought under the provisions of this act proof of one or more acts of selling or giving away any article or product below cost * * * together with proof of the injurious effect of such acts, shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition."

Section 6 provides that the prohibitions of § 3 shall not apply (a) to close out sales of the particular product or to the sale of perishable goods to prevent loss by spoilage, provided notice is given to the public; (b) to the sale of damaged goods, provided notice is given the public; (c) to sales by an officer acting under the orders of any court; and (d) to sales "in an endeavor made in good faith to meet the legal prices of a competitor * * * selling the same article or product, in the same locality or trade area and in the ordinary channels of trade."

Section 10 permits an action to enjoin a violation of the act, while § 11 makes the violation of § 3 a misdemeanor. This last section also provides that: "Proof of average overall cost of doing business for any particular inventory period when added to the * * * invoice or replacement cost, whichever is lower, of each article or product * * * shall be presumptive evidence of cost as to each such article or product involved in any action * * * involving the violation of any provisions of sections 3 and 5 of this act."

Section 13 of the act provides that the purpose of the act "is to safeguard the public against the creation or perpetuation of monopolies and to foster and encourage competition, by prohibiting unfair, dishonest, deceptive, destructive, fraudulent and discriminatory practices by which fair and honest competition is destroyed or prevented."

The complaint charged that the sales here involved were not sales of the types permitted by any of the provisions of § 6. The answer admits, and it was admitted on the trial, and is admitted on this appeal, that none of the sales here involved was made under subdivisions (a), (b), or (c) of § 6. The main defense at the trial, and the main contention on this appeal, is that all of such sales were sales permitted by subdivision (d) of § 6, namely, sales made below cost in a good faith attempt to meet the legal prices of competitors.

[3] The respondent proved the invoice and replacement cost to appellants of the various products set forth in the complaint, and proved that appellants' overall cost of

doing business was 8.03%. It also proved that on various dates appellants sold many of the articles and products set forth in the complaint for either less than the invoice or replacement cost, or less than such cost plus 8.03%. As to some of the articles involved, the appellants proved that their sale price was above invoice cost, plus cost of doing business, if certain advertising allowances were deducted from the cost price. These advertising allowances should be deducted, so that as to these articles there was no violation of the act. As to many other articles, however, the evidence shows, and appellants concede, that they were sold or offered for sale, for less than invoice cost, and in other cases for less than invoice cost plus 8.03%. As to these sales there are but two questions involved: (1) Did the plaintiff prove that such sales were made "for the purpose of injuring competitors or destroying competition" as required by § 3 of the act; and (2) does the evidence, as a matter of law, show that such sales below cost were made "in an endeavor made in good faith to meet the legal prices of a competitor * * * selling the same article or product, in the same locality or trade area * * *."?

[4] So far as the first question is concerned, the respondent produced as the first witness the secretary of the Retail Grocers Association of Alameda County. He testified that appellants attract customers of their competitors by selling at cost or below, and that the natural effect of selling below cost by one merchant is to lessen the business of his competitors. Various grocery store operators then testified that they were competitors of appellants. Several of these operated stores reasonably close to that of appellants, one operated a store in Piedmont, and the others operated stores several miles distant. They all testified that during the early months of 1940 they noticed a material decline in their volume of business that was not purely seasonal. Several of them testified that during this period they noticed a particular decline in the volume of their coffee sales, that being one of the products appellants admittedly sold below cost during this period. Several testified that in self-defense they had to reduce their prices to meet the challenge of appellants. Appellants argue that evidence of loss of volume is not necessarily evidence of "injury" to competitors because to constitute an injury there must be loss of profits, and loss of volume does not necessarily show loss of profits. There is ample evidence in the record of the highly competitive nature of the retail grocery business, and of the small margin of profit that exists because of such competition. In view of that evidence, it is a reasonable, if not inevitable, inference that loss of volume of business shows loss of profits.

[5-8] On this evidence the trial court found that these sales below cost were with the intent to injure competitors or to destroy competition. It is, of course, true that all sales below cost are not prohibited. Only those sales accompanied by the requisite intent are prohibited. This was the express holding in Wholesale T. Dealers v. National, etc., Co., 11 Cal.2d 634, at page 658, 82 P.2d at page 17, 118 A.L.R. 486. See, also, Balzer v. Caler, 11 Cal.2d 663, 82 P.2d 19. Intent, however, is not something that can always be proved by concrete evidence. It is an intangible matter that may be proved by inferences based on reasonable probabilities. Without now considering the evidence produced by appellants, and without regard to the presumption contained in § 5 above quoted, we think that it is a reasonable inference from the above evidence that the sales here involved were with the requisite intent. The sales below cost are admitted. The evidence shows competitors were injured by such price cutting by appellants. In addition, the act permits sales below cost, but the respondent proved that these sales did not fall within any of the permitted categories. This is a necessary part of the respondent's burden of proof. Green v. Grimes-Stassforth S. Co., 39 Cal. App.2d 52, 102 P.2d 452. It seems to us that when sales below cost are shown, when injury to competitors appears, and when the evidence shows the sales were not in any of the permitted classes, the trier of the fact may reasonably infer, as was done in this case, that such sales were of the prohibited class, that is, sales below cost for the purpose or with the intent to injure competitors or to destroy competition.

[9, 10] Respondent, in addition to urging direct evidentiary support for the challenged finding of intent, relies on the presumption created by § 5 to support the finding. It will be noted that by that provision proof of one or more sales below cost, plus proof of the injurious effect of such acts "shall be presumptive evidence of the purpose or intent to injure competitors or destroy competition." Appellants vigorously attack the validity of this provision. It is urged that the legislature has over-

stepped permissible limits in thus attempting to create this presumption. A somewhat similar provision was held to be invalid in Great Atlantic & Pacific Tea Co. v. Ervin, D.C., 23 F.Supp. 70. The true test to be applied in determining the validity of a statutory presumption is to ascertain whether there is a natural and rational evidentiary relation between the fact proved and the fact to be presumed, or to determine whether there is a manifest disparity in convenience of proof and opportunity for knowledge, and to determine whether the shifting of the burden places undue hardship on the defendant. Morrison v. People of State of California, 291 U.S. 82, 54 S.Ct. 281, 78 L.Ed. 664; McFarland v. American Sugar Refining Co., 241 U.S. 79, 36 S.Ct. 498, 60 L.Ed. 899; Mobile, J. & K. C. R. Co. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78, 32 L.R.A., N.S., 226, Ann.Cas.1912A, 463; People v. Associated Oil Co., 211 Cal. 93, 294 P. 717; People v. Murguia, 6 Cal.2d 190, 57 P.2d 115; see note 22 Cal. L. Rev. 420. In view of the rule in this state that a presumption is evidence, and may itself create a conflict with the evidence produced by the adverse party (Westberg v. Willde, 14 Cal.2d 360, 94 P.2d 590; Speck v. Sarver, 20 Cal.2d 585, 128 P.2d 16), and keeping in mind the distinctions that exist between inferences and presumptions in this state, we have grave doubts as to the validity of the presumption attempted to be created by § 5. The intent to injure competitors or to destroy competition is the essence of the offenses defined by § 3. Sales below cost are not per se invalid. Unless the wrongful intent exists, such sales are valid. The Supreme Court in upholding § 3 of the act as it read in 1935, in Wholesale T. Dealers v. National, etc., Co., 11 Cal.2d 634, 82 P.2d 3, 118 A.L.R. 486, had grave doubts as to whether the section would be constitutional if the requisite intent did not exist. At page 658 of 11 Cal.2d, 82 P.2d at page 17, 118 A.L.R. 486, the court stated: "It would certainly add to the weight of appellant's argument on the main issue if the statute omitted intent as an integral part of the act prohibited. It is one thing, from a legal standpoint, to prohibit sales below cost engaged in for the purpose of injuring competitors and destroying competition, and quite another to merely prohibit all such sales regardless of intent. It may well be that an absolute prohibition regardless of intent would be unreasonable." See, also, Fairmont Creamery Co. v. State of Minnesota, 274 U.S. 1, 47 S.Ct. 506, 71 L.Ed. 893, 52 A.L.R. 163. In State v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A.2d 291, it was held that a statute which purports to prohibit all sales below cost without the necessity of the intent to injure competitors or destroy competition, is unconstitutional. The same result was reached by the Supreme Court of Pennsylvania in Commonwealth v. Zasloff, 338 Pa. 457, 13 A.2d 67, 128 A.L.R. 1120. See, also, State v. Ruback, 135 Neb. 607, 281 N.W. 607. Other courts in upholding similar statutes have emphasized that they did so because the statute only prohibited sales below cost that were accompanied with the requisite unlawful intent. Rust v. Griggs, 172 Tenn. 565, 113 S.W.2d 733; State v. Langley, 53 Wyo. 332, 84 P.2d 767.

[11] It would thus appear that the intent to injure competitors or destroy competition is the essence of the offenses prohibited by the act. Unless proof of such intent is required the statute would be unconstitutional. Now, by the 1937 amendment to § 5, the legislature has provided that upon proof of sales below cost plus proof of injury to competitors such unlawful intent will be presumed. Inasmuch as the obvious effect of one merchant selling a particular article below cost will be to take sales from and therefore injure competitors, the effect of this statutory presumption, from a practical standpoint, is that upon proof of sales below cost the unlawful intent can be presumed. There is no natural and rational connection between the fact proved (sales below cost) and the fact presumed (unlawful intent). Nor is there a disparity in convenience of proof and opportunity of knowledge between plaintiff and defendant on this issue. The attempt to thus shift the burden by creating a statutory presumption would place an undue hardship on defendant. Thus, § 5 fails to meet any of the standards set up by the United States Supreme Court and the courts of this state which must exist before an attempt by the legislature to create such a presumption will be upheld.

There is nothing inconsistent between the holding that the statutory presumption contained in § 5 is invalid, and the holding heretofore made, that upon the evidence here produced the trial court was justified in inferring that the required wrongful intent existed. Here the evidence showed not only sales below cost and injury to competitors, but also that such sales did not fall within the permitted categories enumerated in § 6. It is reasonable to infer from such evidence, as already held, that such sales were for the purpose of injuring competitors or destroying competition since they were not permitted sales. The trial court was not required to indulge in the inference, but it could do so.

[12, 13] If the presumption be upheld, the trial court, in the absence of contrary evidence, must find in accordance with the presumption. Moreover, a presumption creates a conflict with adverse testimony and is sufficient to support a finding based thereon. An inference, on the other hand, may be rebutted if the contrary evidence is "clear, positive, uncontradicted, and of such a nature that it cannot rationally be disbelieved" (Blank v. Coffin, 20 Cal.2d 457, 461, 126 P.2d 868, 872), or, as was held in Hicks v. Reis, 21 Cal.2d 654, 660, 134 P.2d 788, 791, "when the rebutting testimony is of such a nature that the minds of reasonable men cannot differ on the subject, then the trier of the facts cannot, and should not be permitted to, indulge in the inference."

[14, 15] This brings us to the second main point urged by appellants, that is, that the evidence, as a matter of law, demonstrates that the admitted sales below cost were made in a good faith attempt "to meet the legal prices of a competitor as herein defined selling the same article or product, in the same locality or trade area," as permitted by subd. (d) of § 6. It will be noted that in order to bring the sale below cost within the provisions of this section it must be a sale to meet the "legal" prices of a competitor. Of course, in many branches of business, including the grocery business, some merchants may be able to purchase for less than others because of the fact that they purchase in larger quantities. There is no evidence in this case as to what the "legal" price of competitors may have been as to many of the articles involved. This deficiency of proof however, in no way, affects appellants' defense under § 6(d). We are of the opinion that one merchant may reasonably assume that his competitor is not violating the law, and that the price fixed by the competitor is a "legal" price. If it is not, the burden of proof rests on the prosecution or the one seeking an injunction to prove that the competitor's price was not a "legal" price. If this were not the rule, each merchant in attempting to stay in business by meeting competitive prices would have to determine, at his peril, whether his competitor's prices were "legal." This interpretation also refutes appellants' argument that the phrase is too indefinite and uncertain to be enforceable. As here interpreted similar phrases have been approved by the courts of several states. State v. Sears, 4 Wash. 2d 200, 103 P.2d 337; Rust v. Griggs, 172 Tenn. 565, 113 S.W.2d 733. It is true that in Commonwealth v. Zasloff, 338 Pa. 457, 13 A. 2d 67, 128 A.L.R. 1120; State v. Packard-Bamberger & Co., 123 N.J.L. 180, 8 A.2d 291; State v. Walgreen Drug Co., 57 Ariz. 308, 113 P.2d 650, similar statutes of Pennsylvania, New Jersey and Arizona were held to be unconstitutional. These cases are either predicated on the failure to include intent as the basis of the offense, or are contrary to the overwhelming weight of authority as shown by the cases cited in the first part of this opinion. Insofar as they discuss the phrase here under discussion, they are not only contrary to the cases from Washington and Tennessee, supra, but they fail to consider the arguments and interpretation set forth in those cases and in this opinion. In the instant case neither side proved the "legal" price of the competitors as to all the articles involved. We may assume, therefore, that the competitor's prices were "legal" prices.

[16, 17] Burnham, appellants' manager, testified positively that his store never sold any articles below cost except where competitors had first lowered the price, and that all of the admitted sales below cost were made in a good faith attempt to meet competitor's prices. So far as his oral testimony is concerned, Burnham's credibility was, of course, for the trier of the facts, and his evidence did no more than create a conflict on the issue. In support of this defense appellants also introduced in evidence a series of newspaper advertisements of various competitors published around the time of defendants' below cost sales. Burnham testified that his store employed persons who read all advertisements of competitors and otherwise checked competitors' prices; that his store reduced their prices only after seeing these advertisements; and that appellants "either had to meet those prices or go out of business and stay out." Appellants urge that these advertisements demonstrate that all of their sales below cost were made to meet the advertised prices of competitors. If these exhibits did show, as contended by appellants, that their sales below cost oc-

curred at or shortly after the time competitors advertised the same article at the price at which appellants sold, we think this would establish appellants' defense. The difficulty with appellants' position is that the exhibits, which we have examined, do not support the contention. Appellants prepared an exhibit (Defendants' Exhibit K) which lists many of its below cost sales and lists the advertisements of its competitors upon which it relies to justify the cut price. That exhibit shows that one of appellants' competitors—Lucky's—advertised M. J. B. coffee, 1 lb. can, at the cut price during the period January 12th to 18th, 1940. The same exhibit shows that appellants sold, or offered to sell, 1 lb. cans of M. J. B. coffee at the cut rate on January 24, 1940, January 31st, February 9th, February 28th, March 6th, March 7th, March 9th, March 11th, March 12th, March 13th, March 22nd, and March 23rd. Thus appellants contend that a sale below cost on March 23rd was made in a good faith attempt to meet the price advertised by a competitor on January 18th—64 days before. It seems to be the theory of appellants that the January 18th ad, as a matter of law, proves that the March 23rd sale was made in a "good faith" attempt to meet the prices of a competitor. There are many other examples disclosed by the exhibit. There are many illustrations of sales below cost three or four weeks after the advertisement last appeared. Items 301, 302 and 303 were sold below cost thirty days after the date of the competitor's advertisement, items 326 and 327, thirty-two days later, items 347 and 348, thirty-three days later, items 363, 367 and 368, thirty-four days later, and items 377, 382 and 383, thirty-five days later. Obviously, the trial court was justified in inferring and finding that such sales, made so much later than the advertisements, were not made in a good faith attempt to meet the prices of competitors, as such prices were disclosed by the relied upon advertisements.

Appellants also introduced into evidence Exhibit L, which purports to show that other merchants advertised articles of "equal quality" at the same price that appellants sold their merchandise. Appellants urge that although subd. (d) of § 6 requires that the competitor sell "the same article or product," that that does not mean the identical brand. We are inclined to agree with appellants that if one merchant sells one brand of coffee, or salad oil, for instance, at a designated price, a competitor under subd. (d) of § 6 may lawfully meet that price with other brands of coffee or salad oil of comparable cost and quality. In each case it is a question of fact as to whether the competing articles are of the same quality. Assuming that appellants are correct in their contention that the articles sold by them below cost were of equal quality with those advertised by their competitors, Exhibit L shows that many of these sales were too far distant from the relied upon advertisements of competitors to make those advertisements, as a matter of law, a defense. The exhibit shows many sales by appellants twenty-one, twenty and nineteen days later than the advertisements. It also shows that item 59 was sold twenty-two days later than the publication date of the relied upon advertisement, item 174, twenty-three days later, item 166, twenty-four days later, items 227 and 233, twenty-five days later, item 191, twenty-six days later, item 219, twenty-seven days later, item 243 twenty-eight days later, items 264, 290 and 296, thirty days later, item 281, thirty-one days later, item 323, thirty-two days later, items 309, 337 and 343, thirty-three days later, item 332, thirty-five days later and item 353, thirty-six days later. It also shows that as to items 9, 31, 63, 82, 83 and 110 no advertisements were relied upon.

Enough has been said on this issue to illustrate that the evidence, as a matter of law, does not demonstrate that appellants' below cost sales were all made in a good faith attempt to meet the prices of competitors. The finding to the contrary is amply supported.

[18] Appellant attacks the provisions of subd. (d) of § 6 as being, in certain respects, so indefinite and uncertain as to render the section and, therefore, the act, unconstitutional. The first attack is made against the phrase "legal prices of a competitor." That phrase, as heretofore interpreted, is, in our opinion, for the reasons already stated, and upon the authorities heretofore cited, sufficiently definite. Appellants also attack the phrase "same article or product" as being too indefinite. We have already agreed with appellants' construction that that phrase includes products of the same kind of similar cost and quality. In each case this is a question of fact. As so interpreted, the phrase is sufficiently definite.

[19, 20] The last attack is made on the phrase "same locality or trade area." The

Supreme Court of Minnesota has upheld a similar phrase appearing in the Minnesota act in McElhone v. Geror, 207 Minn. 580, 292 N.W. 414, 419. In that case it was pointed out that each merchant knows who his competitors are—that whether they are in the same "locality" or "trade area" is a question of fact in each case. In this connection the court stated: "Neither 'same locality' nor 'trade area' is a phrase of art, with precise meaning. However, both are common terms, susceptible of reasonable application by and to evidence. That in some cases the issue of fact as to 'locality' or 'trade area' may be difficult of solution does not render invalid that statute under which it arises. Mere difficulty of application in the processes of litigation is not enough to enable a court to say that a statute is unconstitutional." We agree with this reasoning. It might be added that Burnham had no difficulty in knowing who his competitors were. He not only introduced advertisements of the firms alleged to be his competitors, but he testified that he had employees go out and check the prices of his competitors that were selling "in the trading area." Obviously, the size and extent of a competitive trade area depends upon the nature and size of the business, and many other factors. The holding of the South Carolina court in State v. Standard Oil Co. of New Jersey, 195 S.C. 267, 10 S.E.2d 778, that the terms "section" and "locality" of a city, appearing in an entirely different kind of statute, were too vague to be enforceable, is not convincing in interpreting the type of statute here involved.

[21] Appellants next contend that the injunction is void for uncertainty. It is true that the terms of the decree are sweeping—appellants are prohibited from selling any article below cost as defined in the act for the purpose of injuring competitors or destroying competition, or using any product as a "loss leader" which diverts trade from or injures competitors. But it is also true that the decree expressly provides that it does not apply to the sale of any article below cost, as defined in the act, when such sale is made under subdivisions (a), (b), (c) or (d) of § 6 of the act. It is not a decree, as was involved in Johnson v. Farmer, 41 Cal.App.2d 874, 107 P.2d 959, 108 P.2d 945, where the defendant was enjoined generally from violating the act. The prohibitions in the injunction under discussion are against sales below cost "for the purpose of injuring competitors or destroying competition," or in the case of "loss leaders" against using that device when it "diverts trade from or otherwise injures competitors." All sales below cost as enumerated in § 6 are expressly permitted. The injunction is no more restrictive of appellants' activities than are the provisions of the act itself. In any proceeding for contempt it will be indispensable to show the necessary intent to injure competitors or destroy competition. The injunction is as certain as the nature of the case permits.

Appellants make other contentions as to the interpretation of the act. All such contentions are found to be without merit. Appellants also object to the admission of certain evidence on the ground that it was hearsay. Even if the admission of such evidence were erroneous, such error was not prejudicial.

The judgment appealed from is affirmed.

WARD, J., and DOOLING, Justice pro tem., concur.

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61 Cal.App.2d 632

WELCH v. SECURITY-FIRST NAT. BANK OF LOS ANGELES et al.

Civ. 14184.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1943.

Hearing Denied Feb. 3, 1944.

1. Mortgages 🔑270

In action to quiet title to decedent's land from trust deed lien, testimony of one defendant as to his purchase of note and trust deed was substantial evidence to sustain finding that such defendant had so purchased from original holder and beneficiary.

2. Pleading 🔑291(4)

Where plaintiff in action to quiet title to land from trust deed lien alleged that note and trust deed had not been assigned to certain defendant and such defendant attached to verified answer and made a part thereof a photostatic copy of assignment to her of note and trust deed, and plaintiff did not, by affidavit, deny the genuineness and due execution of such assignment, plaintiff admitted that assignment was genuine and duly executed. Code Civ.Proc. § 448.

3. Pleading 🔑291(4)

In action to quiet title to land from trust deed lien, plaintiff's admission of genuineness and due execution of assignment of note and trust deed to a particular defendant by plaintiff's failure to deny by affidavit the genuineness and due execution of such assignment when defendant attached to and made a part of her verified answer a photostatic copy of assignment constituted substantial evidence supporting finding that assignment was made. Code Civ.Proc. § 448.

4. Pleading 🔑34(5)

In action to quiet title to land from trust deed lien, allegations in complaint that certain defendant had no legal right or title to trust deed or note secured thereby in that trust deed was never assigned or transferred to such defendant and that such defendant was not a party to or a holder of the note and trust deed did not constitute a denial of the genuineness and due execution of a photostatic copy of the assignment of note and trust deed to such defendant attached as an exhibit to such defendant's verified answer. Code Civ. Proc. § 448.

5. Mortgages 🔑345

The enforcement of a power of sale contained in a deed of trust is not outlawed by the lapse of time alone.

6. Mortgages 🔑147

The lapse of eight years and four months between date of execution of note and trust deed and date of death of payor-trustor without any action being taken by successive owners and holders of note and trust deed did not bar by laches claim of lien by holder of trust deed against realty of decedent.

7. Witnesses 🔑133

A lien of a trust deed or mortgage is not a "claim" within meaning of statute barring a party to an action upon a claim against an estate from testifying to any fact occurring before death of decedent. Code Civ.Proc. § 1880, subd. 3.

See Words and Phrases, Permanent Edition, for all other definitions of "Claim".

8. Witnesses 🔑133

In action by executrix to quiet title to decedent's land from trust deed lien, testimony of an assignee of trust deed concerning his acquisition of note and trust deed and subsequent assignment to another was not barred by statute prohibiting a party to an action upon a "claim" against an estate from testifying to any fact occurring before death of decedent. Code Civ.Proc. § 1880, subd. 3.

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Laura Grimm Welch, as the executrix of the last will and testament of Ferdinand Albert Heim, deceased, against Security-First National Bank of Los Angeles, a purported trustee, and others, to quiet title to a parcel of land standing in decedent's name from the lien of a trust deed executed by decedent in his lifetime. Judgment for defendants, and plaintiff appeals.

Affirmed.

Richard A. Haley, of Los Angeles, for appellant.

Chase, Barnes, & Chase, of Los Angeles, for respondents.

McCOMB, Justice.

This action was brought by plaintiff as the executrix of the estate of Ferdinand Albert Heim, deceased, to quiet title to a parcel of land standing in decedent's name from the lien of a deed of trust executed by Mr. Heim in his lifetime.

From a judgment in favor of defendants after trial before the court without a jury, plaintiff appeals.

The evidence being viewed in the light most favorable to defendants (respondents), the essential facts are:

During his lifetime, Ferdinand Albert Heim was the owner of Lot 8, Block 3 of Angeleno Heights in the City of Los Angeles. On April 29, 1933, Mr. Heim executed and delivered a promissory note in favor of the Security-First National Bank of Los Angeles in the sum of $2540.00. On the same date, as security for the aforesaid note, he executed a deed of trust covering the note above described. The Los Angeles Trust & Safe Deposit Company was named as trustee and the Security-First National Bank of Los

Angeles as beneficiary. On May 8, 1933, Ferdinand Heim, an uncle of the deceased, purchased the note and the trust deed above mentioned from the Security-First National Bank of Los Angeles, and said note and trust deed were duly assigned to him on December 24, 1934. Mr. Ferdinand Heim assigned the note and deed of trust to defendant Pedroarena on September 8, 1941. Ferdinand Albert Heim died on September 16, 1941. Thereafter the note, trust deed and assignments were sent by defendant Heim to defendant Pedroarena.

Plaintiff relies for reversal of the judgment upon three propositions, which will be stated and answered hereunder seriatim.

First: *There was not any substantial evidence to sustain the trial court's finding that defendant (a) Heim purchased the note and deed of trust from the Security-First National Bank, (b) Heim assigned the note and trust deed to defendant Pedroarena.*

[1] (a) This proposition is untenable. Defendant Heim, according to his deposition testified in substance as follows:

That his deceased nephew had executed the note and deed of trust which are involved in the present litigation; that he knew the signature of decedent and that it appeared on both the note and deed of trust; that he had purchased the note from defendant bank and subsequently, on December 24, 1934, assigned it to defendant Pedroarena; that he held it in trust for her until September 16, 1941, when he forwarded it to her; and that at no time while he held the note was any sum ever paid upon it.

The foregoing testimony clearly supports the trial court's finding that defendant Heim purchased from defendant, Security-First National Bank, the note and trust deed which his nephew had executed.

[2, 3] (b) Defendant Pedroarena attached to her verified answer and made a part thereof, a photostatic copy of the assignment to her by defendant Heim of the note and trust deed here involved. Plaintiff did not, by affidavit, deny the genuineness and due execution of such assignment. Therefore under the provisions of section 448 of the Code of Civil Procedure plaintiff admitted that such assignment was genuine and duly executed. This admission constitutes substantial evidence to support the trial court's finding that the note and trust deed were duly assigned by defendant Heim to defendant Pedroarena.

[4] Plaintiff alleged in her complaint:

"That Plaintiff alleges that the said Anna Pedroarena has no legal right or title to the aforesaid Deed of Trust in that the same has never in any manner been assigned or transferred to the said Anna Pedroarena.

"That Anna Pedroarena has no legal right to said Trust Deed or its Note for the reason that she is in no way a party to or a holder of the aforesaid Note and Trust Deed * * *."

Neither of the foregoing allegations constitutes a denial of the genuineness and due execution of the assignment attached as an exhibit to defendant Pedroarena's answer.

Cox v. Schnerr, 172 Cal. 371, 156 P. 509; and Singer v. Briggs, 6 Cal.App.2d 665, 45 P.2d 436, are not here in point since they are factually distinguishable from the instant case. In the Cox case, the verified pleading specifically denied the execution and delivery of the document there involved.

In the Singer case, the complaint alleged the execution of a deed and the answer specifically denied the execution of such deed.

Second: *Defendants' claims were barred by laches since eight years and four months elapsed between the date of the execution of the documents here involved and the date of the death of Ferdinand Albert Heim, the payor and trustor, without defendants' taking action of any kind to protect their interest.*

[5, 6] This proposition is also untenable and is governed by the rule that enforcement of a power of sale contained in a deed of trust is never outlawed by the lapse of time alone. (Bank of Italy, etc., Ass'n v. Bentley, 217 Cal. 644, 655, 20 P.2d 940.)

Third: *The trial court committed prejudicial error in receiving over objection the deposition of Ferdinand Heim contrary to the provisions of section 1880, subdivision 3 of the Code of Civil Procedure.*

[7] This proposition is also without merit. The law is established in California that a lien of a trust deed or mortgage is not a claim within the meaning of section 1880, subdivision 3 of the Code of Civil

Procedure. (Porter v. Van Denburgh, 15 Cal.2d 173, 176, 99 P.2d 265; Bollinger v. Wright, 143 Cal. 292, 296, 76 P. 1108; Hector v. Superior Court, 15 Cal.App.2d 552, 554, 59 P.2d 591; Silva v. Dias, 46 Cal.App.2d 662, 664, 116 P.2d 496.)

[8] Applying the foregoing rule to the facts in the instant case, it is evident that since this was a quiet title action to remove the cloud on a title to real property created by the lien of a trust deed, defendant Heim's testimony did not fall within the provisions of Section 1880, subdivision 3 of the Code of Civil Procedure, but such testimony was properly received in evidence.

For the foregoing reason, the judgment is affirmed.

MOORE, P. J., concurs.

W. J. WOOD, J., deeming himself disqualified did not participate in the foregoing decision.

23 Cal.2d 256

BROWN et al. v. GEORGE PEPPERDINE FOUNDATION.

L. A. 18743.

Supreme Court of California.

Dec. 7, 1943.

1. Master and servant 🔑315

A landlord cannot escape liability for failure to maintain elevators in a safe condition by delegating such duty to an independent contractor.

2. Master and servant 🔑315

If an independent contractor is employed to perform duty to put and maintain land in a reasonably safe condition, the possessor is answerable for harm caused by negligent failure of contractor to put or maintain building structures in reasonably safe condition irrespective of whether contractor's negligence lies in his incompetence, carelessness, inattention, or delay.

3. Appeal and error 🔑867(2)

In considering the propriety of trial court's action in granting a new trial, Supreme Court is governed by the cumulative effect of all errors, conflicts, and confusions that appear in the charge as a whole.

4. Landlord and tenant 🔑169(10)

In action against apartment house owner for injuries sustained by minor occupant from a fall down elevator shaft, an instruction, which directed jury to find for owner if regular and frequent inspections of elevator were made by owner's independent contractor, was erroneous in failing to require the exercise of due care.

5. Landlord and tenant 🔑164(1)

Apartment house owner is bound to use the utmost care in the maintenance of elevators, and regular and frequent inspections alone is not sufficient, but landlord must use due care in servicing, inspecting, and maintaining the elevator and all appliances appurtenant thereto.

6. Negligence 🔑138(2)

In action for injuries sustained in a fall down an elevator shaft, instructing that the mere fact that an accident happened, considered alone, does not support an inference that some party was negligent, and further instructing that the inference of negligence from the fact of the happening of the accident itself shifts the burden to defendant of explaining the manner in which the accident happened, was confusing and erroneous.

7. Trial 🔑296(13)

It is not error for trial court to correct mistakes in instructions by subsequent clarification.

8. New trial 🔑27

If it is clear that error could not have affected results of the trial, court is bound to deny motion for new trial; but, if the error can possibly have been prejudicial, the trial court must consider its probable effect and decide the motion accordingly. Const. art. 6, § 4½.

9. Appeal and error 🔑1170(9)

Where trial court erroneously instructed that negligence of independent contractor in inspecting elevators could not be imputed to landlord, and failed to instruct that the exercise of due care in making inspections was required, and gave other instructions which were confusing, trial court's determination that such errors were prejudicial and justified granting plaintiff a new trial could not be regarded as error on appeal. Const. art. 6, § 4½.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Carol Ann Brown, a minor, etc., and others against George Pepperdine Foundation and others for injuries sustained by minor when she fell down an elevator shaft in a building owned by the named defendant. Jury returned a verdict for defendant, and, from an order granting plaintiff's motion for new trial, the defendant named appeals.

Affirmed.

Prior opinion 135 P.2d 707.

Parker & Stanbury, Harry D. Parker, Raymond G. Stanbury and White McGee, Jr., all of Los Angeles, for appellant.

W. I. Gilbert, Jr., of Los Angeles, for respondents.

GIBSON, Chief Justice.

Carol Ann Brown, a minor, and her mother, Minnie Lee Brown, sued defendants George Pepperdine Foundation and Oliver & Williams Company for damages resulting from personal injuries received by the minor. The jury returned a verdict for the defendants, and the court granted plaintiffs' motion for a new trial. George Pepperdine Foundation alone appealed from the order granting the new trial.

Carol Ann, a five-year-old girl, was injured by a fall down the elevator shaft in an apartment building, owned by appellant, in which she and her mother were living. The codefendant, Oliver & Williams Company, was in the business of elevator maintenance and had a contract with appellant for the weekly inspection of the elevator, which was operated by the passengers using it.

Mrs. Brown testified that she left her apartment on the third floor with her brother and Carol Ann, intending to use the elevator which was located on an intersecting hallway. Carol Ann ran ahead, and when Mrs. Brown was 10 or 15 feet distant from the elevator she saw Carol Ann push the elevator button and pull the outer door open. When the door opened into the hallway it was between Carol Ann and her mother, and although she could not say she saw the child fall directly into the shaft, the mother testified that she did see Carol Ann lean forward and disappear "as if she just leaped forward." When Mrs. Brown reached the door it would not open. She pushed the button and the elevator containing two passengers came down from the fourth floor to the third floor where it was held by the occupants until Carol Ann was rescued from the bottom of the shaft. Plaintiffs relied upon this evidence and the doctrine of res ipsa loquitur to establish the negligence of defendants.

Witnesses for the defendants testified that the elevator had been regularly inspected and serviced weekly, and that it was examined immediately after the accident and found to be working properly. Experts stated that the type of lock used to fasten the outer door was so designed that the door could not be opened unless the elevator car was at the level of that floor, and that they had never known this type of lock to fail even though the electrical current was cut off. They also testified that if the elevator was stopped at a certain point between floors, and the inner folding door opened, it was possible for a small child to crawl from the car into the shaft. Based upon such evidence it is appellant's theory that the accident occurred in this manner.

A new trial was granted upon the sole ground of errors of law occurring in the instructions. Appellant asserts that no error was committed and that the jury, having been fully and correctly instructed on all phases of the case, the order granting a new trial should be reversed.

[1, 2] The court, at the request of appellant, told the jury in two separate instructions (Nos. 49 and 56) that the negligence of the codefendant Oliver & Williams Company could not be imputed to appellant. In our opinion these instructions are erroneous. A landlord cannot escape liability for failure to maintain elevators in a safe condition by delegating such duty to an independent contractor. Tippecanoe Loan & T. Co. v. Jester, 180 Ind. 357, 101 N.E. 915, L.R.A.1915E, 721; 32 Am.Jur. 617, sec. 740; see, also, Hussey v. Long Dock R. Co., 100 N.J.L. 380, 126 A. 314; Cramblitt v. Percival-Porter Co., 176 Iowa 733, 158 N.W. 541, L.R.A.1917C, 77; Gobrecht v. Beckwith, 82 N.H. 415, 135 A. 20, 52 A.L.R. 858. The general rule is set forth in the Restatement of the Law of Torts, Negligence, page 1138, section 422, as follows: "The duty which a possessor of land owes to others to put and maintain it in reasonably safe condition is nondelegable. If an independent contractor, no matter how carefully selected, is employed to perform it, the possessor is answerable for harm caused by the negligent failure of his contractor to put or maintain the buildings and structures in reasonably safe condition, irrespective of whether the contractor's negligence lies in his incompetence, carelessness, inattention or delay."

[3] Appellant argues, however, that even though instructions Nos. 49 and 56 are erroneous they could not have been prejudicial in this case since by its verdict in favor of Oliver & Williams Company, the jury impliedly found that the independent contractor was not negligent and consequently there was no negligence to impute. In considering the propriety of the court's action in granting a new trial we are to be governed, however, not alone by the error in instructions Nos. 49 and 56 but by the cumulative effect of all errors, conflicts and confusion that appear in the charge as a whole.

At the request of appellant the court gave instruction (No. 46) as follows: "If you find that the elevator in question and all of the appliances appurtenant thereto were of a standard make in wide use in this locality under similar conditions, that it was in daily use, that neither the defendant George Pepperdine Foundation nor any of its agents or employees had any notice of any defect therein, nor any reason to suspect the same, that the George Pepperdine Foundation exercised the care required of it by employing the services of the defendant Oliver & Williams to inspect and service the said elevator, that the said defendant Oliver & Williams was, so far as it was possible for the defendant George Pepperdine Foundation to ascertain by the use of the care required of it, competent and experienced elevator maintenance men, and that the said defendant Oliver & Williams did in fact make regular inspection of the said elevator at intervals which were sufficiently frequent to be consistent with such care on the part of the defendant George Pepperdine Foundation, then you are instructed that, as a matter of law, the defendant George Pepperdine Foundation would not be liable in this action and you must return a verdict in its favor even though you find that the accident occurred exactly as claimed by the plaintiffs."

[4, 5] This formula instruction directs the jury to find for appellant if it had no notice of any defect in the elevator nor reason to suspect the same, and if appellant used the care required of it in employing the services of Oliver & Williams Company to inspect the elevator, and if Oliver & Williams Company made regular inspections which were sufficiently frequent to be consistent with such care on the part of appellant. The instruction does not purport to relieve appellant of responsibility for any negligence of the independent contractor as in instructions Nos. 49 and 56, but it assumes to declare the entire duty owed by appellant, and in so doing it omits an important element. It directs the jury to find for appellant if regular and frequent inspections were made but fails to require the exercise of due care in making such inspections. An owner is bound to use the utmost care and diligence in the maintenance of elevators. Treadwell v. Whittier, 80 Cal. 574, 591, 22 P. 266, 5 L.R.A. 498, 13 Am.St.Rep. 175; Gregg v. Manufacturers' Bldg. Corp., 134 Cal.App. 147, 152, 25 P.2d 43, 1014; 18 Am.Jur. 531, sec. 13. In the fulfillment of this obligation something more than regular and frequent inspections is required. Perfunctory inspections, although regularly and frequently made, would not meet the obligation appellant owed to respondents. In order to fulfill the duty imposed upon it by law appellant was required to use due care in servicing, inspecting and maintaining the elevator and all the appliances appurtenant thereto. The instruction erroneously failed to include this requirement.

[6] The court, at the request of appellant, instructed the jury (No. 63) that "The mere fact that an accident happened, considered alone, does not support an inference that some party or any party to this action was negligent." Appellant claims that this instruction is not error because the doctrine of res ipsa loquitur does not apply unless the basic requisites of exclusive control and probability of negligence exist. Under appellant's theory of how the accident occurred the instruction is not erroneous when considered with certain other instructions. It may have confused the jury, however, in view of instruction No. 30 which states that "The inference of the negligence which you may draw in this case *from the fact of the happening of the accident itself* shifts the burden to the defendants of explaining the manner in which the accident happened. * * *" (Italics added.) These two instructions contain inconsistent ideas and the jury may have been confused thereby.

[7] It also appears that certain instructions were reread and the jury told to disregard them and then told not to disregard one which was again reread. It is, of course, not error for a court to correct its mistakes. But in passing upon the motion for new trial, the court probably concluded that instead of clarifying the instructions it further confused and misled the jury in attempting to correct the mistakes.

[8, 9] The trial court, no less than the appellate court, is expressly enjoined by article VI, section 4½, of our Constitution to deny a new trial for error of law unless such error is prejudicial. If it is clear that the error could not have affected the result of the trial, the court is bound to deny the motion. But if the error can possibly have been prejudicial, the trial court must consider its probable effect and decide the motion accordingly. The trial court here has determined that the errors in the instructions prejudiced respondents' cause,

and we cannot say in the light of the record that the trial court was in error in so holding.

The order granting a new trial is affirmed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

23 Cal.2d 330

TRINDLE v. WHEELER.

L. A. 18684.

Supreme Court of California.

Dec. 18, 1943.

1. Appeal and error 🔑927(7)

On appeal from judgment on a directed verdict for defendant in malpractice action, the sole consideration is whether, disregarding conflicting evidence, and giving to the evidence tending to establish negligence in the administration of treatment all the value to which it is legally entitled, there is evidence of sufficient substantiality to support a verdict in favor of plaintiff.

2. Physicians and surgeons 🔑14(4)

The law requires a physician to have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality, and that he use ordinary care in applying that learning and skill to the treatment of his patient.

3. Physicians and surgeons 🔑18(8)

Whether a physician has used ordinary care in applying that degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality is generally a question for experts, and can be established only by their testimony unless the matter in issue is within the common knowledge of laymen.

4. Physicians and surgeons 🔑18(6)

In malpractice action, burden was upon plaintiff to prove that defendant was unskillful or, negligent, and that want of skill or care caused the injury.

5. Physicians and surgeons 🔑18(8)
Trial 🔑178

In malpractice action where plaintiff did not introduce expert testimony as to the prevailing standard of care and skill, such evidence being introduced by defendant only, plaintiff was entitled to rely upon expert testimony introduced by defendant, and trial court, on motion for directed verdict, was required to consider the evidence favorable to plaintiff introduced by defendant.

6. Physicians and surgeons 🔑18(9)

In malpractice action to recover for burns sustained by patient during diathermy treatment, where only evidence as to the prevailing standard of care and skill was introduced by defendant and showed that instructions given patient receiving such treatment become an important factor in determining negligence, but a conflict in the evidence was created by plaintiff's testimony that she did not receive the required instructions, questions of negligence and contributory negligence were for jury.

In Bank.

Appeal from Superior Court, Riverside County; R. A. Moore, Judge pro tem.

Action by Lillian F. Trindle against O. W. Wheeler for malpractice. From a judgment for defendant entered upon a directed verdict, plaintiff appeals.

Reversed.

Prior opinion 133 P.2d 425.

Hahn, Graf & Ross, of Los Angeles, for appellant.

Fred O. Reed, Richard L. Kirtland, and Henry E. Kappler, all of Los Angeles, for respondent.

SHENK, Justice.

This is an appeal by the plaintiff from a judgment entered on a directed verdict for the defendant, a physician, in an action to recover damages for alleged negligence in the treatment of an ankle injury.

The plaintiff had been employed for over thirty-five years as a teacher in the schools at Indianapolis, Indiana. While spending her vacation with her sister in Riverside, California, she sprained and resprained her ankle. Some twenty years previously the same ankle had been broken and the

X-ray revealed signs of enlargement and traumatic arthritis. When she sustained the recent sprains she consulted the defendant, who was practicing his profession in Riverside. He prescribed diathermy as treatment for the injury. He accompanied the plaintiff into the treatment room adjoining his office and instructed a nurse trained and experienced in such treatments to apply diathermy to the ankle at 3,000 milliamperes for twenty minutes. The plaintiff's shoe and stocking were removed, she was placed in a recumbent position on a bed, and the nurse proceeded to adjust the electrodes to the ankle. The electrodes were encased in rubber pads. A folded towel was wrapped around each electrode, and the plaintiff's angle placed between them. The electrodes were held in position by small bags of sand. They were connected to the diathermy machine by wires. The nurse set the dial at 3,000 milliamperes for a twenty-minute treatment. Both the doctor and the nurse left the room and shut the door.

The plaintiff testified that she was given no instruction by the defendant or the nurse; that after the lapse of a few minutes the ankle became uncomfortably hot, and that when the heat had become unbearable she called for help. The defendant immediately entered the room and turned off the machine which at that point registered 3,500 milliamperes. Eight minutes had elapsed from the beginning of the treatment until the time when defendant turned off the machine. The machine in that time had jumped to 3,500 milliamperes. The plaintiff sustained a burn on her ankle about the size of a half dollar or a dollar. According to the testimony of the defendant and his assistants a small table adjacent to the head of the bed on which plaintiff was lying was provided with a push button for the use of diathermy patients. The nurse testified that she pointed out the buzzer to the plaintiff and told her to call if the heat became uncomfortable, and that such instructions were customarily given to every diathermy patient. The plaintiff testified that the push button was not pointed out and that no such instruction was given to her.

[1] The defendant and the nurses applied ointment to the burned area and bandaged the ankle. Defendant subsequently treated the burn until he believed it to be completely healed. Plaintiff does not contend that there was any negligence in diagnosis or in prescribing diathermy as treatment; nor did she offer any proof that the method of the treatment of the burn itself was improper. Her case depends entirely upon a showing of negligence by the defendant in administering the diathermic treatment whereby she suffered injury. That the plaintiff sustained some injury as the result of the treatment was established by the evidence. How much permanent disability is the result of the burn caused by the treatment and how much is due to injury or conditions which were not immediately under treatment by the defendant are not questions which require review on this appeal. The sole consideration is whether, disregarding conflicting evidence, and giving to the evidence tending to establish negligence in the administration of the treatment all the value to which it is legally entitled, there is evidence of sufficient substantiality to support a verdict in favor of the plaintiff. In re Estate of Lances, 216 Cal. 397, 14 P.2d 768; Engstrom v. Auburn Automobile Sales Corp., 11 Cal.2d 64, 77 P.2d 1059.

[2, 3] The law requires that the physician shall have the degree of learning and skill ordinarily possessed by physicians of good standing practicing in the same locality and that he shall use ordinary care and diligence in applying that learning and skill to the treatment of his patient. Whether he has done so in a particular case is generally a question for experts and can be established only by their testimony unless the matter in issue is within the common knowledge of laymen. Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695.

The plaintiff offered no testimony to establish the standard of care in the application of diathermy prevailing in the community. Application of diathermy is by means of an electric modality which produces heat within a member of the body by the resistance offered to the passage of short waves between the electrodes placed on opposite sides of the member to be treated. The uncontradicted evidence introduced by the defendant showed that the physician or nurse administering the treatment must be made acquainted with the patient's tolerance to heat. Resistance to heat varies in individuals. Herzog, Medical Jurisprudence, sec. 369. The method of diathermic treatment is in contrast to the process of transference of energy or light waves emitted from the surface of an article, instrument or element, such as a hot water bottle, electric heating pad, heat lamp, X-ray or radium. Also diathermy, like X-ray and radium, may be said to be a recently developed method of treatment. Gray, in his discussion of X-ray and radium treatments, concludes: "It is obvious that X-ray and radium treatments are difficult to control, not only because of the considerable variation between the action of these agents upon different parts of the body, but also because of the difficulties in subjecting the patient to a known dosage. This field of treatment is still in its infancy. A doctor must proceed as best he can, and with the meager knowledge of this field available. Unfortunate results are bound to occur in spite of his best efforts. He cannot properly be held at fault if he has proceeded in accordance with the practice used by other men of like ability in his community." Gray, Attorneys' Textbook of Medicine, 2d Ed., p. 854.

The testimony of the defendant's witnesses established that it was considered good practice in the community to leave the patient in the room unattended after the diathermy machine had been set at 3,000 milliamperes, which was the number of milliamperes applied in the treatment of the plaintiff's ankle, and the stop-clock at twenty minutes, as it was set by the nurse; provided, however, that a call device be available to the patient and that she be instructed to use it to summon the attendant if the heat should become uncomfortable.

[4, 5] The burden was upon the plaintiff to prove that the defendant was unskillful or negligent and that want of skill or care caused her injury. In support of the judgment on the directed verdict in his favor, the defendant contends that the plaintiff, in order to establish her case, was required to introduce expert testimony concerning the standard of care and skill prevailing in the community, and that in the absence of such testimony introduced by her, she failed to present a case which the court was required to submit to the jury. It is unnecessary to determine on this appeal the question whether in such cases a plaintiff is required to introduce expert testimony as to the prevailing standard of care and skill. Regardless of whether or not the plaintiff here was so required, it is apparent that when the evidence was all in, she was entitled to rely upon the expert testimony which had been introduced by the defendant; and in the absence of any such testimony offered by the plaintiff the court, on the motion for a directed verdict, was required to consider the evidence favorable to the plaintiff introduced by the defendant. On the question of the prevailing standard of care, therefore, it may be said there was no conflict, and the standard established by the defendant's witnesses was a proper guide for the court. But on the question of whether that standard of care was followed, there was a direct and substantial conflict in the evidence. The standard established showed that the instructions given a patient receiving diathermic treatment become an important factor in determining whether the defendant was negligent. If the plaintiff's testimony that no call button was pointed out to her and that she did not receive the required instruction be considered worthy of credence by the jury it is apparent that it would constitute sufficient evidence to support a verdict in her favor.

[6] The plaintiff invokes the doctrine of res ipsa loquitur, but it is unnecessary to decide whether it is or is not applicable under the facts of this case. Even if we assume that a burn does not usually result from careful treatment the benefit of the permissible inference is not necessary in support of her case. Considering the nature and method of operation of the diathermy apparatus, its characteristic tendency to increase milliamperage while in operation, and the attendant's dependency on the subjective reaction and oral information of the patient concerning the progress of the treatment, it becomes obvious that the plaintiff's testimony of what occurred, if believed by the jury, would be sufficient, without the aid of the inference, to support a verdict in her favor. Under the facts of this case, therefore, the questions of the defendant's violation of the standard of skill and care prevailing in the community and of the plaintiff's alleged contributory negligence were for the jury's determination. See Wemett v. Mount, 134 Or. 305, 292 P. 93.

The judgment is reversed.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

61 Cal.App.2d 463

MILANI et al. v. SUPERIOR COURT, IN AND FOR ALAMEDA COUNTY.

Civ. 7028.

District Court of Appeal, Third District, California.

Dec. 22, 1943.

Hearing Denied Feb. 7, 1944.

Habeas corpus 🔑41

Where superior court of one county determined that a minor child was a resident of that county, that it was a proper case for appointment of guardian and appointed guardians, the superior court of another county could not proceed to hear petition for habeas corpus seeking to obtain custody of minor from guardians.

◆

On rehearing.

Former opinion modified and petition for rehearing denied.

Prior opinion, 143 P.2d 402.

F. W. Halley and Leslie A. Cleary, both of Modesto, and Errol C. Gilkey, of Oakland, for petitioners.

Ralph E. Hoyt, Dist. Atty., R. Robert Hunter, Asst. Dist. Atty., Stanley C. Smallwood, Asst. Dist. Atty., and Karma Dudleigh, Deputy Dist. Atty., all of Oakland, for respondent.

George F. Sharp, of Oakland, for Ann Wilson.

PER CURIAM.

Respondent in its petition for a rehearing attacks the opinion filed herein as containing "erroneous statements of material facts" and as "based upon erroneous statements of the law." Respondent questions particularly the statement in the opinion [143 P.2d 402, 403] that "It is conceded here that Carmen Arias, the minor child here involved, had resided and was domiciled in Stanislaus County for six years prior to the appointment of the guardians," and asserts that it made no such concession. We may have misunderstood what respondent conceded, but the concession is apparent from the pleadings themselves. The petition for the writ of prohibition alleges in paragraph I that petitioners have been residents of Stanislaus County for ten years immediately last past and this allegation is not denied by the answer. The petition for a writ of habeas corpus, which appears in a supplement to the answer, sets forth that approximately four years ago Ann Wilson, the mother, placed the child in the care of the Milanis, petitioners herein, and that the said child has remained in their care ever since; and there is nowhere in said petition for habeas corpus or in said answer any allegation that said minor child is, or ever was, a resident of Alameda County. We will, however, modify our opinion by striking out the words, "It is conceded here" and substituting in lieu thereof the words, "It must be conceded upon the record here."

We believe the opinion correctly states the law that where the Superior Court of one county in a guardianship proceeding has determined that a minor child is a resident of that county, that it is a proper case for the appointment of a guardian and has appointed guardians for said minor child, the Superior Court of another county may not proceed to hear a petition for a writ of habeas corpus filed therein after the filing of the petition for guardianship, which petition for habeas corpus seeks to take the custody of the minor from the guardians. As stated in the opinion, any other holding would lead to absurd results and is not supported by either reason or authority.

With the modification hereinbefore indicated, the petition for a rehearing is denied.

Hearing denied; SHENK and CARTER, JJ., dissenting.

62 Cal.App.2d 66

MEGEE v. STAR RENDEZVOUS et al.

Civ. 7013.

District Court of Appeal, Third District, California.

Dec. 22, 1943.

Appeal and error 🔑14(2)

Where, on plaintiff's appeal, the court reversed a judgment entered notwithstanding the verdict for plaintiff, and directed the entry of judgment on the verdict, defendant was entitled to appeal from the judgment so entered, since there might be errors in the instructions or other matters not determined on plaintiff's appeal.

Appeal from Superior Court, Yuba County; Warren Steel, Judge.

Action for personal injuries by Robert L. Megee against Star Rendezvous and another. From a judgment for plaintiff, pursuant to the mandate of the Court of Appeal, 57 Cal.App.2d 275, 134 P.2d 815, John Fasulis, individually and as an individual doing business under the name and style of Star Rendezvous, appeals. Motion by plaintiff to dismiss the appeal.

Motion denied.

Manwell & Manwell, of Marysville, for appellant.

Van Dyke & Harris, of Sacramento, for respondent.

PER CURIAM.

Plaintiff Megee sued defendant Fasulis for damages for personal injuries which he alleged he sustained by reason of defendant's negligence. The jury before which the action was tried returned a verdict in plaintiff's favor. Defendant then moved for judgment notwithstanding the verdict. The trial court granted the motion, set aside the verdict and entered judgment for defendant. Plaintiff appealed and this court reversed said judgment with directions to the trial court to enter judgment in favor of plaintiff in accordance with the verdict of the jury. Megee v. Fasulis, 57 Cal.App.2d 275, 134 P.2d 815. Judgment for plaintiff was thereafter rendered and defendant appealed therefrom.

Plaintiff has now moved to dismiss defendant's appeal on the ground that the record before this court is the same record brought up on the former appeal, that all matters upon which defendant might rely for reversal were determined on that appeal, that the previous decision of this court is now the law of the case, that if defendant now contends that the evidence is insufficient to support the judgment his appeal is frivolous, and that as he did not, when he made his motion for judgment notwithstanding the verdict, reserve the right to apply for a new trial, he had no right to move for a new trial after entry of judgment against him.

Defendant filed no memorandum of authorities in opposition to this motion to dismiss, but in his argument on the motion he contended that not all matters which he has a right to urge upon appeal from the judgment subsequently entered in the case were necessarily determined on the appeal from the judgment notwithstanding the verdict; that the former appeal was by plaintiff in the action, while this appeal is by defendant therein, and that even though the question of the sufficiency of the evidence may have been determined conclusively against him on the former appeal he has a right, on this appeal, to raise any other questions such as errors in rulings of the trial court on admissibility of evidence, the propriety of instructions given or refused, etc., etc.

There seems to be merit in this contention. While defendant may not on this appeal raise and reargue matters determined upon the former appeal, we cannot say that all matters upon which defendant may be relying for reversal were passed upon when the case was previously before us, or that there are no errors in the record which defendant has a right to urge as grounds for overthrowing the judgment against him.

The motion to dismiss the appeal is denied.

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61 Cal.App.2d 666

In re WEINTRAUB.

Cr. 1856.

District Court of Appeal, Third District, California.

Dec. 9, 1943.

1. Habeas corpus 🔑85(1)

Evidence did not authorize issuance of writ of habeas corpus releasing petitioner from prison on ground that petitioner had been convicted without due process of law, where evidence established that court had duly appointed an attorney to represent petitioner at time of his arraignment, that petitioner had been fully represented by such attorney in all subsequent proceedings and that both petitioner and his attorney were present at time sentence was pronounced. Pen.Code § 987; Const. Art. 1, § 13.

2. Criminal law ⚷1208(9)

An "indeterminate sentence", in legal effect, is a commitment for maximum term prescribed by law.

See Words and Phrases, Permanent Edition, for all other definitions of "Indeterminate Sentence".

3. Habeas corpus ⚷30(3)

Even if prison board should have fixed petitioner's term of imprisonment after six months from actual commencement of imprisonment, board's failure to do so did not invalidate judgment of commitment pursuant to an indeterminate sentence, or entitle petitioner to his discharge from custody in habeas corpus proceeding, where it appeared that petitioner had not completed service of maximum sentence prescribed by law. Pen.Code, § 3020.

4. Habeas corpus ⚷1

A writ of habeas corpus is not the proper remedy to compel a ministerial board to perform a duty required by law.

5. Habeas corpus ⚷92(1)

The office of writ of "habeas corpus" is ordinarily confined to determination of legality of custody of a prisoner, by inquiry into jurisdiction of the court and validity of the process upon its face, and to review anything which may have transpired after issuance of the commitment rendering it invalid.

See Words and Phrases, Permanent Edition, for all other definitions of "Habeas Corpus".

6. Habeas corpus ⚷3, 4

Habeas corpus is not designed as a means of retrying issues of fact or errors occurring in course of trial which may be determined on appeal or by a motion to vacate the judgment.

7. Criminal law ⚷641(1)

Mere failure to appoint an attorney to represent defendant as provided by statute may be waived. Pen.Code, § 987.

8. Habeas corpus ⚷30(1)

Failure to appoint an attorney to represent defendant as provided by statute, even if established, did not furnish ground for defendant's discharge upon habeas corpus. Pen.Code, § 987.

◆

Proceeding in the matter of the application of Joseph Weintraub, for a writ of habeas corpus to secure petitioner's release from custody as a prisoner at Folsom State Prison.

Writ discharged.

Joseph Weintraub, of Represa, in pro. per.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

THOMPSON, Justice.

By means of habeas corpus the petitioner, appearing in proper person, seeks to obtain his release from custody as a prisoner at Folsom State Prison. He contends that he was convicted, without due process of law, of the misdemeanor of having in his possession "a preparation of morphine" without having procured a physician's prescription therefor, contrary to the provisions of Section 11160 of the Health and Safety Code, St.1941, p. 2820, with relation to the use of narcotics. He claims that the lack of due process consisted of pronouncing sentence against him in his absence and in the absence of his attorney, contrary to the provisions of Section 987 of the Penal Code, and Article I, Section 13, of the Constitution of California.

The Attorney General filed a return to the petition denying the material allegations thereof. The case was heard upon affidavits filed, certified copies of the minute orders of the trial, the medical certificates of physicians at the State Prison to which he was committed, and the oral examination of the petitioner.

The record shows that the petitioner was charged by information filed in the Superior Court of Los Angeles County with the misdemeanor of having "in your possession on or about the 2nd day of December, 1941, a preparation of morphine" contrary to the provisions of Section 11160 of the Health and Safety Code; that he was also charged with the prior conviction of a felony, which was subsequently dismissed; that upon arraignment on December 26, 1941, the court appointed the Public Defender of Los Angeles County, who at all proceedings of the trial appeared with the defendant in open court and represented him as his attorney, as certified copies of the court minutes clearly show; that on March 20, 1942, when the defendant, his said counsel and the District Attorney were present in open court, an application for probation was duly made, and the cause was continued for sentence to April 3, 1942; that on the last mentioned date, in the presence of the defendant and his said attorney, the application for probation was denied, and the defendant was then duly sentenced to imprisonment at San Quentin State Prison "for the term prescribed by law." No appeal was taken from that judgment. The defendant was forthwith delivered to the Warden of San Quentin State Prison for imprisonment, pursuant to the judgment of conviction and sentence, and subsequently transferred, as authorized by law, to Folsom State Prison, where he has remained and is now confined by virtue of the same judgment and sentence.

We are satisfied there is no merit in this petition for a writ of habeas corpus. The judgment is valid on its face. At the hearing of this proceeding the petitioner was sworn as a witness in his own behalf and testified without objection to many improbable circumstances which are refuted by the record. Among other statements to which he testified was that he employed a named attorney to represent him in the trial of his case but that this attorney was later called East. Said lawyer filed a verified affidavit in which he positively avers that he was never requested by the defendant, or any other person, to represent him, and that he did not in fact represent him as his attorney at any of the hearings of said charge of violating the narcotic laws. Petitioner testified that he then employed another named attorney and that said lawyer appeared in court in an intoxicated condition, whereupon the court committed him to jail for contempt, and continued with the subsequent proceedings without appointing another lawyer to represent him; that the defendant was not represented by counsel at the time of pronouncing sentence, or at any of the other proceedings of his case. The minutes of the court contain no reference to either of said attorneys in connection with said case. On the contrary, the minutes of court specifically show the appointment, at the time of arraignment, without objection, of the Public Defender of Los Angeles County, to represent the defendant as his attorney and that said officer did appear with the defendant and represent him in court at each and every subsequent proceeding therein.

The petitioner further testified that neither he nor his attorney was present in court at the time sentence was pronounced. The certified copy of the judgment which was rendered April 3, 1942, signed by a Judge in high standing of the Los Angeles Superior Court, recites the fact that "the defendant was present in court with his counsel, R. F. Bird, Esq., Deputy Public Defender of Los Angeles County", when the sentence was pronounced.

The petitioner further testified that the officers savagely beat him, breaking his jaw, both wrists and several ribs, and that he was in that condition when he arrived at State Prison. The certificate of the State Prison medical expert, which was filed on this hearing, shows that a physical and mental examination of the defendant was made May 5, 1942, after his arrival at San Quentin, in which report no suggestion of the existence of broken wrists, jaw or ribs appears. On the contrary, all that appears in the report in that regard is that the defendant "is a psychopathic personality, alcoholic, drug addict, with poor and insufficient insight."

[1] From the oral and documentary evidence adduced on this hearing we are satisfied that it is true, and so find, that the court duly appointed an attorney to represent the defendant at the time of his arraignment, as provided by Section 987 of the Penal Code, and that he was fully and fairly represented by that lawyer in all subsequent proceedings in his case; that both the defendant and his attorney were present in court at the time judgment and sentence were pronounced, and that the defendant was not deprived of due process of law in any of said proceedings against him.

The petitioner complains of the failure of the prison board to fix or determine the term of his imprisonment pursuant to Section 3020 of the Penal Code, notwithstanding the fact that he has already served some eighteen months of imprisonment. It is true that petitioner's term of imprisonment has not yet been determined by the board. The reason assigned by the board for not doing so is that under rules of the prison board, regularly adopted and in force, it is the practice of the board, with respect to prisoners committed for offenses punishable by imprisonment for terms in excess of two years without prescribing a minimum penalty therefor, and when the prisoner has also suffered a prior conviction of a felony, not to definitely fix his term until after two years have elapsed from the commencement of his imprisonment. In the present case it appears that the petitioner had been previously convicted of a felony, although that charge in the information was dismissed.

In this case no minimum penalty is prescribed for the offense of which the petitioner was convicted. He was convicted under Section 11160, Division 10, Chapter 3 of the Health and Safety Code, which section prescribes no penalty. But Section 11712 of that said Chapter, as amended in 1941, St.1941, p. 2264, provides that: "Any person convicted *under this division* for having in possession any narcotic, or of violating the provisions of Sections 11530 or 11557 shall be punished by imprisonment in the county jail for not less than 90 days nor more than one year, *or in the State prison for not more than six years.*" (Italics added.)

The foregoing statute authorizes the court, in its discretion, to impose the penalty for violation of that statute of imprisonment in the State prison. The court did so in this case. In fixing the term of imprisonment the board is controlled by the provisions of Section 11712 of the Health and Safety Code, which prescribes a maximum penalty of six years.

[2-4] Regardless of whether the board is authorized to defer the fixing of a term of imprisonment for two years after the commencement thereof, on account of the prisoner's having suffered a prior conviction of a felony, or otherwise, which question is unnecessary for us to determine, that failure is not ground for the release of the petitioner in this case because it appears that he has not completed the service of his sentence. He is nevertheless lawfully restrained of his liberty. He is still held under a valid unexpired judgment of imprisonment. The indeterminate sentence, in legal effect, is a commitment for the maximum term prescribed by law, which in the present case was six years. People v. Sama, 189 Cal. 153, 207 P. 893; In re Lee, 177 Cal. 690, 693, 171 P. 958. In the absence of evidence of the invalidity of the judgment, or the shortening of the maximum term by order of the prison board or the application of credits for good behavior, we must assume on habeas corpus that the prisoner is lawfully imprisoned for the maximum period prescribed by the statute. In the present case the credit for good behavior is insufficient to entitle the petitioner to his discharge.

It is true that Section 3020 of the Penal Code provides that the prison board "*may* determine and redetermine, after the expiration of six months, from and after the actual commencement of imprisonment, what length of time, if any, such person shall be imprisoned."

Assuming, as the petitioner contends, that the foregoing language requires the prison board to fix the term of a prisoner, promptly "after the expiration of six months, from and after the actual commencement of imprisonment," which we do not concede, that omission does not invalidate the judgment of commitment, nor entitle the petitioner to his discharge from custody in this habeas corpus proceeding. He is still lawfully held in custody. The fixing of the term of imprisonment by the board is not judicial in its nature. 21 Cal.Jur. 458, sec. 16. The writ of habeas corpus is not the proper remedy to compel a ministerial board to perform a duty required by law. There is no merit in the petitioner's foregoing contention which entitles him to be discharged on this writ of habeas corpus.

[5, 6] The office of the writ of habeas corpus is ordinarily confined to the determination of the legality of the custody of a prisoner, by inquiry into the jurisdiction of the court and the validity of the process upon its face, and to review anything which may have transpired after the issuance of the commitment rendering it invalid. Habeas corpus is not designed as a means of retrying issues of fact or errors occurring in the course of trial which may be determined on appeal or by a motion to vacate the judgment.

[7, 8] The mere failure to appoint an attorney to represent the defendant, as provided by Section 987 of the Penal Code may be waived. That omission does not furnish ground for the discharge of a petitioner upon habeas corpus. In re Connor, 16 Cal.2d 701, 705, 108 P.2d 10; In re Gutierrez, 1 Cal.App.2d 281, 36 P.2d 712; In re Maldonado, 97 Cal.App. 288, 275 P. 495; 13 Cal.Jur. 236, sec. 17.

The writ is discharged.

SCHOTTKY, J., pro tem., and ADAMS, P. J., concur.

61 Cal.App.2d 761

PENNIX v. WINTON.

Civ. 12467.

District Court of Appeal, First District,
Division 2, California.

Dec. 15, 1943.

Hearing Denied Feb. 10, 1944.

See 145 P.2d 561.

1. Automobiles 🔑245(87)

Evidence that plaintiff had been in defendant's company for several hours immediately preceding automobile accident and that plaintiff knew that defendant had been drinking intoxicating liquor during that time presented question for jury as to whether plaintiff was guilty of contributory negligence in riding with defendant, so as to preclude recovery for injuries sustained in the accident.

2. Automobiles 🔑245(24)

Evidence that motorist after having once temporarily dozed off continued to drive and thereby took risk of falling asleep again presented question for jury as to whether motorist was guilty of willful misconduct, so as to authorize guest to recover for injuries sustained in collision with parked automobile.

3. Evidence 🔑14

It is common knowledge that many crimes and many acts of willful misconduct are committed by persons while under influence of intoxicating liquor.

4. Trial 🔑330(4)

In guest's action against motorist for injuries sustained in automobile accident, a finding could be made without inconsistency that injuries to guest resulted both from intoxication and willful misconduct of motorist.

5. Appeal and error 🔑1062(3)
Trial 🔑145

In guest's action against motorist for injuries sustained in automobile accident, where jury might have sustained either the charge that accident was caused by motorist's intoxication or by motorist's willful misconduct, withdrawing issue of willful misconduct from jury constituted prejudicial error.

6. Attorney and client 🔑20

An attorney, purporting to act as counsel for defendant in automobile guest action, could not continue to act as such counsel while attacking defendant and openly charging plaintiff and defendant with collusion without being chargeable with "misconduct" notwithstanding his actions were in good faith and resulted in a verdict in favor of client. Vehicle Code, § 403, St.1935, p. 154; St.1939, p. 355, § 6068.

See Words and Phrases, Permanent Edition, for all other definitions of "Misconduct".

7. Trial 🔑127

In automobile guest action, there are ordinarily but two parties before court and trial of action should be conducted, in so far as possible, without reference to question of whether defendant is insured. Vehicle Code, § 403, St.1935, p. 154.

8. Evidence 🔑20(1)

It is common knowledge that insurance carriers have quite generally made strenuous effort to keep from juries any knowledge of existence of insurance in personal injury cases.

9. Appeal and error 🔑1060(1)

In automobile guest's action, permitting defendant's counsel to interject the issue of collusion between plaintiff and defendant was prejudicial error where real issues were clouded by such reference and the verdict might well have been different in the absence thereof in view that the jury remained divided after lengthy deliberation.

◆

Appeal from Superior Court, San Francisco County; C. J. Goodell, Judge.

Action by Edythe Pennix against Oron A. Winton for injuries sustained by plaintiff while riding as a guest in defendant's automobile. From a judgment for defendant, the plaintiff appeals.

Judgment reversed.

Maurice C. Ryan, of San Francisco, for appellant.

Hoge, Pelton & Gunther, of San Francisco (A. Dal Thomson, of San Francisco, of counsel), for respondent.

SPENCE, Justice.

Plaintiff sued to recover damages for personal injuries sustained while riding as a guest of defendant in defendant's automobile. The complaint was in two counts. It was alleged in both counts that defendant, while operating his automobile in the vicinity of Market and Valencia Streets in San Francisco, collided with a parked car and thereby caused plaintiff's injuries. The first count was based upon the alleged intoxication of defendant. The second count was based upon the alleged wilful misconduct of defendant as follows: "that knowing that he was in a drowsy condition and knowing that he was napping at the wheel he continued to drive said automobile with reckless disregard of the consequences and recklessly and wantonly took a chance with the knowledge that probable serious injury would result to plaintiff from such wilful misconduct." The answer of defendant denied the allegations concerning intoxication and wilful misconduct and affirmatively alleged in general terms that plaintiff had been contributorily negligent. The cause was tried by a jury which deliberated approximately two hours and then, by a vote of nine to three, returned a verdict in favor of defendant. Plaintiff appeals from the judgment entered upon said verdict.

[1] Plaintiff first contends that the trial court erred in denying her motion for a directed verdict. This contention is based upon the claim that all the evidence showed that defendant was intoxicated and that there was no evidence which showed contributory negligence on the part of plaintiff. Assuming, as claimed by plaintiff, that all the evidence showed that defendant was intoxicated, the uncontradicted evidence further showed that plaintiff had been in defendant's company for several hours immediately preceding the accident and that plaintiff knew that defendant had been drinking intoxicating liquor during that time. While this evidence did not necessarily bar plaintiff's recovery, we are of the opinion that the question of whether plaintiff was guilty of contributory negligence in riding with defendant under the circumstances was essentially a question of fact for the determination of the jury. Lindemann v. San Joaquin Cotton Oil Co., 5 Cal.2d 480, 55 P.2d 870; Smith v. Baker, 14 Cal.App.2d 10, 57 P.2d 960. We therefore find no merit in the contention that the trial court erred in denying plaintiff's motion for a directed verdict.

[2] Plaintiff further contends that the trial court erred in eliminating the issue of wilful misconduct from the consideration of the jury. In the instructions, the trial court read to the jury some of the language found on pages 384 and 664, respectively, of the opinion in Schneider v. Brecht, 6 Cal.App.2d 379, 44 P.2d 662. The trial court then continued as follows: "In other words, from the quotation I have just read you out of one of the cases, wilful misconduct may be eliminated from this case, because there is no proof of any act done by defendant Winton which could be regarded as wilful misconduct except such acts as have been proven which may or may not establish intoxication. Is that clear? Wilful misconduct, therefore, need not be regarded by you any further."

Defendant testified that as he drove down Market Street approaching Valencia Street he "just dozed off" and then "struck a parked car". He then gave the following answers to the following questions propounded to him:

"Q. Mr. Winton, had you noticed this dozing off prior to the collision? A. I said once before, yes.

"Q. On the same evening, I mean? A. Yes.

"Q. For some distance prior to the time you hit the car you realized you were dozing a bit? A. Well, I did doze off once and I kind of shook it off. * * *

"Q. But did you realize then that there were intervals when your eyes were closed? A. I did; I would doze off temporarily, just a flash."

Plaintiff testified that shortly before the accident occurred, she asked defendant "if he was sleepy or something was wrong with him," and he said "No".

In Erickson v. Vogt, 27 Cal.App.2d 77, 80 P.2d 533, the trial court directed a verdict for defendant upon somewhat similar facts. The judgment was reversed and the court said on page 80 of 27 Cal.App.2d, on page 534 of 80 P.2d, "The first contention, in appellant's behalf, is that willful misconduct appears from the circumstance that, after once having fallen asleep, respondent nevertheless continued to drive and thereby took the risk of falling asleep again." The court discussed numerous authorities and distinguished the cases of Rode v. Roberts, 11 Cal.App.2d 638, 54 P.2d 498, and Foreman v. Colton, 136 Cal.App. 97, 28 P.2d 429, upon which defendant relies, and then said on page 82 of 27 Cal.App.2d, on page 535 of 80 P.2d, "In the circumstances we think that the question whether respondent was or was not guilty of willful misconduct was in the instant case one of fact for the jury, rather than of law for the court." We therefore conclude that in the present case there was sufficient evidence to sustain a finding of wilful misconduct.

But in justification of the trial court's action defendant cites Schneider v. Brecht, 6 Cal.App.2d 379, 44 P.2d 662, and claims that "where intoxication is present, the defendant cannot possess the state of mind sufficient to establish wilful misconduct and that the injuries must be attributed solely to intoxication, if recovery is permitted at all." The particular language upon which defendant relies is found on page 384 of the opinion in 6 Cal.App.2d, on page 664 of 44 P.2d. In the cited case, the appeal was on the judgment roll which contained very full findings. The trial court there found both wilful misconduct and intoxication on the part of the defendant. It further found that "the intoxication of the defendant was the proximate cause of the accident". The trial court denied a recovery to plaintiff, however, upon its findings with respect to plaintiff's own conduct including findings of contributory negligence. On appeal, plaintiff relied solely upon the finding of wilful misconduct and made the contention "that the finding of willful misconduct governs, and that any negligence on the part of the plaintiff cannot be considered as a contributing cause to her injury". In answer to this contention the court said on pages 383 and 384 of 6 Cal.App.2d, on page 664 of 44 P.2d, "While it is true, generally speaking, that ordinary negligence on the part of a plaintiff is not a defense upon which a defendant may rely when the complaint is based upon a charge of willful misconduct, this overlooks a principle which we think must be considered, to wit: "That where the negligence of the plaintiff is of such a character that it contributes to, and becomes a part of, and the inducing cause of the defendant's willful misconduct, no recovery can or should be had." The court pointed out that plaintiff and defendant had been "engaged in a drinking carousal to a considerable extent"; that plaintiff had participated in the drunken orgy being engaged in by all the parties and then said on page 387 of 6 Cal.App.2d, on page 666 of 44 P.2d, "The case cited by the appellant to the effect that ordinary negligence constitutes no defense to a charge of willfulness or wantonness, we think inapplicable where the facts show that the plaintiff was guilty of every act complained of, as against the defendant, and participated in bringing about the mental condition of the defendant which culminated in the collision." It is apparent that the court there deemed the case to be one of "first impression". 6 Cal.App.2d at page 388, 44 P.2d at page 666.

[3-5] As we read the cited case, there is no holding that a finding of intoxication precludes a finding of wilful misconduct. On the contrary, the court there recognized that the trial court had found that the defendant was chargeable with both intoxication and wilful misconduct, and those findings were permitted to stand. The question before the court there was whether the findings with respect to plaintiff's conduct were sufficient to preclude her recovery notwithstanding the findings of both wilful misconduct and intoxication on the part of the defendant. It was held. and we believe properly held under the facts there presented, that they were. The language used by the court on page 384 of the opinion in 6 Cal.App.2d, on page 664 of 44 P.2d, must be read in the light of the question under discussion in that case. Having in mind the general rule that intoxication is not a defense to a criminal charge (Penal Code, section 22) and believing that it is a matter of common knowledge that many crimes and many acts of wilful misconduct are committed by persons while under the influence of intoxicating liquor, we are of the view that a trial court or jury, in a civil action brought by a guest, might properly find without inconsistency that the injuries to the guest resulted from both the intoxication and the wilful misconduct of the driver. And as the jury might have sustained either or both charges in the present case and as the defenses to said charges differ to some extent, we are of the opinion that the trial court committed prejudicial error in withdrawing the issue of wilful misconduct from the consideration of the jury.

We now turn to a contention of plaintiff which raises a question of first impression and which requires rather extended discussion. The contention is that counsel for defendant was guilty of prejudicial misconduct which prevented plaintiff from having a fair trial on the real issues involved. While several instances of alleged misconduct are cited, the main burden of plaintiff's argument is that counsel for defendant, while purporting to represent defendant, introduced into the case the issue of alleged collusion between plaintiff and defendant; that counsel in reality abandoned the defendant as his client for the avowed purpose of protecting some third party who was not a party to the action; that he attempted to impeach his own client; and that he attacked generally the character and motives of defendant as well as plaintiff. There can be no doubt that all of the claims made by plaintiff with respect to the attitude of counsel for defendant toward defendant are sustained by the record. In passing we may state that it is conceded by all that defendant carried insurance and that counsel for defendant had been employed by the insurance carrier to represent defendant in this action.

Before proceeding with the discussion of plaintiff's contention, it is appropriate to refer briefly to the state of the evidence. Both plaintiff and defendant testified concerning the events preceding the happening of the accident. There was no particular conflict in their testimony and there was no other witness who testified concerning these events. It appears from their testimony that defendant had made an engagement to take plaintiff to dinner and had asked her to meet him at 9:30 p. m. at the Ambassador Bar in the downtown district in San Francisco. Defendant left work that night at 7 p. m. and, unknown to plaintiff, had had three or four alcoholic drinks between 7 p. m. and the time he met plaintiff at 9:30 p. m. After meeting plaintiff, defendant had one alcoholic drink at the Ambassador Bar and then plaintiff and defendant left to go to dinner at the "Chicken Shack", an eating place on the peninsula road beyond the cemeteries. On the trip, defendant stopped at one place and had one or two alcoholic drinks. They then proceeded to the "Chicken Shack", arriving there at about 10:30 p. m., had dinner and left there about 11:30 p. m. There was no bar at that place and defendant had no further alcoholic drinks that night. All alcoholic drinks consumed by defendant consisted of whiskey and coca-cola and he had not eaten between noon-time and the arrival at the "Chicken Shack" at 10:30 p. m. When defendant met plaintiff that evening, she was sober and she drank no alcoholic drinks after meeting defendant. She drank plain coca-cola while defendant drank the alcoholic drinks in her presence and she drank milk with her dinner. Plaintiff testified, however, that she had had two alcoholic drinks, consisting of whiskey and coca-cola, while waiting for defendant at the Ambassador Bar in the company of some friends.

The accident occurred shortly after midnight after defendant had driven back from the "Chicken Shack" to a point on Market Street near Valencia Street in San Francisco. Plaintiff testified with respect to defendant's sobriety that he "looked perfectly all right" when they left the "Chicken Shack" and that they made no stop on the way back. She further testified regarding the collision with the parked car that "I noticed going down the hill his speed increased slightly, and I asked him if he was sleepy, or something was wrong with him. He said, 'No'. The next thing, it was all over." Plaintiff testified that she did not know defendant's capacity for liquor as he had previously drunk but one drink in her presence on a former occasion. While both plaintiff and defendant testified that plaintiff was sober at all times, she was taken to the emergency hospital because of her injuries and the records of the hospital listed her as "alcoholic". Plaintiff claims that any conduct on her part at the hospital, which may have led to such entry, resulted from the shock and hysteria following her injuries together with her resentment at the failure of those at the emergency hospital to comply with her request to call her own doctor.

Two police officers who arrived at the scene of the accident also testified. Both saw defendant there but did not see plaintiff until later at the hospital. With respect to defendant, one officer testified that defendant was under the influence of intoxicating liquor while the other testified that defendant did not appear "as if he were under the influence of liquor" but that "he showed some signs of alcohol". Defendant told the officers at that time that he had had a couple of beers. With respect to plaintiff, one officer testified that she "seemed to be suffering from shock" but that he did not "notice anything boisterous or unusual about her conduct". The other officer likewise testified that he observed no boisterous conduct on plaintiff's part.

Plaintiff's injuries necessitated her hospitalization for a time and defendant paid a portion of her hospital bills. It appears that while counsel for plaintiff obtained a statement from defendant shortly after the accident and while counsel for defendant also obtained a statement, neither statement was used at the trial for the purpose of attempted impeachment of the defendant as a witness.

At the opening of the trial, counsel for defendant made an opening statement immediately following the opening statement by counsel for plaintiff. He stated therein that "We expect to show * * * that * * * she was under the influence of liquor, and these people went out, they were drinking at the time; she was cooperating with him in the imbibing of liquor, and her conduct superinduced his. And we expect to show that it was simply a joint affair, and that she should have known that under those circumstances that an accident might occur." Counsel indicated, however, in this opening statement that he intended to inject the issue of alleged collusion into the case and to attack defendant by the following language "* * * it is my duty—as well, I guess I am attorney for the defendant in this case, so I will refer to myself as the attorney for the defendant—to make a statement to you as to what I expect to prove by way of a defense to this action that has been filed."

Thereafter defendant was called as a witness by plaintiff under section 2055 of the Code of Civil Procedure, but not as a witness for the defense. On cross-examination, counsel for defendant sought to impeach his own client and when objection was made upon the ground that such impeachment was improper, counsel stated "I am in a peculiar position in this case"; and again later he stated "I think we are trying to see that justice is done here. I don't want to make a statement in front of the jury. I think the court can appreciate my predicament." Further when counsel for plaintiff referred to defendant as "your client", or "Mr. Hoge's client", counsel for defendant said, "Thanks again for reminding me" and "Thank you for the reminder again, counsel", and "Thank you for reminding me that he is my client. I thought you were his attorney."

The true position of counsel for defendant was made entirely clear in his argument to the jury. While it is true that he argued that plaintiff had been drinking, the main theme of his argument was an attack upon the character and veracity of both plaintiff and defendant and he urged upon the jury the claim that plaintiff and defendant were in collusion. We quote but a few excerpts from the argument of counsel for defendant. He said "As his lawyer—yes, I have to, I suppose, refer to him technically, ladies and gentlemen, as my client; I had to cross-examine him, my own client. Now he does not have the same desire to tell the same story he told the officers, that he had a couple of beers. Now he has taken one highball after another to get himself good and drunk, you know. During all this time this lady of the evening with him was drinking milk and coca-cola. The idea of trying to foist a thing of that sort upon an unsuspecting public. It is the most ridiculous story you every heard in your life. * * * Because a person gets up there and testifies to one set of facts, you do not have to believe that testimony. * * * If you do not believe that those witnesses are telling the truth, if from their testimony you believe that that is just being done for the purpose of putting something over on a jury, you do not have to believe that. If you believe these people are in collusion here in order to soak an innocent party, a party who is not a party to this litigation, you can so find by a verdict in this case, by a verdict that will reflect your findings." Speaking of the testimony of plaintiff and defendant that they dined at the "Chicken Shack", counsel for defendant said, "I don't think they were ever out there at all"; and again "Well, do you think that they were ever down to the so-called Chicken place? Personally, I don't think so." And again he said, "Now, members of the jury, here are two people coming—of course, they are sitting apart now. Mind you—well, yes, I guess I will refer to him as my client, ladies and gentlemen; he admitted on the stand in this case that he has been in conversation with her since this accident occurred a few days ago, talked to her on the telephone. In court here they are not having anything to do with each other. Why, they sit apart; they don't talk to each other; they are supposed to be strangers; they are supposed to be enemies. This is for your benefit. You are supposed to fall for this idea, he being a bona fide defendant in a damage suit and she being a bona fide plaintiff. Yes, that is all done, just staged here for you, ladies and gentlemen —sitting apart, having nothing to do with each other—when I get an admission out of him that he has talked to her on the telephone within the last several days. He has been friendly with her ever since. Oh, this lurid sort of thing is disgusting."

Counsel further argued, "And, ladies and gentlemen of the jury, this a sham battle. That is what it amounts to. It is a sham battle,—two people in here trying to give the appearance of an honest to goodness, bona fide dispute, when you know and I know that these people have gotten together, one helping out the other * * * and I think you will bring in a verdict that is going to show these people that they are not going to be permitted to act in collusion with each other and come into court here and do an injustice—do a grave injustice to an innocent party that is not a party to this litigation. I can't say any more on that, because I think that you have got them sized up and you know just what the situation is. Ladies and gentlemen of the jury, you bring in a verdict by which you will show them that you are not placing your stamp of approval on conduct of this sort."

There were frequent assignments of misconduct by counsel for plaintiff but counsel for defendant merely continued on with a different phase of his argument returning in due time to his attack upon the parties, including his own client, and to his claim of collusion.

On this appeal, counsel still purports to represent the defendant but the attack upon defendant continues. The first and main heading in the respondent's brief is directed to the claim that "the jury was entitled to conclude that the plaintiff and defendant were confederating and cooperating toward the procurement of a judgment by the plaintiff, regardless of the facts." Counsel states that defendant's testimony at the trial "was given solely for the purpose of enabling the plaintiff to recover a judgment which his insurance company would be obligated to pay." Counsel speaks of "defendant's lack of sincerity"; "his purpose to mislead"; and his realization of the "falsity" of his answers. Counsel states that defendant's testimony "was not uttered in good faith"; that it was "deliberately false"; that "defendant joined in plaintiff's fantastic tale"; that he gave an "unbelievable account of the peregrinations of the evening"; and that his testimony "was not only not in accord with the facts, but was deliberately uttered in bad faith and for an evil motive."

We have been at pains to set forth numerous excerpts from the transcript and from respondent's brief in order to show that there is no doubt concerning the attitude of counsel for defendant toward defendant. Both in the trial court and in this court, counsel for defendant has consistently attacked defendant, charging that defendant acted in collusion with plaintiff for the immediate purpose of misleading the trial court and jury and for the ultimate purpose of defrauding defendant's insurance carrier. The charges made against defendant by his own counsel are of a most serious nature involving as they do specific charges that defendant has been guilty of acts constituting perjury (Penal Code, section 118), and of acts constituting criminal conspiracy (Penal Code, section 182).

[6] We are not concerned for the moment with the question of the truth or falsity of such charges. Even if it be assumed that the state of the evidence was such that the jury might have inferred that said charges were true, there was ample evidence from which the jury might have found that such charges were false. The first question for determination is whether an attorney, purporting to act as counsel for defendant in a guest case, may continue to act as such counsel while bitterly attacking defendant and while openly charging plaintiff and defendant with collusion involving criminal acts on the part of both without being himself chargeable with misconduct. In our opinion, he may not.

[7, 8] In arriving at this conclusion, we are not so unrealistic as to believe that every so-called guest case is entirely free from the taint of collusion. On the contrary, we believe that there are some such cases which are wholly collusive in nature and that there are many other such cases in which some suspicion of collusion naturally arises. Such suspicion flows from the fact that the guest plaintiff is ordinarily a close friend or perhaps a relative

of the defendant driver and therefore a doubt frequently arises as to whether any action would have been brought if there had not been an insurance carrier behind the scenes. But the legislature has settled the policy of permitting an action by a guest against his host under certain circumstances (Vehicle Code, section 403, St. 1935, p. 154) and it cannot be assumed that every such action is a collusive action in the legal sense. In any such action, there are ordinarily but two parties before the court and the trial of the action should be conducted, in so far as possible, without reference to the question of whether the defendant is or is not insured. Parenthetically, we may say that it is a matter of common knowledge that insurance carriers have quite generally made strenuous efforts to keep from juries any knowledge of the existence of insurance in personal injury cases. These efforts have been entirely proper and have resulted in the decisions of the courts which prohibit any reference to insurance in personal injury cases except in those situations in which the interests of justice necessitate and therefore justify some limited reference. But it would seem incongruous for insurance carriers, acting from behind the scenes in personal injury cases, to argue that the reference to insurance should be prohibited in those cases in which such reference would probably be to their ultimate disadvantage and to argue, on the other hand, that the reference to insurance should be permitted in those cases in which such reference would probably be to their ultimate advantage.

Returning to the precise question presented here, that of alleged misconduct of counsel for defendant, it is conceded that counsel for defendant had been employed by defendant's insurance carrier to represent defendant in this action. Under these circumstances, counsel no doubt felt that he was under the duty to represent the interests of the insurance carrier as well as the interests of defendant. Ordinarily there is no conflict of interests involved in such a situation but that such conflict may arise seems quite obvious from the claims made by counsel in this case. In assuming to act as counsel for defendant in this action, counsel assumed toward defendant the high duties imposed by statute (Bus. & Prof. section 6068, St. 1939, p. 355), and by the rules governing professional conduct (Rules of Professional Conduct, 213 Cal. p. cxiii), and whenever counsel had reason to believe that the discharge of those duties would conflict with the discharge of counsel's duties to the insurance carrier, it became the duty of counsel to take appropriate steps to terminate the relationship. In this case, it appears that counsel felt that there was reason so to believe even prior to the commencement of the trial for in his opening statement he used the expression "I guess I am attorney for the defendant in this case, so I will refer to myself as attorney for the defendant." This expression indicated a predetermined intention on the part of counsel to act solely in the interests of the insurance carrier and to attack defendant during the trial. The existence of such predetermined intention was made manifest throughout every stage of the proceedings. We know not whether such belief and such intention were based upon previous confidential communications received by counsel from defendant while acting as defendant's counsel, but that is not decisive. Whatever may have been the basis of such belief and of such intention, counsel could not consistently continue to act as counsel for defendant and to discharge his duties toward defendant as such counsel while entertaining such belief and while carrying out such intention. To hold that counsel could continue to act under such circumstances would be violative of every legal and ethical concept of the attitude which counsel should maintain toward his client. The results of such continuance to act are made clear by the record before us. Having purported to enter the trial of the cause as the trusted and confidential adviser of defendant, counsel for defendant turned upon his client and, without according to the client the benefit of any warning or the benefit of any true representation by counsel, suddenly changed his real role from that of the defender of defendant upon the charges made by the pleadings to that of the prosecutor of defendant upon charges not embraced within the pleadings and thereafter inflicted upon defendant the proverbial stabs in the back throughout the entire proceedings.

Our conclusions regarding the duties of counsel toward his client are not affected by the fact that the misconduct of counsel toward his client may have resulted in a verdict in favor of his client. We are dealing for the moment solely with the question of whether there was misconduct rather than the question of whether such misconduct was prejudicial to either plaintiff or defendant. In passing, however, we may observe that there are many things in life which are more precious than the pocket book and that many bona fide litigants would prefer to have a judgment entered against them rather than to have a judgment entered in their favor at the expense of being defamed in open court by one purporting to act as their trusted and confidential adviser. It is therefore no answer to the question before us, as suggested by counsel, to say that "counsel is not acting adversely to his client when he is taking a necessary step to thwart the prearranged plan and is endeavoring to prevent the entry of a judgment in favor of plaintiff." This answer is based upon counsel's belief that there was a prearranged plan between the parties and not necessarily upon fact but, in any event, we cannot subscribe to the suggestion that counsel, while entertaining such belief and the intention to besmirch the character of his client in the hope of attaining a given result, may continue to act as counsel for his client while carrying out such intention. It is not inappropriate to suggest that such belief may easily arise in the mind of counsel for defendant in guest cases involving insurance carriers whenever the account given by defendant of the happening of the accident tends to show that liability exists. This is true regardless of the truth or falsity of the account thus given by defendant. But the burden is placed upon counsel, if he entertains such belief, to act accordingly and to withdraw as counsel for defendant. Counsel cannot serve two masters and he can only properly represent the defendant so long as his duties as counsel for defendant do not conflict with his duties as counsel for the insurance carrier. It is conceded by counsel that under the circumstances "counsel could withdraw" and could "thereafter defend upon the policy" in any action brought against the insurance carrier. But he states that "defenses upon policies are difficult to maintain" and that "as a practical matter, therefore, the only protection against a plan or scheme of this character is to permit counsel to counteract it by endeavoring to bring out the truth from his own client." Here again the argument is based upon counsel's belief that there was a prearranged plan between the parties and not necessarily upon fact but counsel's duty to withdraw as counsel for defendant arises from the existence of the belief regardless of whether such belief may be in accord with the fact. The very argument advanced shows the impossibility of the position in which counsel is placed as counsel insists that while continuing to act as counsel for defendant in the action between the parties, counsel may, without regard to the legal and ethical duties owed to defendant as defendant's counsel, act solely upon practical considerations in the interests of the insurance carrier. In other words, counsel for defendant insists upon the right, in the interests of the insurance carrier, to have the opportunity to interject the issue of collusion not only into any action which might be brought against the insurance carrier but also into the personal injury action to which the insurance carrier is not a party. Whether the carrier, after the denial of liability on its policy and after the withdrawal of counsel employed by the carrier as counsel for defendant, might properly intervene in the personal injury action or otherwise suggest to the court its claim that the action is collusive, is not a question which need be determined here. On the question under discussion, we are of the opinion that counsel for defendant was guilty of misconduct in continuing to act as counsel for defendant while acting, as above indicated and as admitted by counsel, solely in the interests of the insurance carrier.

[9] The question remains as to whether such misconduct of counsel for defendant was prejudicial to plaintiff. We see no escape from the conclusion that it was. A reading of the entire record shows that the real issues presented by the pleadings were entirely beclouded by the repeated references to the issues interjected through such misconduct of counsel for defendant. The result of allowing the interjection of the issue of collusion by defendant's counsel into cases of this character would be to make it more, instead of less, difficult for plaintiffs to recover verdicts in those cases where liability is so clear that the honest defendant's testimony must corroborate the plaintiff's. In practically every such case defendant's counsel could point to the friendship of the parties (which is necessarily present in most guest

cases) and the substantial agreement of their testimony (which must exist if both are conscientiously telling the truth) and base thereon a charge of collusion between them. The doubt thus cast on the good faith of defendant by counsel standing before the jury as his confidential representative would in many cases, where the testimony of the parties was in agreement not because of collusion but because both had the highest respect for their solemn oaths to tell the truth, be impossible for plaintiff or his attorney to dispel. The confusion of a jury in a situation in which counsel reverse their normal positions, counsel for the defendant attacking his client and counsel for plaintiff upholding the defendant, may readily be imagined. Every attempt of plaintiff's attorney to establish the credibility and good faith of defendant might well be regarded by the jury as additional evidence of the collusion charged by defendant's own counsel. There is ample evidence in the record before us to sustain a verdict in favor of plaintiff and while it is true that there is also evidence sufficient to sustain a verdict in favor of defendant, we are of the opinion that the verdict upon which the judgment was based was not the result of a fair trial by reason of the misconduct to which reference has been made. That the verdict might well have been different in the absence of such misconduct is clearly indicated by the fact that, despite such misconduct, the jury remained divided after lengthy deliberation.

Before concluding, in fairness to counsel for defendant, it seems appropriate to state that we do not wish to be understood as doubting the good faith of counsel in forming the belief that collusion existed and, having reached that conclusion, in proceeding as he did. The question here presented, as we have indicated, appears to be one of first impression and counsel had no specific precedents upon which to base his conduct of the case. The good faith of counsel, however, is not the issue. We hold too high an opinion of the bar not to believe that most error committed by counsel in the trial of lawsuits is the result of a mistaken idea of the law held in good faith by the attorney committing it; but error committed in good faith is still error, and if prejudicial, as we are convinced it was in this case, must result in a reversal.

In view of the conclusions which we have reached on the main points which have been considered, we deem it unnecessary to discuss other points raised by plaintiff.

The judgment is reversed.

DOOLING, J. pro tem., concurs.

NOURSE, P.J., not participating.

61 Cal.App.2d 694

PIERCE v. PIERCE et al.

Civ. 14235.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1943.

Rehearing Denied Dec. 31, 1943.

Hearing Denied Feb. 7, 1944.

1. Appeal and error 🔑989

When judgment is attacked as being unsupported by evidence, power of appellate court in passing on such question is limited to determination as to whether there is any substantial evidence supporting verdict.

2. Appeal and error 🔑996

When two or more inferences can be reasonably deduced from facts, reviewing court is without power to substitute its deductions for those of jury.

3. Appeal and error 🔑842(7)

Only when evidence upon its face may justly be held to be insufficient to support the ultimate issue is an appellate court authorized to review the evidence because in such case the review is not of a "question of fact" but purely a "question of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Fact" and "Question of Law".

4. Appeal and error 🔑995

Before an appellate tribunal can reject positive testimony believed by the trial court, such testimony must be inherently improbable, and fact that the testimony may disclose circumstances which are unusual does not justify review thereof by an appellate court.

5. Deeds ⚷211(3, 4)
Gifts ⚷49(5)

Evidence supported judgment setting aside deeds and invalidating transfer of specified sum to one defendant on ground that the conveyances and transfer were without consideration and that defendants had exerted fraud, deception, and undue influence over 86-year-old grantor.

◆

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Action by Mno Pierce, as administrator of the estate of Herbert A. Pierce, deceased, against James W. Pierce and another to set aside deeds and to recover cash allegedly obtained from plaintiff's intestate. From an adverse judgment, defendants appeal.

Affirmed.

James W. Pierce, of El Monte, for appellants.

Louis J. Euler, of Los Angeles, for respondent.

WHITE, Justice.

Plaintiff, as administrator of the estate of Herbert A. Pierce, deceased, instituted this action to set aside three deeds to four parcels of real property conveyed by said decedent during his lifetime to defendants, who are his son and daughter, and also to recover the sum of $2,100 cash allegedly obtained from said decedent by defendant Nellamae Pierce Brown, allegedly without consideration therefor and by means of fraud, deception and undue influence allegedly exerted by said last named defendant daughter.

The real property and money around which this litigation centers was allegedly obtained by defendants about January 8, 1942. The father, Herbert A. Pierce, died on February 19th of the same year. Prior to his death and on September 26, 1941, decedent executed an holographic will leaving his entire estate in equal shares to his four adult children, who, in addition to both defendants, included plaintiff Mno Pierce, administrator of his father's estate, and Mrs. Lillie B. McClellan.

The complaint alleged that during the last illness of decedent and approximately five weeks prior to his death defendants "fraudulently taking advantage of the incapacity, illness and weakness of mind of said Herbert A. Pierce, deceased, and through exercising undue influence upon said decedent, caused him to sign deeds to the aforesaid four parcels of property then owned by him to the defendants herein". Then follows similar allegations as to the alleged activities of defendant Nellamae Pierce Brown in obtaining from her father the sum of $2,100 cash.

By their answer defendants generally and specifically denied the allegations of fraud, deception and undue influence alleged in the complaint, and by way of an affirmative and separate defense set forth that "each and every of the said transfers of real property and personal property were made upon valid and valuable consideration passing from and to these defendants and the said decedent".

The cause was tried before the court sitting without a jury, resulting in a judgment against defendants adjudging and decreeing the aforesaid deeds to be null and void and directing defendants to convey said properties to the estate of their father, Herbert A. Pierce. Also by the judgment herein, the above mentioned sum of $2,100 cash was decreed to be part of the estate of Herbert A. Pierce and that the transfer of said sum to defendant Nellamae Pierce Brown was null and void. From this judgment both defendants have appealed.

The single contention advanced on this appeal is that the adverse findings and judgment are without support in the evidence. Stating the evidence in a light most favorable to plaintiffs, as we are required to do following a judgment rendered in their favor, we find in the record testimony that at the time of the transactions which gave rise to this litigation decedent was of the age of 86 years; that on an occasion approximately one month before his death decedent was "nervous and quite upset"; that he inquired as to the location of the bathroom in the place where he was residing, was led thereto and in a few minutes when the witness went to look for him "he was in the back bedroom and he had done a job on the floor. He was very confused". That during the month of December preceding his death and execution of the deeds here in question, decedent was confused mentally; that "he did not know how to get his sweater on"; that in putting on his underwear he would "get his legs in the arms and his arms in the legs." A physician testified that he was called to treat decedent professionally on January 28, 1942, that "his heart muscle was not working the way it should, or he might possibly have had a beginning cerebral hemorrhage". The cause of decedent's death on February 19, 1942, was cerebral hemorrhage. There was medical testimony that the condition of body and mind which caused decedent's death is progressive and gradual in the degenerative changes that attended it. A nurse who was in attendance upon the decedent testified that during his last illness "he seemed very much disturbed and he grabbed hold of my hand after one of Miss Lillian's visits. He said 'They are not going to take me away'. I said 'No, sir, they cannot take you away. You are not able to go. They are not going to take you away'. He says, 'There is something doing; they are fixing something'. He was so—he had this obsession that they were going to take him away and put him in a hospital, or old people's home, or something." Another witness testified that when she visited decedent in the latter part of January, 1942, "He was failing very fast * * * very weak * * * he did not know just where he was, whether he was there or in a sanitarium * * * he thought he was in the mountains someplace. He said 'The water is so nice up here'. He didn't know he was home * * * his memory was very poor". There was also testimony that from about Christmas time in 1941 until his death some two months later decedent "couldn't remember"; complained at times that he was dizzy and "just didn't seem to be able to carry on a clear conversation". There is also in the record evidence that by his will, executed September 26, 1941, decedent divided his estate equally between his four adult children, that he stated "he was going to divide it equally; that they would share alike; each of them". It was also in evidence that after offering for probate the just mentioned original will of September 26, 1941, and after its admission to probate, defendant James W. Pierce proffered for probate another will, or as he designated it—a codicil, by the terms of which the very same parcels of property, transferred by the deeds here in question, were bequeathed to the defendants herein. With reference to the last named document, defendant James W. Pierce testified that the administrator of the estate of his father contested it; that upon a trial the court found that it was fictitious and denied its admission to probate. Defendants failed utterly to establish the truth of the allegation contained in their affirmative defense that a good and valuable consideration passed between the parties to the challenged deeds. In this connection it was admitted by the defendants themselves that at the time of the execution of the deeds decedent stated that "to make the deeds legal" each of the defendants, as grantees therein, should give to their father, as grantor, the sum of $10. This was done but subsequently the major portion of such sums, if not all thereof, was returned to defendants by their father. Another witness, Mrs. Jeannette Brown, testified that she was acquainted with defendant Nellamae Pierce Brown; that upon one occasion defendant Mrs. Brown "showed me, took out the deed from her purse and showed it to me and said, 'My father has turned over a very good piece of property to me'. I didn't pay much attention. Finally we went downstairs and she took it out again. I said, 'Let me see it', I looked at it and I says, 'Well, Nell, this isn't signed; this isn't any good.' And she said, 'Oh, it will get signed'. I said, 'You should have had the father sign it while he was in the mood'. She said, 'Oh, he will sign it'. She says something to the effect, or 'He better, if he knows what is good for him,' or something to that effect." There was also testimony that upon another occasion when defendant Nellamae Pierce Brown was asked: "You have your own home, and you are under no obligation to stay here with your father. Why don't you go to your own home?" She replied: "He don't need to think that he is going to get rid of me. I am going to be right here at the finish." Thereupon the witness asked decedent why he kept his daughter, Mrs. Brown, at his home, and her testimony in regard to that incident is: "He said he couldn't put her out. He seemed to be afraid of her." Another witness, who was a daughter of the decedent, testified that the latter often spoke "of the way she treated him", referring to defendant Mrs. Brown; that "she was abusive to him and swore at him". The same witness testified that she heard defendant Mrs. Brown swear at her father "time and again for several years * * * the main expression she used was 'You damn old fool', that was the way she spoke of my father". The same witness testified to an occasion when defendant Mrs. Brown said to her father "If I have to leave here, you will go too, because I will burn this house down". There was other testimony substantiating the foregoing treatment of decedent by his daughter, defendant Mrs. Brown, as well as testimony indicating a neglect of him by her while she was living at his home and taking care of him. There was also testimony to the effect that he frequently complained of such treatment but declared his inability to "get rid of her".

It is true there was evidence contradictory of some of that just narrated; that the relationship existing between the decedent and his two children, named herein as defendants, was harmonious, kindly, friendly and affectionate, but there was also positive testimony to the contrary which, in addition to that hereinbefore recited, need not here be set forth.

Appellants contend that their father desired to favor them because the other two children on or about January 16, 1942, instituted proceedings for the appointment of a guardian of his person and estate, but there is also in the record evidence that such a proceeding met with his unqualified approval; that prior to the filing thereof his son and plaintiff herein, Mno Pierce, discussed with his father the advisability thereof and obtained his consent thereto. In any event, the guardianship proceedings were not instituted until after execution of the deeds and transfer of the cash here involved.

[1, 2] In view of the foregoing and where, as here, appellants challenge the judgment on the ground that the record is barren of any substantial evidence to support the same, it is well settled and firmly established in our law, as was stated in Arundel v. Turk, 16 Cal.App.2d 293, 295, 60 P.2d 486, 487, that: "When a judgment is attacked as being unsupported by the evidence, the power of the appellate court in passing on this question begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the verdict rendered by the jury; and, on appeal from a judgment for defendant in an action for damages for negligence, all conflicts in the evidence must be resolved in favor of the defendant, and all legitimate and reasonable inferences indulged in to uphold the judgment, if possible; and, when two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the jury. Crawford v. Southern Pac. Co., 3 Cal.2d 427, 45 P.2d 183." The case at bar presents substantial evidence which, if believed by the trial court, tended to establish that decedent was an elderly man, 86 years of age, mentally feeble and to a degree childish in his conduct and actions; unable at times to even dress himself or know where he was; that one of the defendants, his daughter, swore at him; that she resided in his home and that he was in fear of her; that he had drawn a will leaving his estate in equal shares to his four children when two of the adult children, defendants herein, secured from him deeds to four parcels of property approximately one month prior to his death; that such deeds were not obtained openly but secretly; that the notary attesting the signature on some of the deeds was brought to the decedent's home by one of the defendants; that on other deeds defendant James W. Pierce was himself the notary. That plaintiff, administrator of the estate and another adult child of decedent, knew nothing about the execution of the deeds until it was accidentally brought out in subsequent court proceedings; that decedent Herbert A. Pierce for several months prior to his death was physically and mentally ill.

Under strikingly similar circumstances judgments setting aside conveyances on the ground that they were obtained by fraud and undue influence exercised upon and against elderly persons were upheld in Payne v. Payne, 12 Cal.App. 251, 107 P. 148, and Mau v. McManaman, 29 Cal.App.2d 631, 85 P.2d 209.

[3-5] It is only when evidence upon its face may justly be held to be insufficient to support the ultimate issue involved that appellate courts are authorized to review the evidence because in such a case, it is not a review of a question of fact but purely one of law. And, before an appellate tribunal can reject the positive testimony of a witness who is believed by the trial court, such testimony must be inherently improbable. The testimony herein, upon which the trial court relied does not admit of such stricture. Neither does the fact that the testimony may disclose circumstances which are unusual justify review thereof by the appellate court which does not sit as a jury to determine the issues of fact, the credibility of witnesses or the weight to be attached to their testimony. In the instant case we are not directed to nor do we find anything in the record to justify this court in concluding from all the facts and circumstances here present that there was not sufficient legal evidence upon which the trial court could rely in determining that the deeds in question were null and void; that the real property sought to be conveyed thereby, as well as the alleged gift of $2,100 cash, belonged to and are the property of the estate of Herbert A. Pierce, deceased.

The judgment must therefore be affirmed. It is so ordered.

YORK, P. J., and DORAN, J., concur.

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61 Cal.App.2d 803

HITSON v. DWYER et al.

Civ. 6984.

District Court of Appeal, Third District, California.

Dec. 17, 1943.

Hearing Denied Feb. 14, 1944.

1. Pleading 🔑214(1)

A general demurrer admitted truth of allegations of complaint, however improbable.

2. Intoxicating liquors 🔑306
Pleading 🔑35

Complaint alleging that plaintiff, while obviously intoxicated and sitting on movable stool at bar of defendants' tavern, wrongfully was served intoxicating liquor and as result fell from stool, and that defendants unlawfully dragged plaintiff on floor and as result of fall or of dragging or both, plaintiff suffered certain injuries, was sufficient as against general demurrer; allegations regarding intoxication and fall, if improper, being mere surplusage.

3. Action 🔑5

Statute making it misdemeanor to sell alcoholic beverages to an "obviously intoxicated person" was not adopted for benefit of intoxicated person, in view of declaration in another section that primary purpose of act involved in the highest degree the economic, social, and moral well-being and safety of state and of all its people. Gen.Laws 1937, Act 3796, §§ 1, 62.

4. Negligence 🔑56(3)

The principle that violation of statute or ordinance is negligence per se is subject to limitation that the act or omission must proximately cause or contribute to the injury.

5. Intoxicating liquors 🔑291

Unless alleged violation of Alcoholic Beverage Control Act provision making it misdemeanor to sell alcoholic beverage to obviously intoxicated person, by defendants in selling liquor to plaintiff while obviously intoxicated at bar in defendants' tavern, was proximate cause of plaintiff's injuries when he fell from movable stool and was subsequently dragged on floor by defendants, such violation would not make defendants liable for plaintiff's injuries. Gen. Laws 1937, Act 3796, § 62.

6. Intoxicating liquors 🔑291

In absence of statute, the sale of intoxicating liquor is not deemed to be the proximate cause of injuries received by buyer because of his intoxication.

7. Intoxicating liquors 🔑282

At common law, no legal liability was imposed on seller of intoxicating liquor for damages resulting from intoxication.

8. Intoxicating liquors 🔑291

In absence of showing to contrary, the proximate cause of injuries resulting from intoxication is not the wrongful sale of liquor to the intoxicated person, but the drinking of liquor so purchased.

9. Pleading 🔑207

Complaint alleging that plaintiff, while obviously intoxicated and sitting on movable stool at defendants' tavern bar, wrongfully was served intoxicating liquor and as result fell from stool, and that defendants unlawfully dragged plaintiff on floor, and that as result of the fall or dragging, or both, plaintiff suffered certain injuries, was subject to special demurrer for uncertainty.

10. Pleading 🔑18

The particularity with which plaintiff must state his cause of action depends, to some extent, upon circumstances.

11. Pleading ⚿367(6), 368

Though complaint is sufficient against general demurrer, it may still lie within trial court's discretion to require clarification of uncertainties therein or insist that alternative allegations be restated as direct allegations in separate counts.

12. Pleading ⚿207, 225(1)

Where complaint, though sufficient against general demurrer, was uncertain because alleging both actionable and non-actionable wrongs without stating them in separate counts, trial court properly sustained special demurrer to complaint with leave to amend so as to set forth all actionable elements.

◆

Appeal from Superior Court, Shasta County; Albert F. Ross, Judge.

Action by John David Hitson against M. J. Dwyer and another for personal injuries. From a judgment of dismissal, after plaintiff declined to amend his amended complaint to which defendants' demurrer had been sustained with leave to amend, plaintiff appeals.

Affirmed.

Carr & Kennedy, of Redding, for appellant.

Daniel S. Carlton, of Redding, for respondents.

PEEK, Justice.

Plaintiff appeals from a judgment of dismissal after declining to amend his complaint to which defendants' demurrer had been sustained with leave to amend pursuant to the court's directions.

The action was one for personal injuries suffered by the plaintiff while he was a patron in the "Rigger's Club", a tavern owned and operated by the defendant Dwyer. Plaintiff alleges that while obviously intoxicated and sitting on a movable stool at defendants' bar he wrongfully was served intoxicating liquor, and as a result he fell from said stool to the floor; that defendant Dwyer and defendant Hacker, his employee, unlawfully dragged the plaintiff from his position on the floor, and that as a result of said fall or the dragging, or both, plaintiff suffered a fracture, and other injuries of the shoulder and further bodily injuries.

Plaintiff in setting forth such facts in his complaint further alleged that although he was in an obviously intoxicated and helpless condition defendants negligently failed to take precaution to protect him while he was in a perilous position sitting upon a movable and unguarded stool; that by reason of the negligence of defendants in accepting plaintiff as a customer and failing to properly care for him in his intoxicated condition and while in such dangerous position, he fell from the stool and suffered the alleged injuries.

It appears from the record that the defendants' demurrer to the original complaint was sustained with leave to amend; that plaintiff filed an amended complaint and that defendants' demurrer was again sustained, and thereupon leave was granted plaintiff to again amend his complaint in accordance with the directions of the court. Plaintiff elected not to amend his complaint again, and a judgment of dismissal was entered in favor of the defendants. The record also discloses that a motion to strike certain portions of plaintiff's amended complaint was filed by defendants. No issue is raised herein and no mention is made in the transcript of the court's ruling on said motion, but respondents' brief states the motion was denied.

The court, in its ruling wherein defendants' demurrer was sustained, stated in part as follows:

"In this case the only possible cause of action would be for negligence in lifting and moving the man after he fell to the floor. That is not separately alleged and the present complaint is therefore defective.

"The demurrer to the amended complaint is sustained. Leave to amend will be granted if it is desired to sue for any alleged negligence in dragging the injured man, but the injury he suffered by reason of such will have to be alleged, and injuries received from his drunken fall cannot be considered."

It is plaintiff's contention on this appeal that defendants participated in producing plaintiff's helpless condition of which they were fully aware; that because of the invitee relationship and because the "instrumentality" was under their control, they owed him a duty to take affirmative steps to prevent the injury under the "discovered peril" doctrine; that such duty exists regardless of statute, and that plaintiff's intoxication was remote and not the proximate cause of the injuries.

Plaintiff further maintains that defendants were negligent per se by reason of violation of the provisions of the Alcoholic Beverage Control Act, Gen.Laws 1937, Act 3796, which prohibits the selling, furnishing or giving of any alcoholic beverage to any obviously intoxicated person. It is also his contention that the trial court's ruling on defendants' demurrer that there was a misjoinder of causes of action, was error since the demurrer interposed did not specify this ground, and that in addition the injuries arose out of the same tort, and therefore need not be separately stated.

To these contentions the defendants reply that the plaintiff is required to plead with exactness the injuries and damages resulting from the alleged wrongful act; that the injuries, if any, resulting from his own intoxication for which he alone was responsible, should not be incorporated in his claim against the defendants for the alleged dragging; that if the plaintiff, after having caused injuries to himself, contends that he received further injuries as the result of defendants' negligence, this likewise must be alleged and proven. The defendants, in effect, state they are liable in no way for the injuries which might have resulted from the fall from the stool, but inferentially admit under the cases such as Doherty v. California Navigation etc., 6 Cal.App. 131, 91 P. 419, that having undertaken to remove plaintiff or care for him then defendants must do so in a careful manner.

[1] Defendants by their general demurrer admitted the truth of the allegations of plaintiff's complaint, however improbable (Woodruff v. Howes, 88 Cal. 184, 26 P. 111), "that as a direct and proximate result of the unlawful and wrongful acts of the defendants in serving alcoholic beverages to the plaintiff when he was in an obviously intoxicated condition and the negligence of the defendants in omitting to exercise due and proper care for the safety of the plaintiff and to prevent his injury when he was in such obviously intoxicated and helpless condition in a position of danger, and the wanton, vicious, wrongful, careless and reckless conduct of defendants in violently dragging the plaintiff by his arms from his position on the floor of said "Rigger's Club", all of said factors concurring in producing and directly and proximately contributing to the result."

[2] Insofar as the general demurrer is concerned the question whether the fall itself or the dragging resulted in the injuries as alleged is immaterial. The allegations as regards the intoxication and the fall, if improper, would amount to nothing more than mere surplusage, and the complaint therefore was good as against a general demurrer.

The sole question then remaining relates to a consideration of the special demurrer of defendants which alleges that the complaint was uncertain in that it could not be ascertained what injuries, if any, plaintiff suffered when he fell from the stool and what injuries, if any, he suffered when he was dragged from his fallen position, and that the complaint was ambiguous and unintelligible for the same reason.

From an examination of the ruling of the trial court previously mentioned it is apparent that the theory upon which the court made its determination was that it could not be determined from the complaint what portion of the damages alleged to have been suffered by plaintiff was attributable to each of the various elements which plaintiff contends constituted his cause of action. Plaintiff has consistently maintained his position throughout both in his oral argument and in his briefs now on file, that the allegations contained in his complaint as regards the serving of alcoholic beverages to plaintiff while in an obviously intoxicated condition and the failure of defendants to exercise care and caution for the safety of plaintiff was the direct and proximate cause of the injury, and in addition insists that he was one of a class for whose benefit the statute was enacted in that it prohibited the sale of alcoholic beverages to an "obviously intoxicated person". With this contention we cannot agree unless the alleged violation by defendants of the Beverage Act was negligence per se and constituted, as a matter of law, the proximate cause of plaintiff's subsequent injuries.

[3] It is true that the act does make it a misdemeanor to sell alcoholic beverages to an "obviously intoxicated person" (Act 3796, Gen.Laws 1937, Sec. 62, Stats. 1935, p. 1151, as amended), but that is not to say, as contended by plaintiff, that he was one of a class for whom the act was drafted. The primary purpose of the act is declared in Section 1 thereof to involve "* * * in the highest degree the econ-

omic, social and moral well-being and the safety of the State and of all its people." Under such a statement it cannot be said that an obviously intoxicated person is one for whom the act was adopted.

[4, 5] The principle that a violation of a statute or ordinance is negligence per se is subject to the limitation that the act or omission must proximately cause or contribute to the injury. Burtt v. Bank of California National Association, 211 Cal. 548, 296 P. 68; Lawrence v. Southern P. Co., 189 Cal. 434, 208 P. 966. Unless the alleged violation of the Beverage Act by defendants constituted the proximate cause of plaintiff's injuries such violation is wholly immaterial to a disposition of this appeal.

[6-8] From our examination of the numerous cases cited we find none which hold, in the absence of a statutory enactment to the contrary, that the sale of intoxicating liquor was the proximate cause of injuries subsequently received by the purchaser because of his intoxication. Rather we find the general rule to be as stated in the case of Hyba v. C. A. Horneman, Inc., 302 Ill.App. 143, 23 N.E.2d 564, 565: "The common law gave no remedy for the sale of liquor, either on the theory that it was a direct wrong or on the ground that it was negligence which would impose a legal liability on the seller for damages resulting from intoxication." See also Tarwater v. Atlantic Co., 176 Tenn. 510, 144 S.W.2d 746. This rule has found support in California in the case of Lammers v. Pacific Electric R. Co., 186 Cal. 379, 199 P. 523, wherein the court held that the sale of intoxicating liquor is not the proximate cause of injuries subsequently received by the purchaser because of his intoxication. Therefore, in the absence of a showing to the contrary, the proximate cause is not the wrongful sale of the liquor but the drinking of the liquor so purchased. 30 Am.Jur. Sec. 611.

[9] If our view be correct it becomes apparent that plaintiff has alleged both an actionable and a non-actionable wrong, and the defendants' special demurrer was properly sustained. Under the rule as stated in the case of Dauberman v. Grant, 198 Cal. 586, 246 P. 319, 48 A.L.R. 1244, it was held that the special demurrer of defendants therein should have been sustained on the ground that plaintiff's complaint was ambiguous in that it could not be determined therefrom what portion of the damage alleged to have been suffered by plaintiff was attributable to each of the three things which the plaintiff alleged constituted a nuisance.

[10, 11] It has been recognized that the particularity with which a plaintiff must state his cause of action depends to some extent upon the circumstances and the situation of the party, and this is so that no greater particularity is required than the nature of the thing pleaded will conveniently admit. Frequently the plaintiff may not be able to specify the general cause of the injury and he may be entirely ignorant as to the specific acts or omissions which led up to it. In the case of Guilliams v. Hollywood Hospital, 18 Cal.2d 97, 114 P.2d 1, 5, the plaintiff alleged in general terms that the hospital undertook to prepare plaintiff for an operation and to care for and attend him during the operation and thereafter in a skillful and careful manner, and that through the negligence and want of care on the part of the hospital, the plaintiff suffered certain injuries; that he did not know whether the injuries were sustained during or after the operation but alleged that they were not incurred prior thereto. To these allegations both a special and a general demurrer was interposed by the defendant hospital. The court held that the complaint was sufficient as against the general demurrer but added "it may still lie within the discretion of the trial court to require the clarification of uncertainties or ambiguities, or to insist that alternative allegations be restated as direct allegations in separate counts."

[12] It would therefore appear that the ruling of the trial court herein, which did not preclude plaintiff from amending his complaint so as to set forth only those elements which were actionable, was a proper disposition of the question raised by defendants' special demurrer.

The judgment is affirmed.

ADAMS, P. J., and THOMPSON, J., concur.

Hearing denied; EDMONDS and TRAYNOR, JJ., dissenting; CARTER, J., not participating.

61 Cal.App.2d 672

HASTINGS v. SERLETO et al.

Civ. 14222.

District Court of Appeal, Second District,
Division 1, California.
Dec. 10, 1943.

1. Automobiles 🔑181(1)

To constitute "willful misconduct", within automobile guest statute, there must be actual knowledge, or that which in the law is deemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury, and mere failure to perform a statutory duty is not alone willful misconduct. Vehicle Code, § 403, St.1935, p. 154.

2. Automobiles 🔑181(1)

A motorist is guilty of "willful misconduct" within automobile guest statute if he intentionally does an act with wanton and reckless disregard of its possible result. Vehicle Code, § 403, St.1935, p. 154; Pen. Code, § 21.

3. Automobiles 🔑245(24)

In action by automobile guest for personal injuries, question whether driver intentionally drove automobile with wanton and reckless disregard of possible result of such driving or whether he intentionally drove automobile with knowledge, express or implied, that serious injury would be probable result thereof is one of fact for determination of fact finder. Vehicle Code, § 403, St.1935, p. 154; § 505, St.1939, p. 2107.

4. Automobiles 🔑244(20)

In automobile guest's action for injuries sustained when automobile being driven allegedly at excessive rate of speed over narrow winding mountain road struck tree seven feet to right of edge of pavement, substantial evidence sustained finding of jury that driver was guilty of willful misconduct. Vehicle Code, § 403, St. 1935, p. 154.

5. Trial 🔑260(8)

In action by automobile guest for personal injuries, trial court's refusal to give instruction regarding willful misconduct and defining difference between gross negligence and willful misconduct was not error in view of instructions given. Vehicle Code, § 403, St.1935, p. 154; § 503, St.1939, p. 1481.

6. Trial 🔑295(1)

Instructions should not be considered singly but in their entirety.

7. Automobiles 🔑246(3)

In action by automobile guest for personal injuries, instruction giving jury a standard to measure conduct of automobile driver charged with willful misconduct was not misleading. Vehicle Code, § 503, St.1939, p. 1481.

8. Evidence 🔑506

Where police officer had made experiments to determine how fast automobile could make turn and leave tire burns, opinion of officer based on brush marks found at scene of accident and evidence of collision of automobile with tree was admissible over objection that opinion invaded province of jury, and that weight of automobiles and condition of tires, etc., would make a difference.

9. Appeal and error 🔑1048(2)

Where automobile guest, suing for personal injuries, had testified that she paid no attention to speed of automobile until just before accident, permitting guest to express her opinion regarding speed of automobile was not reversible error.

10. Evidence 🔑474(8)

The law recognizes a very broad and liberal rule in reception of opinion evidence of nonexperts regarding rate of speed of streetcars or motor vehicles.

11. Evidence 🔑474(8)

A person of ordinary intelligence having opportunity for observation is competent to testify regarding speed at which automobile is being operated at a given time.

12. Automobiles 🔑243(3)

In action for personal injuries by automobile guest against host and his parents, permitting guest to show that none of the defendants visited her after the accident was error.

13. Automobiles 🔑243(3)

It is proper to interrogate motorist accused of willful misconduct relative to his mental attitude and knowledge of probable consequences of his act, but such inquiry must be confined to his state of mind prior to or contemporaneously with the accident and not subsequent thereto. Vehicle Code, § 403, St.1935, p. 154.

14. Automobiles 🔑243(3)

In action by automobile guest for personal injuries against host and his parents, refusing to permit defendants to show that third occupant who uttered a warning to driver a moment prior to accident had not previously made any protest was not error. Vehicle Code, § 403, St.1935, p. 154.

15. Trial 🔑76

Counsel may not speculate on a favorable answer being given by witness and then be heard to complain.

16. Appeal and error 🔑207

In action for personal injuries by guest against minor host and his parents, questions of guest's counsel regarding other accidents of host were not such that any prejudicial effect resulting therefrom could not have been cured by appropriate admonition to jury, so that where no request for such curative instruction had been made to trial court, question of prejudice could not be raised for first time on appeal.

17. Appeal and error 🔑1170(1)

Under constitutional provision forbidding an appellate court from setting aside judgment or granting new trial unless error complained of has resulted in "miscarriage of justice," where record discloses commission of errors at trial, appellate court must first find that upon record it is seriously doubtful that without such errors judgment appealed from would have been rendered, before reversal of judgment is justified. Const. art. 6, § 4½.

See Words and Phrases, Permanent Edition, for all other definitions of "Miscarriage of Justice".

18. Appeal and error 🔑1170(7)

In personal injury action, error in admitting evidence that none of defendants visited plaintiff after accident did not require reversal, where evidence was admitted subject to motion to strike out, but such motion was not made, and there was no claim that damages awarded were excessive. Const. art. 6, § 4½.

◆

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Personal injury action by Geraldine Hastings, by Robert I. Hastings, her guardian ad litem, against Frank Serleto and others. Judgment for plaintiff, and defendants appeal.

Affirmed.

Parker & Stanbury and Harry D. Parker, both of Los Angeles, for appellants.

David Spaulding, of West Los Angeles, for respondent.

WHITE, Justice.

This action was instituted by the minor plaintiff through her guardian ad litem to recover damages for personal injuries sustained by her while she was riding as a guest in an automobile driven by the minor defendant Frank Serleto, Jr. Frank J. Serleto and Gertrude M. Serleto, parents of the minor defendant, having signed and verified his application for a driver's license, were also joined as parties defendant.

Trial before a jury resulted in a verdict in favor of plaintiff for the sum of $5,000 against the minor defendant and for a like amount against his parents. From the judgment entered upon such verdict, defendants prosecute this appeal.

The evidence as reflected by the record shows that on the evening of August 30, 1942, the minor plaintiff, then of the age of 14 years, was seated in a confectionery store consuming a drink of Coca-Cola. The minor defendant and his companion, Wilkie Richardson, had spent the afternoon from about the hour of 3:30 o'clock in a bowling alley in Westwood Village. The minor defendant had under his control and was driving a 1938 Buick Club coupe automobile. About 7:30 o'clock in the evening the minor defendant and his companion entered the confectionery store. The defendant was unacquainted with plaintiff, while Wilkie Richardson had a slight acquaintance with her. At the time of the accident the minor defendant was 18 years of age and his companion was approximately 20. Plaintiff accepted an invitation to go for a ride in the automobile with the two young men. Shortly after embarking on the trip a stop was made and some beer was purchased by Richardson. After driving a short distance away, the beer was consumed and thereafter another stop was made for the purpose of purchasing more beer. It was established that two or three bottles of beer were purchased on the occasion of the first stop and one bottle on the second. Following the accident, one unbroken quart-size beer bottle was found in the automobile. After the second purchase of refreshments, plaintiff heard the minor defendant state that he knew "a short cut", and followed this remark with the statement to Wilkie Richardson, "I know a good spot". During the drive after the second purchase of beer, plaintiff testified she paid little attention to the direction in which the car was headed or to the manner of driving, but testified that she knew they were rounding curves because "I could feel it as we went around them". She further testified that she had not noticed the manner in which the minor defendant was driving until, while making a turn just before the curve on which the accident occurred, she became "uneasy, or nervous, about the manner in which he was driving". Just about the time she became aware of the fact that the car was moving at a very fast rate of speed, she heard Mr. Richardson shout "Slow down, Frank, and watch out for that tree". She further testified, "the next thing I knew I saw the tree and the steering wheel jumped up, and that is all I remember".

The accident occurred on Mandeville Canyon Road in the city of Los Angeles, which road branches off from Sunset Boulevard and leads into, but not through, the Santa Monica Mountains. It is a narrow, winding road, 23 feet wide. The place where the accident occurred is approximately three miles from Sunset Boulevard and is about ten blocks from where Mandeville Canyon Road ends.

According to the testimony of two police officers, they, in answer to a call, travelled to the scene of the accident where they found the Buick automobile, driven by the minor defendant, against a tree, about seven feet to the east, or right, of the edge of the pavement. The tree had several trunks branching from the ground. The trunks rise at an angle. The automobile had hit the tree and the angle of the trunks. The momentum of the vehicle and the angle of the tree-trunks had buried in the ground the front end of the car, including the knee-action units and the oil pan, clear back to the transmission. The steering wheel had gone through the windshield just below the top edge. The entire front end of the vehicle was caved in, the left front wheel had been set back and all the attachments on the left front end of the frame had been loosened and set back. The instrument board on the automobile had been bent into a "V" shape, while the glass on the speedometer was broken, the needle of which was stopped at 65 miles per hour. The gear shift lever which extends up from the floor had been bent down and was lying on the floor for its entire length, being tangled with plaintiff's limbs. The post that divides the two parts of the windshield had been knocked loose and had been pushed down. The rear wheels were locked. The right front fender of the car was damaged where it struck the wall. The right rear end of the car had left the ground and hit a stone wall approximately three feet off the ground. Some parts of the automobile were found at a distance ranging from 50 to 60 feet in front of the vehicle while other parts thereof were picked up at a distance of some 83 feet.

The canyon in which the accident occurred is steep-walled and very narrow at the scene of the impact. On the night in question the canyon was very dark, the last street light having been passed about a mile prior to the collision. There were other vehicles on the canyon road that night, and as to curves, the road is substantially the same from its inception at Sunset Boulevard. A police officer testified that while making an inspection at the scene on the day following the accident he observed tire marks and tire burns leading from the scene of the impact back to a point 250 feet from the point of impact. At a point 59 feet from where the automobile came to rest it had left the highway on the driver's right side, climbed an almost perpendicular bank, slid along the bank sideways and then came to the level portion of a garden and on to the final impact. According to the police officer, the tire burns observed by him indicated that the vehicle was driven at a high rate of speed and while advancing forward was careening or swaying to the right. It is also in evidence that defendant driver knew that the road upon which he was driving was a narrow, winding mountain road. He had been over this road before, he was familiar with the fact that the turn where the accident happened was a double turn and he knew that the paved highway ended a short distance from where the collision occurred and that the road itself terminated entirely about 10 blocks ahead. He was familiar with the fact that there were trees on both sides of the road, close to the edge of the highway, and that but a short distance from the point of collision the road divided and that a large tree stood in the middle thereof.

The evidence shows without conflict that there was no quarreling between any of the parties prior to the accident, that there had been no arguments between any of them nor any acrimonious discussion. They were all friendly toward each other up to the instant of the accident.

The minor defendant driver testified that at the time his vehicle ran off the road he was driving at a speed of about 35 miles per hour.

With reference to the time just preceding the happening of the accident, the minor plaintiff testified she did not pay any attention to the speed of the car until just prior to the happening of the accident when, she testified, she "was afraid" of the manner in which the minor defendant was driving. In that connection the record reflects the following:

"Q. What were you doing? A. I was busy with Wilkie.

"Q. You were in his embrace, were you? A. Yes, sir."

In describing the events leading up to and at the time of the accident, the minor defendant testified "Well, we got almost up to the 3100 block and when we were entering near to the point, I turned my head for a second to see what Geraldine and Wilkie were doing and at that moment I went off the road, and Wilkie shouted, 'Watch out, Francis. There is a tree', but I was on the shoulder, in the dirt, and when I turned the wheel nothing happened. The car just kept sliding toward the tree, and that is all I remember."

The first contention made by defendants on this appeal involves the issue of whether the evidence is such as to warrant a finding of wilful misconduct so as to make the driver of the guest car, or those legally liable for the conduct of such driver, answerable in damages under the provisions of section 403 of the California Vehicle Code, St. 1935, p. 154.

[1] Various definitions of the phrase "wilful misconduct," as used in our so-called guest statute, appear in the many cases wherein there arose occasion to consider the same. In the case of Meek v. Fowler, 3 Cal.2d 420, 45 P.2d 194, 197, our Supreme Court adopts as satisfactory the definition in Turner v. Standard Oil Co., 134 Cal.App. 622, 626, 25 P.2d 988, wherein it is said that " 'wilful misconduct,' within the meaning of this statute, may then be defined as intentionally doing something in the operation of a motor vehicle which should not be done or intentionally failing to do something which should be done under circumstances disclosing knowledge, express or to be implied, that an injury to a guest will be a probable result". In the same case it is further said "The case of Howard v. Howard, 132 Cal.App. 124, 128, 22 P.2d 279, 281, after defining gross negligence as set forth in Krause v. Rarity, 210 Cal. 644, 293 P. 62, 77 A.L.R. 1327, and what is meant by willful misconduct as set forth in Helme v. Great Western Milling Co., 43 Cal.App. 416, 185 P. 510, declares that: '*The mere failure to perform a statutory duty is not, alone, willful misconduct. It amounts only to simple negligence. To constitute "willful misconduct" there must be actual knowledge, or that which in the law is esteemed to be the equivalent of actual knowledge, of the peril to be apprehended from the failure to act, coupled with a conscious failure to act to the end of averting injury.*'

"While the line between gross negligence and willful misconduct may not always be easy to draw, a distinction appears from the definition given in that gross negligence is merely such a lack of care as may be presumed to indicate a passive and indifferent attitude towards results, while willful misconduct involves a more positive intent actually to harm another *or to do an act with a positive, active, and absolute disregard of its consequences.* (Italics ours.) It seems clear that in excluding all forms of negligence as a basis for recovery in a guest case, the Legislature must have intended that to permit a recovery in such a case the thing done by a defendant must amount to misconduct as distinguished from negligence, and that this misconduct must be willful. While the word 'willful' implies an intent, the intention referred to relates to the misconduct and not merely to the fact that some act was intentionally done. In ordinary negligence, and presumably more so in gross negligence, the element of intent to do the act is present and any negligence might be termed misconduct. *But willful misconduct as used in this statute means neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negli-*

gence. Willful misconduct implies at least the intentional doing of something either with *a knowledge that serious injury is a probable (as distinguished from a possible) result, or the intentional doing of an act* with a wanton and reckless disregard of its possible result. (Italics ours.)"

While it is true that the mental state of the driver is extremely important and that there must exist in the mind of the driver intentional misconduct coinciding with knowledge of, or indifference to, the probability of injury, nevertheless it is equally well established that the state of a person's mind can rarely, if ever, be shown by his own statements or testimony. To meet this situation we have in this state a very common sense rule announced in section 21 of our Penal Code that "The intent or intention (with which an act is done) is manifested by the circumstances connected with the offense * * *." In the instant case therefore, we must examine the circumstances connected with the claimed wilful misconduct on the part of defendant driver to determine whether they are of such a nature as to disclose the requisite and necessary elements that are essential to support a charge of wilful misconduct; viz., (1) the intentional doing of something with a knowledge that serious injury is a probable (as distinguished from possible) result; (2) the intentional doing of an act with a wanton and reckless disregard of its possible result. The first of the above-mentioned alternatives, the doing of an act with knowledge of its probable results, is qualified by the cases to the extent that the knowledge may be either express or implied or in other words there must be actual knowledge, or that which in contemplation of law is regarded and deemed to be the equivalent of actual knowledge. Van Fleet v. Heyler, 51 Cal.App.2d 719, 727, 125 P.2d 586.

With reference to what actions, behavior and conduct amounts to wilful misconduct, we think it may fairly be said to envisage something more than ordinary or even gross negligence, but less than the conventional intentional tort such as trespass, assault and battery. Existing as it does in the shadowy realm between the two well-established classes of so-called ordinary negligence and intentional wrongdoing, the various terms which have from time to time been used to describe conduct which falls within that intermediate zone adds to the difficulty of applying the rules governing wilful misconduct to a given set of facts. We are impressed that in the consideration of cases arising out of section 403 of the Vehicle Code the interpretation to be given actions and conduct of a defendant must turn on the circumstances of the individual case, and that the decisions passing upon facts deemed sufficient or insufficient to sustain a verdict or judgment can be of little assistance other than to announce the definition of the terms and phrases used in the statute. For instance, it has been held that the violation of a statutory duty alone does not constitute wilful misconduct (Porter v. Hofman, 12 Cal.2d 445, 85 P.2d 447); that speed alone, or inattention to the roadway alone, do not constitute wilful misconduct (Stacey v. Hayes, 31 Cal.App.2d 422, 88 P. 2d 165); and that colliding with a car at an intersection while driving 60 miles per hour was not wilful misconduct. McCann v. Hoffman, 9 Cal.2d 279, 70 P.2d 909. Neither the sort of misconduct involved in any negligence nor the mere intent to do the act which constitutes negligence amounts to wilful misconduct. Howard v. Howard, 132 Cal.App. 124, 129, 22 P.2d 279, 281. In the case just cited it was said "Willful misconduct implies at least the intentional doing of something either with a knowledge that serious injury is a *probable* (as distinguished from a possible) result, or the intentional doing of an act with a wanton and reckless disregard of its *possible* result." (Italics ours).

[2] We, therefore, conclude that a defendant driver is guilty of wilful misconduct if he intentionally does an act with wanton and reckless disregard of its possible result. Vehicle Code, section 505, St. 1939, p. 2107, defines reckless driving as the driving of a car "in wilful or wanton disregard for the safety of persons"; and in the case of People v. Young, 20 Cal.2d 832, 837, 129 P.2d 353, the Supreme Court approves of the conclusion reached by the superior court, sitting as an appellate tribunal, in People v. McNutt, 40 Cal.App.2d Supp. 835, 105 P.2d 657, that reckless driving and wilful misconduct as specified by the Vehicle Code are the same. Furthermore, it has been stated that: "'The actor's conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize that the actor's conduct not only creates an unreasonable risk of bodily harm to the other but also

involves a high degree of probability that substantial harm will result to him.' (Restatement, Torts, § 500)." [20 Cal.2d 832, 129 P.2d 356.] In the case of People v. Young, supra, 20 Cal.2d at page 837, 129 P.2d 356 the Supreme Court holds that there is no substantial difference between the description "wilful or wanton" and "reckless".

[3, 4] Therefore, the question of whether the defendant driver herein intentionally drove his automobile with a wanton and reckless disregard of the possible result of such driving or whether he intentionally drove his automobile with a knowledge, express or implied, that serious injury would be a probable (as distinguished from a possible) result thereof, is essentially one of fact for determination by the fact finder. And the problem presented to us on appeal is to determine whether there is in the record any substantial evidence to justify the finding by the jury that the actions and conduct of defendant driver amounted to a course of conduct which included the intentional doing of one or more things with a wanton and reckless disregard of the possible result or whether his conduct was intentional and such as, under the circumstances present, he is charged with knowledge, express or implied, that as a result of his recklessness or wantonness, injury to others would be the probable (as distinguished from the possible) result.

In the case with which we are here concerned, we feel that both queries must be answered in the affirmative. In the instant case we are confronted with the spectacle of a driver who is acquainted with the road over which he was driving, a road that he knew was a narrow, winding mountain road, which led into but not through the mountains. He was aware that the turn where the accident happened was a double turn and that the paved highway ended at about the scene of the disaster, while the road in its entirety ended about ten blocks ahead. He knew there were trees on both sides of the road close to the edge of the highway; that but a short distance from the scene of the accident the road was divided with a large tree standing in the middle. The driver was aware of the fact that the canyon was steep-walled and that he had passed the last street light and was traveling in a canyon that was very dark. That he had knowledge of the presence of other vehicles on the road is shown by the fact that he had passed two or three within the distance of a few miles. Possessed of this knowledge and after having consumed some intoxicating liquor, defendant driver drove his car first off the left side of the road, where he barely missed striking a large tree, then off the right side of the road. His car was driven in such a manner that it climbed up an almost perpendicular bank, slid along sideways, then on a garden for 59 feet before striking a tree with force and violence concededly tremendous. The speedometer on the car, after the collision, was found broken with the needle pointing at 65 miles per hour. We are persuaded that the jury was justified in concluding, as apparently it did, that notwithstanding defendant driver's knowledge of the road over which he was traveling and its hazards, he knowingly, deliberately and intentionally flirted with danger. The jury, we feel, were also authorized to conclude that any reasonable person knowing what the defendant driver knew and seeing what he saw, and confronted with the conditions which confronted him, would have realized that such wanton and reckless driving could result only in injury to those who were riding in the automobile, and certainly the jury was authorized, under the facts here present, to conclude that defendant driver was charged with the implied knowledge of not only the possible but the probable results of such conduct.

Appellants contend that the only recklessness, if any, shown on the part of defendant driver was the speed of his vehicle and that, standing alone, is not sufficient to sustain a charge of wilful misconduct. However, of necessity the question of speed must be considered in connection with the type of the highway on which the speeding vehicle travels; the width of such highway, its surface and the presence or absence of traffic upon it. Then, too, there is the factor of visibility. In the instant case the car was not only traveling after dark in the manner hereinbefore referred to, but was driven in extreme darkness through a winding and walled canyon. When considered in relation to these other factors, mere speed may amount to wilful misconduct because such driving under the mentioned conditions could reasonably be said to be in wanton and reckless disregard of both the probable and possible results that would ensue.

It is true, as contended by respondents, that there was no animosity of feeling or acrimony of conversation or actions on the part of defendant driver and either of his guests, but wilful misconduct may exist without the presence of animus or ill-feeling. It may be motivated by what is referred to in Rawlins v. Lory, 44 Cal.App.2d 20, 24, 111 P.2d 973, as "skylarking" or indulging in antics or the cutting of capers with an automobile. Or it may be occasioned for the sake of the thrill which it produces and with reckless indifference to consequences.

Appellants further contend that the principal and only cause of the accident was not due even to speed but rather was due to the act of the driver in momentarily turning his head to see what his passengers were doing, with the result that the car ran off the road, got into some soft dirt and became unmanageable. In that connection it may well be said that the jury could have concluded that there was no causal connection shown between the act of defendant driver in turning his head and the injury to plaintiff. The jury was entitled to assume and infer, as evidently they did, that had defendant driver been operating his automobile at a moderate rate of speed, commensurate with the circumstances which surrounded him, and of which he had knowledge, and with due regard for the duty he owed his guests, that the turning of his head would not have resulted in injury. Furthermore, the jury was not required to believe appellants' version as to why and how the accident occurred but they were authorized, under the facts here present, to conclude that the probability of injury to a guest from such conduct would immediately suggest itself to any person of ordinary prudence as the inevitable consequence of such driving and that, therefore, any driver engaging in such conduct as is set forth herein is charged with implied knowledge of not only the possibility but the probability of injury to his guests. We, therefore, conclude that the evidence in this case justified the finding by the jury that the defendant was guilty of wilful misconduct.

[5] As a second ground for reversal of the judgment herein, appellants urge that the trial court refused to give the jury certain instructions tendered by them at the trial on the subject of wilful misconduct and defining the difference between gross negligence and wilful misconduct. It would unduly prolong this opinion to here set forth the proffered and refused instructions. Suffice it to say that they set forth recognized abstract principles of law governing wilful misconduct; defined ordinary and gross negligence; distinguished such forms of negligence from wilful misconduct; and set forth the line of demarkation between the two forms of negligence and what is known as wilful misconduct. By the refused instructions the jury would have been advised that a charge of wilful misconduct puts in issue the state of the defendant driver's mind; that the violation of a statutory duty does not of itself establish wilful misconduct; that excessive speed of and by itself, and unaccompanied by circumstances indicating an intent to injure another or a wanton disregard for the safety of a guest, is not sufficient to support a finding of wilful misconduct; that no issue of intoxication was involved in the case.

Examination by us of the record herein leaves us with the belief that the court fully and fairly instructed the jury upon all of the issues raised by the pleadings and presented by the evidence. The jury was explicitly instructed that under the law of this state a guest in an automobile driven by another cannot recover damages for injuries sustained when such driver fails to exercise ordinary care; that in order to recover damages the guest must establish by a preponderance of the evidence that the injuries were occasioned by the driver's intoxication or by his wilful misconduct. The jury was advised that the plaintiff did not contend that her injuries were the result of any intoxication on the part of the defendant driver. The court then correctly defined for the jury what is meant by the phrase "wilful misconduct"; that excessive, unreasonable or imprudent speed "does not in and of itself show that the driver was guilty of wilful misconduct"; that unless the speed under all the circumstances was so excessive as to make it evident to a reasonably prudent person that danger of injury to the guest was a real probability, then such speed would not amount to wilful misconduct. The jury was also instructed that the mere fact that the defendant driver had consumed alcoholic beverages prior to the happening of the accident is not sufficient in and of itself to prove that the defendant is liable; that the intent which is a necessary element of wilful misconduct, as referred to in other instructions, is not a mere intent to commit an act, but the intent must go to the misconduct. While the court did not, in the language suggested by defendants, admonish the jury as to the difference between ordinary and gross negligence and wilful misconduct, it did clearly and understandingly define for the jury what constitutes wilful misconduct, which was the only issue before them.

[6] When it is remembered that instructions should not be considered singly, but in their entirety, we have no hesitancy in saying that the jury was clearly, understandingly and unerringly admonished, and must have understood, that before they could find defendant driver guilty of wilful misconduct they must be convinced by a preponderance of the evidence that the conduct of defendant driver amounted either to the intentional doing of an act with knowledge on his part, that as a consequence thereof, injury to his guests was a probable, as distinguished from a possible, result, or that he intentionally acted with a wanton and reckless disregard of the possible result of such act. From a reading of all the instructions given, we are impressed that the trial judge fully, fairly and correctly advised the jury as to the amount, quality and degree of proof necessary before defendant driver could be held guilty of wilful misconduct. The law requires no more than this.

[7] Appellants next complain of an instruction given by the court wherein the jury was told that "a driver is charged with knowledge of the probable consequences of his conduct, if such consequences would have been apparent to any person of ordinary prudence and intelligence". In another instruction the jury was advised that "in order that an actor's conduct may be classed as reckless or wilful, it is not necessary that he himself should recognize it as being extremely dangerous. His inability to recognize the danger may be due to his own reckless temperament, or to the abnormally favorable results of previous conduct of the same sort". We fail to perceive wherein the challenged instructions constituted serious or any prejudicial error which militated against the substantial rights of the defendants. The latter apparently base their attack upon the quoted instructions on the ground that they measure the required standard of defendant driver's conduct on the basis of what would be apparent to the ordinary, careful and prudent driver. Appellants' claim in this regard cannot be sustained. For the same reason that the law prescribes a standard for measuring the conduct of people in determining whether they are guilty of ordinary negligence, there must be a standard to measure the conduct of a vehicle driver charged with wilful misconduct, to determine whether such conduct was of the character contemplated by section 503 of the Vehicle Code, St.1939, p. 1481. Of necessity that standard must consist of a comparison of the conduct of the driver in question with that of the average man, or to use the phrase so familiar to us, "the ordinary, careful and prudent man" situated as the defendant driver was, seeing what he saw and knowing what he knew. Instead of misleading the jury as to the character and quantum of evidence required to support a charge of wilful misconduct, the questioned instructions merely gave to the jury the universally applied standard from and by which they were to determine whether the actions and conduct of defendant driver amounted only to ordinary or gross negligence, or when viewed in the light of what, under the existent circumstances, ordinary prudence and care would dictate, amounted to such recklessness, wantonness, and wilfulness as to approach that wilful misconduct contemplated by the Code section upon which this action was predicated. It is noteworthy that appellants do not venture to suggest any different standard by which to measure the conduct of defendant driver than that contained in the challenged instructions. Manifestly, it cannot be said that the conduct of defendant driver should be measured by the actions or behavior of a careless, an imprudent man, an intoxicated man, or one who is an incompetent vehicle driver.

[8] For their next ground of appeal appellants contend that the court erred to their prejudice in permitting a police officer to testify to an experiment allegedly made by him and to express his opinion as to speed, based upon such an experiment. In that connection the record reveals the following:

"Q. (By Mr. Spaulding, attorney for plaintiff) You made some experiments up there as to how fast a car could make that turn and leave tire-burns? A. I drove my police car around these curves, yes, sir.

"Q. And how fast did you go around these curves?

"Mr. Parker: I object to demonstration evidence as incompetent, irrelevant and immaterial. It does not tend to prove or disprove any of the issues in this case. The weight of the cars was not the same, the condition of the highway was not the same, dampness, and so forth. It is not proper evidence.

"The Court: I think with that evidence he may then proceed to testify as to the other matters involved. I think possibly the evidence along that line may tend to a little confusion, but having tried it, he is in a position, with what he has testified to, to testify to the ultimate, so he can tell us, from his skid-marks. *You can go into that matter of the brush-marks.* (emphasis added).

"By Mr. Spaulding (continuing): Q. *From the brush-marks you found there, and the evidence of the collision of the tree and the automobile,* which you saw, are you able to express an opinion as to the momentum, or speed of the car, at that turn? (emphasis added).

"Mr. Parker: If the Court please, I object to that on the ground it is an invasion of the province of the jury. I submit, the weight of the cars, the condition of the tires, and so forth, would make a lot of difference. If the tires had gotten off the road and there was some mud on them they would skid further than if the car had been on the road all the time. The conditions are not identical. He did not make the test with our car under the same conditions.

"The Court: Overruled.

"By Mr. Spaulding (continuing):

"Q. Can you express such an opinion, Sergeant? A. Yes, sir.

"Q. What is your opinion as to the minimum speed at which that car was traveling?

"Mr. Parker: Same objection.

"The Court: Overruled.

"A. At least fifty miles an hour."

It is at once apparent from the foregoing that the opinion of the officer was not finally asked for nor based on the result of the experiment he made with an automobile, but was founded upon the presence at the scene of the accident of certain physical facts, viz., the brush-marks and the tree with which defendant driver's vehicle collided. The objection, therefore, went more to the weight than to the admissibility of the questioned testimony.

[9-11] The next contention made by appellants is that prejudicial error was committed by the trial court in permitting the plaintiff, over defendants' objections, to express her opinion or impression as to the speed at which the automobile in which she was riding traveled. In that regard it appears that after plaintiff had testified that she paid no attention to the speed of the automobile until just before the impact, when she became apprehensive and afraid, she was asked whether or not she had any opinion as to the speed of the automobile at the point where she heard her fellow passenger exclaim "Slow down"; to which interrogatory she answered in the affirmative. Objection, made on the ground that no proper foundation was laid, being overruled, the witness testified "I should say sixty-five (65) or seventy (70)". She was then asked "That was your impression at the time?", to which she replied "Yes, sir". While the testimony in question was probably entitled to little weight, nevertheless we cannot say that its admission for what it was worth constituted reversible error because the plaintiff had previously testified that just prior to the accident "and the next thing I noticed, we were going very fast. I was afraid * * *". She also testified that she was aware of the fact that they were going around various curves in the road, indicating that she was not entirely oblivious to the surroudings in and conditions under which she was traveling. Furthermore, the law recognizes a very broad and liberal rule in the reception of opinion evidence of non-experts as to the rate of speed at which street cars or motor vehicles are traveling. Johnsen v. Oakland, etc., Ry., 127 Cal. 608, 611, 60 P. 170; cited with approval in Schneider v. Market St. Ry. Co., 134 Cal. 482, 486, 66 P. 734. There is little conflict as to the rule applicable to automobiles, and in fact all moving objects, that a person of ordinary intelligence, having opportunity for observation, is competent to testify as to the speed at which an automobile is being operated at a given time. Shimoda v. Bundy, 24 Cal. App. 675, 678, 142 P. 109.

[12] Again it is contended that the court committed prejudicial error in permitting the plaintiff to show that none of the defendants visited her after the accident. While the minor plaintiff was testifying, she was asked the question "Now, Miss Hastings, you say you had never seen this Serleto boy before. Have you ever seen him since, until today?" An objection was interposed by defendants on the ground that the interrogatory did not tend to prove or disprove any of the issues in the case,

and was sustained by the court. Plaintiff's counsel thereupon urged that the testimony was admissible as tending to show the attitude of defendant driver at the time of the accident. After some discussion, the court stated, "I will receive it with the right on the part of defendants to move to strike later if he chooses". Thereupon the minor plaintiff was permitted to answer that she had not seen the defendant driver since the accident except upon one occasion when she observed him drive by her place of residence on a motorcycle. This was followed by the question, "Have you ever seen his parents since?" Timely objection on the part of defendants was overruled and the witness answered, "No, I have never seen his parents until today". Although the trial judge admitted the testimony subject to a motion to strike, no such motion was at any time made by defendants.

[13] The rulings complained of were erroneous. We are unable to perceive or understand wherein or how this evidence could have any proper bearing upon the legal rights of the parties involved. Undoubtedly, it is proper to interrogate one accused of wilful misconduct relative to his mental attitude and knowledge of the probable consequences of his act, but such inquiry must be confined to his state of mind prior to or contemporaneously with the accident and not subsequent thereto. Rhoads v. Studley, 15 Cal.App.2d 726, 729, 59 P.2d 1082. Manifestly, under no theory whatever was the inquiry proper or warranted as to the parents of the minor defendant. Their condition of mind was not an issue in the case. The testimony elicited could serve no purpose except possibly to arouse the prejudice and excite the passions of the jury. There are some good and sufficient reasons why the failure of a defendant to visit an injured plaintiff is not indicative of a lack of sympathetic impulses. For instance, the terms of one's public liability insurance policy may prohibit such visitations by the insured; and again, there are instances where a sympathetic driver has visited the home of an injured person following an accident, inquiring into the nature and extent of such injuries, only to be confronted at the subsequent trial of a damage suit with the statement that on the occasion of such humanitarian visit the defendant expressed his sympathy and regret and furthermore stated that the accident was all his fault. If such a situation the defendant driver is obliged to admit that he did visit the injured party, and it then becomes a question as to whose version of the conversation the jury is going to believe. We think the questioned testimony was immaterial, irrelevant and was improperly admitted.

[14] The next assignment of error involves a ruling of the trial court by which the defendants were denied the right to show that the third occupant of the automobile, Wilkie Richardson, who uttered a warning to the driver a moment prior to the accident, had not previously made any protest or offered any criticism of the manner in which the vehicle was being driven. Wilkie Richardson was not called by either side as a witness at the trial. The record indicates that while the minor plaintiff was testifying as a witness she was asked on cross-examination, "Did Wilkie make any complaint? You said you didn't, but now I am inquiring about Wilkie". An objection to the question was sustained. Thereupon, defendants offered to prove that Richardson "made no protest and did not criticize in any manner the driving of the automobile the evening of the accident at any time prior to the accident, preceding the incident when he made an exclamation, 'Slow down,' or 'Look out. Don't you see that tree?' Prior to that time we offer to prove there was no protest or criticism made by witness."

Appellants contend that Richardson's failure to protest against the manner in which the minor defendant was driving until the former uttered a warning just prior to the accident, would tend to show that the automobile had been driven in a safe and prudent manner up to a moment before the crash; and that if the passengers thought the vehicle was being driven in a careful manner then the driver of the automobile, who was likewise of the same frame of mind, could not be charged with wilful misconduct. The claim is without merit. Plaintiff had testified that she made no protest during the ride and certainly Richardson's failure to make audible protest was not indicative of nor would it tend to prove what he "thought" of the manner in which the vehicle was being driven.

Finally, appellants urge that respondent's counsel was guilty of prejudicial misconduct in asking the minor defendant driver if he had had previous accidents and in eliciting from him testimony that he did have another accident subsequent to the one involved in this litigation. In that respect the record shows:

"Q. You have had accidents before, up that Canyon, haven't you? A. No.

"Q. You have had no accidents before? A. No, not one.

"Mr. Parker: If the Court please, I object to that as irrelevant and immaterial.

"The Court: Well, he just asked if he has had accidents. Overruled.

"Q. You have had some since, haven't you? A. I have had one since that.

"Q. You ran into an automobile on the road some where?

"Mr. Parker: Objected to as irrelevant and immaterial.

"The Court: Sustained."

[15, 16] It is noteworthy that when the question was asked as to previous accidents no objection was made thereto by defendants' counsel until after the answer was given, and no motion was offered to strike the answer given. Then when the question was asked as to accidents subsequent to the one here involved, no objection whatever was made. But when plaintiff's counsel asked "You ran into an automobile on the road somewhere?", an objection by defendants' counsel was promptly sustained by the court. Appellants now contend that plaintiff's counsel deliberately injected a false issue into the case for the sole purpose of prejudicing defendant driver before the jury. However, at the trial, appellants' counsel apparently did not regard the question as sufficiently prejudicial to warrant him in asking the court to admonish the jury or to attempt by appropriate instruction to cure any prejudicial effect of the interrogatories and answers thereto. From a reading of the cold record it would appear that when the defendant driver denied being involved in any previous accidents, his counsel speculated on a similar answer being given to the second interrogatory concerning involvement in accidents subsequent to the one herein; and only when the answer proved disappointing did he object and the court promptly sustained his objection. Counsel may not speculate upon a favorable answer being given and then be heard to complain. Furthermore, it is manifest that the challenged questions are not such that any prejudicial effect resulting therefrom could not have been cured by appropriate admonition to the jury. No request for such curative instructions having been made in the trial court, the claimed resultant prejudice cannot be raised for the first time on appeal.

[17, 18] With the record in the condition in which we find it, we must, in connection with the disposition of this appeal, look into the effect of the error of the trial court in admitting the evidence that none of the defendants visited the minor plaintiff after the accident, in the light of the provisions of section 4½ of Article VI of our State Constitution, which forbids us to set aside any judgment or grant a new trial unless, after an examination of the entire cause, including the evidence, this court shall be of the opinion that the error complained of has resulted in a miscarriage of justice. The phrase "miscarriage of justice", used as descriptive of that condition of a cause, has no hard and fast definition. We are persuaded that where the record discloses the commission of errors at the trial the appellate court must first find that upon the record it is seriously doubtful that without such errors the judgment appealed from would have been rendered, before a reversal of such judgment is justified. Our duty under the constitutional provision is thus epitomized in People v. Black, 73 Cal.App. 13, 38, 238 P. 374, 385, "It is the law that, when applying the provisions of section 4½ of article 6 of the Constitution to an entire cause, we must direct a reversal when we are unable to say 'whether appellant would or would not have been convicted but for the errors of the court' People v. Degnen, [70 Cal.App. 567], 234 P. 129". In the case with which we are here concerned the evidence of defendant driver's guilt of wilful misconduct was, under all the circumstances, overwhelming and conclusive. In the light of such a record we cannot say that the error complained of was so flagrant that it might have been directly responsible for the verdict against the defendant. In this connection it must be remembered also that the challenged evidence was admitted subject to a motion to strike and the defendants' counsel chose not to make such a motion. To us the conclusion seems justified that had counsel felt at the trial that the cause of his clients was seriously jeopardized or even prejudiced by the admission of such testimony he would have availed himself of the opportunity offered him to move that it be stricken. Furthermore, no claim is made that the damages awarded were excessive or exceeded the bounds of fair and just compensation for the injuries received.

Indeed, no such contention could justifiably be made for the evidence discloses that the minor plaintiff's expense for hospitalization alone was in excess of $1,000; that the doctor's bills had not yet been submitted and that at the time of trial respondent was still on crutches and under the tutelage of instructors from a school for crippled children. The verdict rendered does not, therefore, admit of the stricture that it was prompted by bias, passion, sympathy or prejudice.

For the foregoing reasons, the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

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61 Cal.App.2d 712

HAWKINSON v. OESDEAN.

Civ. 13936.

District Court of Appeal, Second District, Division 3, California.

Dec. 10, 1943.

Hearing Denied Feb. 7, 1944.

1. New trial ⇨66

A verdict is against law when it is contrary to the instructions given the jury, but is not against the law merely because evidence is insufficient to justify it.

2. New trial ⇨65

That a verdict is against law or that it is not justified by the evidence are separate grounds for a new trial.

3. New trial ⇨66

An order granting a new trial on the ground that verdict is against law cannot be sustained by merely showing that it is unsupported by the evidence.

4. New trial ⇨66, 157

Where evidence on a point covered by instruction is conflicting but sufficient to support a finding of fact which under the instruction warrants the verdict, it must be presumed that jury did make such finding, and hence its verdict is not contrary to the instruction and not against the law.

5. Appeal and error ⇨1015(1)

Order granting new trial on ground that verdict is against the law will not be sustained on ground evidence was insufficient to justify verdict, where record shows that evidence was legally sufficient to justify the verdict.

6. Appeal and error ⇨302(6)

Order granting new trial on ground verdict is against the law cannot be sustained because of insufficiency of evidence to justify verdict, where motion for new trial did not set forth insufficiency of evidence as a ground therefor.

7. Appeal and error ⇨933(4)

Where order granting new trial did not specify that it was granted upon ground that evidence was insufficient to sustain verdict, it will be conclusively presumed that order was not based upon that ground. Code Civ.Proc. § 657.

8. Appeal and error ⇨854(6)

The fact that court granted motion for a new trial upon the one ground that the verdict was against the law does not preclude an examination of other grounds set forth in the motion for new trial.

9. Trial ⇨86

If evidence offered is admissible for any purpose, a general objection should be overruled.

10. Witnesses ⇨396(2)

Where plaintiff suing for injuries received when struck by automobile opened subject of conversation between witness and police officers respecting accident by offering portion of it for impeachment purposes, defendant was entitled to show any additional statements which would qualify or explain the portion presented by plaintiff. Code Civ.Proc. §§ 1854, 2048.

11. Appeal and error ⇨1050(1)

If, incidental to receiving pertinent and material parts of a conversation, some immaterial matter is included, the error is harmless, unless it is reasonably probable that a different verdict would have been reached if the immaterial matter had not been included. Code Civ.Proc. § 475.

12. Appeal and error ⇨1048(6)

Where plaintiff, suing for injuries received when struck by automobile, on rebuttal called investigating police officer to testify respecting conversation with witness for impeachment purposes, cross-examination including statements of alleged facts indicating that plaintiff was at fault was not prejudicial error because of fact that such cross-examination also included witness' opinion that plaintiff was at fault. Code Civ.Proc. § 475.

13. Appeal and error 🔑**302(1)**

Grounds for new trial included in motion as to which no affidavits were filed in support thereof will not be considered.

14. Appeal and error 🔑**933(1)**

Presumption is in favor of order and against verdict upon an appeal from an order granting a new trial.

◆

Appeal from Superior Court, Los Angeles County; Arthur S. Guerin, Judge.

Action by Harold L. Hawkinson against John Oesdean to recover damages for personal injuries sustained by plaintiff when he was struck by an automobile operated by defendant. Judgment for defendant, and from an order granting plaintiff's motion for a new trial, defendant appeals.

Reversed.

Paul Nourse, of Los Angeles, for appellant.

William K. Young, of Los Angeles, for respondent.

PARKER WOOD, Justice.

Defendant appeals from the order granting plaintiff's motion for a new trial. The motion was granted upon the sole ground "that the verdict is against the law."

The action was for damages for personal injuries sustained by plaintiff, a pedestrian, when he was struck by an automobile operated by defendant. The accident occurred about 9:55 p.m. on December 18, 1941, in the proximity of the intersection of Hollywood and Cahuenga Boulevards. Hollywood Boulevard extends east and west, and Cahuenga Boulevard extends north and south. The traffic at that intersection was controlled by mechanical colored light signals. Defendant, who was driving an automobile south on Cahuenga Boulevard, stopped at the north entrance to the intersection of Cahuenga and Hollywood Boulevards, as required by the red light signal. When the light signal changed to green, defendant made a right turn, in a westerly direction, onto Hollywood Boulevard and collided with plaintiff who was crossing Hollywood Boulevard in a southerly direction. A marked pedestrian crosswalk was on the west side of the intersection. There was a conflict in the evidence as to whether plaintiff was within the marked pedestrian crosswalk.

Plaintiff testified that he was within the pedestrian crosswalk; that before stepping from the curb into the crosswalk, he had first looked over his left shoulder to ascertain whether any vehicles coming south on Cahuenga were going to make a righthand turn; that he saw none and stepped from the curb about the center of the crosswalk; that he proceeded at his "usual gait" to a point about 7 feet "north of the northerly (streetcar) track," when he again looked to see whether any traffic "coming from the south on Cahuenga" was going to make a righthand turn; that he saw none and proceeded about 2 feet more when he "happened to look across" his left shoulder and saw a car turning which struck him; that he was on his way to a curio store on the south side of Hollywood Boulevard about 1½ blocks west of Cahuenga; and that he was "quite close" to the western boundary of the crosswalk when he was struck. He further testified that he was wearing a "powder blue" suit and a gray overcoat at the time he was struck; and that there were not "many pedestrians or much traffic crossing" at the time of the accident.

Defendant testified that he did not see plaintiff until the impact; that there was no one coming from either direction in the "pedestrian zone" when he made the right turn; that he struck plaintiff at a place on the pavement between 20 and 30 feet west of the pedestrian crosswalk; that plaintiff was wearing a dark coat, but he "wouldn't say it was or was not" the one placed in evidence by plaintiff; and that he was interviewed at his home in Detroit, Michigan, regarding the accident by two men and, during the interview, one of them wrote in a book, but he (defendant) did not make the statement that plaintiff was cutting across the crosswalk or say anything about a crosswalk.

A deposition of one of the two men who interviewed defendant was read into evidence. It stated that deponent was a court reporter by profession; that he wrote said conversation verbatim in shorthand; that defendant, in describing plaintiff's position at the time of the accident, made the following statements: "Well, he cut across the crosswalk there, see, and he didn't cross at the corner, I can't say where he come from though because I was coming down the street and there he was and I don't know where he come from," and "No, I don't know where he come from because I did not see him until I hit him"; and that defendant stated he (defendant) was going west on Hollywood Boulevard after making a right-hand turn from Cahuenga and "he would say" that he hit plaintiff about 2 car lengths west of the crosswalk, but he didn't know what "the witness" would say because it all happened so fast that he didn't know where the plaintiff came from.

The deposition of a witness to the accident, who had since moved to Oregon, was read into evidence. The witness stated that she and her sister were walking east on the north sidewalk of Hollywood Boulevard, west of Cahuenga Boulevard, on the night of the accident; that she saw plaintiff "hurrying," with "more of a running step," between 2 cars parked at the north side of Hollywood Boulevard; that plaintiff "just stepped, kind of slipped between the 2 cars and ducked out in front of the other"; that he was wearing dark clothing—as she "recalled," it was a sweater and slacks; that he was not going straight across the street but was proceeding at a slant in a southwesterly direction; that "he slightly ran," and "as he stepped from the curb he leaped from the curb"; that she did not see plaintiff until he stepped off the curb; that when she first saw him he was "coming between two cars" not more than 20 feet from the corner; that she believed she observed the pedestrian continuously from the time she first saw him until he was struck; that she saw defendant turn the corner very slowly, approximately 12 to 15 miles per hour, and he did not increase his speed; that he stopped immediately after the impact; that she could see plaintiff was "going to be hit" so she went to the curb; and that she made statements to two police officers on the night of the accident, but she did not think she told them she did not see the pedestrian before the collision because she did see him before the accident occurred.

A policeman, who was patrolling Hollywood Boulevard, testified that he arrived at the scene a "few minutes" after the accident; that plaintiff was lying on the pavement and his feet were pointed in a southwesterly direction and his head was approximately 12 to 15 feet from the westerly portion of the crosswalk; that cars were parked along the north curb of Hollywood Boulevard, west of Cahuenga; that traffic was "heavy" that night; that he talked with the witness (who later moved to Oregon) and her sister, who gave their names as witnesses to the accident; and that the witness stated she saw plaintiff walk between the second and third cars parked at the north curb of Hollywood Boulevard, and that she heard but did not see the impact.

Two police officers, who investigated the accident, testified that cars were parked along the north curb of Hollywood Boulevard west of Cahuenga when they arrived at the scene, about 5 minutes after the collision.

The jury returned its verdict in favor of the defendant, and a judgment was entered in accordance therewith.

[1-4] Defendant contends that the verdict is not against law, and that the trial court erred in granting the motion for a new trial upon that ground. Plaintiff maintains that the verdict is against law because, as he asserts, the evidence is insufficient to justify the verdict. There are several reasons why plaintiff's position cannot be sustained. A verdict is against law when it is contrary to the instructions given the jury. No conflict is claimed or appears between the verdict and the instructions. A verdict is not against law merely because the evidence is insufficient to justify it. That a verdict is against law or that it is not justified by the evidence are separate grounds for a new trial. An order granting a new trial on the ground that the verdict is against law cannot be sustained by merely showing that it is unsupported by the evidence. Brumagim v. Bradshaw, 1870, 39 Cal. 24, 35. It is possible to determine whether a verdict is contrary to an instruction only when the evidence on a point covered by the instruction is without conflict and fails to show a set of facts which, under the instruction, would warrant the verdict reached. Where the evidence on that point is conflicting, but sufficient to support a finding of fact which, under the instruction, warrants the verdict, it must be presumed that the jury did make such a finding, and hence its verdict is not contrary to the instruction and not against law. Declez v. Save, 1887, 71 Cal. 552, 554, 12 P. 722; Northern Ry. Co. v. Jordan, 1890, 87 Cal. 23, 28, 25 P. 273.

[5] As an additional reason for holding plaintiff's argument to be untenable, it will be noted that the record shows, as indicated by references herein, that the evidence was legally sufficient to justify the verdict.

[6, 7] Another reason plaintiff's position cannot be sustained is that plaintiff's motion for a new trial did not set forth insufficiency of the evidence as a ground therefor. The order granting the new trial did not specify that it was granted upon the ground that the evidence was insufficient to sustain the verdict; therefore, it will be conclusively presumed that the order was not based upon that ground. Code Civ.Proc. sec. 657, as amended 1939; Dempsey v. Market Street R. Co., 1943, 23 Cal.2d 110, 142 P.2d 929; Lewis v. Southern California Edison Co., 1931, 116 Cal.App. 44, 49, 2 P.2d 419. Sufficiency of the evidence is not an issue on this appeal.

[8] Another ground set forth in plaintiff's motion for a new trial, and urged upon appeal, is error in law occurring at the trial and excepted to by plaintiff. The fact that the court granted the motion for a new trial upon the one ground, that the verdict is against the law, does not preclude an examination of other grounds set forth in the motion for a new trial in this case which, as above stated, did not include insufficiency of the evidence. Weddle v. Loges, 1942, 52 Cal.App.2d 115, 120, 125 P.2d 914; Lomori & Son v. Globe Laboratories, 1939, 35 Cal.App.2d 248, 251, 95 P.2d 173; Reilley v. McIntire, 1938, 29 Cal.App.2d 559, 562, 85 P.2d 169; Weisser v. Southern Pacific R. Co., 1906, 148 Cal. 426, 428, 83 P.2d 439, 7 Ann.Cas. 636. It was stated in Gray v. Robinson, 1939, 33 Cal.App.2d 177, at page 180, 91 P.2d 194, at page 196: "The reasons given by a trial judge in support of an order which sets forth the ground or grounds on which the motion is granted is no concern of this court where adequate grounds are specified in the motion and established by uncontradicted affidavits, and particularly so where the court has failed to specifically exclude in the order for a new trial those specified grounds"; and it was stated further therein, on page 181 of 33 Cal.App.2d, on page 197 of 91 P.2d, in quoting from Kauffman v. Maier, 1892, 94 Cal. 269, 276, 29 P. 481, 18 L.R.A. 124: "'If there be any grounds upon which its action can be upheld, the order will be sustained, irrespective of the particular ground given by that court, whether in an opinion or by a statement in the order itself.'"

[9-12] Plaintiff asserts that the alleged error in law occurring at the trial occurred by reason of the following: Plaintiff, on rebuttal, called the two investigating police officers and, referring to the officers' written report of the accident, asked each to state whether or not Betty Hulse (the witness) stated to them at the scene of the accident and in the presence of each other "that she didn't see the pedestrian before the collision." Each officer answered in the affirmative. On cross-examination, over the objection of plaintiff, the officers were allowed to testify as to further statements, shown in the same written report as allegedly having been made to them by Betty Hulse during the same conversation. On such cross-examination one of the officers testified as follows: that Betty Hulse in substance made the statements "that she didn't see the pedestrian before the collision, but saw party number one [defendant] from the corner with the signal, driving west about 15 miles per hour and going about a car length and a half west of the crosswalk where he struck the pedestrian crossing south across Hollywood Boulevard, from between parked cars; pedestrian was knocked about three feet to the center of the street; the car stopped immediately without skidding"; "that she believed the pedestrian was at fault," and that "she looked back as he [the pedestrian] came from in between the parked cars and walked into the street and was struck." The other officer testified as follows: that Betty Hulse stated, "she didn't see the pedestrian prior to the collision and that she looked back just as the collision happened," and "that the pedestrian had walked between parked cars." Plaintiff contends the foregoing testimony, elicited from the officers by defendant, did not relate to or explain the testimony of the officers given on direct examination, but related to matters in addition thereto, and that it was improper cross-examination. Section 1854 of the Code of Civil Procedure provides: "When part of an [a] * * * conversation * * * is given in evidence by one party, the whole on the same subject may be inquired into by the other; * * * when a detached * * * conversation * * * is given in evidence, any other * * * conversation * * * which is necessary to make it understood,

may also be given in evidence." Section 2048 of said Code provides: "The opposite party may cross-examine the witness as to any facts stated in his direct examination or connected therewith * * *." Plaintiff's objection, on the ground it was not proper cross-examination, went to the whole of the offered testimony, and no specification was made as to any particular in which it was not proper. If evidence offered is admissible for any purpose, a general objection should be overruled. 10 Cal.Jur. sec. 111, p. 822; In re Estate of De Laveaga, 1913, 165 Cal. 607, 635, 133 P. 307. Plaintiff opened the subject of the conversation by offering a portion of it for impeachment purposes, and defendant was entitled to show any additional statements which would qualify or explain the portion presented by plaintiff. Ashley v. Rivera, 1934, 220 Cal. 75, 79, 29 P.2d 199; Hatfield v. Levy Brothers, 1941, 18 Cal.2d 798, 812, 117 P.2d 841. Unless the whole of the conversation on the same subject is received, the true meaning and import of the part which is proper evidence cannot be ascertained. It does not follow that all the parts of a conversation are to be regarded as proper cross-examination. If, incidental to receiving pertinent and material portions of a conversation, some immaterial matter is included, the error is harmless unless it is reasonably probable that a different verdict would have been reached if the immaterial matter had not been included. Code Civ.Proc. sec. 475. It is not reasonable to believe that any of the testimony, which might be considered as unrelated to the testimony elicited on direct examination in the instant case, would have materially affected the result. Most of the same statements made on such cross-examination were in the witness' deposition, which had been read into the record, and were before the jury, that is: that the witness saw defendant turn the corner very slowly, approximately 15 miles per hour, he did not increase his speed, and he stopped immediately after the impact. Such cross-examination did include, however, a statement which was not before the jury for its consideration, as a result of reading the deposition, since such statement was ordered stricken out after it was read. That statement was that the witness thought the pedestrian was at fault. In view of the whole of such cross-examination which included statements of alleged facts indicating that plaintiff was at fault, the fact that such cross-examination also included witness' opinion that plaintiff was at fault was not prejudicial error. In the case of Meredith v. Key System Transit Co., 1928, 91 Cal.App. 448, 267 P. 164, the court held that section 1854 of the Code of Civil Procedure did not justify the admission in evidence of a statement made by a witness to the defendant shortly after the collision. The court, asserting that the statement was hearsay and the opinion of the witness, held it was not probable that the result would have been different if such statement had been excluded, and stated at page 459 of 91 Cal.App., at page 168 of 267 P.: "It not being reasonably probable that any other verdict would have been reached in this case, we cannot say, under the provisions of section 475 of the Code of Civil Procedure and section 4½ of article 6 of the Constitution, that prejudicial error in the admission of testimony was committed by the trial court."

[13] Two other grounds for a new trial included in plaintiff's motion were: newly discovered evidence; and surprise and excusable neglect. No affidavits were filed in support thereof and it will not be necessary to consider such grounds. The other ground specified in plaintiff's motion, that the judgment is against law, need not be discussed inasmuch as the statements made herein concerning the ground that the "verdict is against the law" are applicable thereto.

[14] Although the presumption is in favor of the order and against the verdict upon an appeal from an order granting a new trial (Lucerne Country Club v. Beal, 1937, 21 Cal.App.2d 121, 124, 68 P.2d 408), an examination of the record herein shows that the order granting the motion for a new trial cannot be sustained.

The order granting the motion for a new trial is reversed.

SHINN, Acting P.J., and SHAW, Justice pro tem., concur.

62 Cal.App.2d 14

MYLES v. LOS ANGELES RY. CORPORATION.

Civ. 14264.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1943.

1. New trial ⚷69, 72

A motion for a new trial is directed to the sound discretion of the trial judge, who must pass upon the credibility of the witnesses and the weight and probative force of their testimony.

2. New trial ⚷69

In passing on defendant's motion for new trial, court is not bound to accept as true the testimony of plaintiff's witnesses, but may consider all the circumstances shown in evidence in connection with the matter pending, and, although it may not arbitrarily reject the testimony of witnesses, it may weigh their testimony in light of surrounding circumstances.

3. Appeal and error ⚷1015(3)

Where trial court concludes that preponderance of evidence is with party presenting motion for a new trial, its action in granting the motion will not be disturbed if from all the evidence a probable justification appears for discrediting testimony of witnesses for party opposing granting of motion.

4. Appeal and error ⚷979(2)

On review of an order granting a motion for new trial, District Court of Appeal may not place itself in position of trial court and weigh the evidence and will merely determine whether trial court acted within its discretion when it discredited testimony presented by party opposing the motion.

5. Appeal and error ⚷979(2)

The discretion with which the trial court is vested in granting a new trial upon the ground of insufficiency of the evidence to uphold the verdict will not be deemed to have been abused unless a decision in favor of the moving party would have no substantial support in the evidence.

6. New trial ⚷70

Where evidence was such that a verdict for defendant would not be lacking in evidentiary support, granting of defendant's motion for new trial after verdict for plaintiff was not an abuse of discretion.

◆

Appeal from Superior Court, Los Angeles County; Harry R. Archbald, Judge.

Action by Susie Myles against the Los Angeles Railway Corporation to recover for injuries sustained in a fall alleged to have resulted when defendant's streetcar started while plaintiff was attempting to board such streetcar. From an order granting defendant's motion for a new trial after verdict for plaintiff, plaintiff appeals.

Affirmed.

Clarence A. Jones, of Los Angeles, for appellant.

Gibson, Dunn & Crutcher, of Los Angeles (E. H. Chapman, of Los Angeles, of counsel), for respondent.

W. J. WOOD, Justice.

Plaintiff has appealed from an order of the trial court granting defendant's motion for a new trial after a jury had returned a verdict in favor of plaintiff in the sum of $5,000. The new trial was granted on the ground of the insufficiency of the evidence to justify the verdict. On this appeal plaintiff contends that the court abused its discretion in granting the motion.

Plaintiff testified that on September 3, 1941, accompanied by two friends, she attempted to board a southbound street car operated by defendant at the intersection of Twelfth Street and Central Avenue in Los Angeles; that while she was attempting to board the car it started and caused her to be dragged for some distance along the pavement. Plaintiff narrated the circumstances of the accident:

"Well, I was supposed to go to the show, that is where I started to go to the show, so I came across the street to catch the car and I stood in the safety zone. The car stopped. Just as I went to mount the car or board the car, the car—I got on the back steps of the car and before I could get on the car, the car started. Well, that threw my feet off the steps but I still held on the support of the car with my hands. My feet was dragging but I still had hold of the car.

"Q. Then what happened? A. Well, the car didn't stop. Well, my right hand gave way and I still had hold of the rails with the left hand, see, while praying for the car to stop, hoping that it would. Well, they drug me quite a ways. Well, then my left hand gave way, this arm was dragging already (indicating). Well, when I fell loose from the car my arm, my right knee, was tore, my clothes was tore off this arm this side and my arm and my knee was bleeding (indicating).

"Q. Then what happened— A. I beg your pardon?

"Q. Then what happened after that? A. What happened? Well, after I fell away from the car there was some men they rescued me to the sidewalk. They helped me to the sidewalk. They picked me up out of the street and rescued me to the sidewalk."

Plaintiff's testimony was corroborated by the testimony of her two friends and by that of another witness, who had not been on the street car. One of the friends, Mrs. Shaw, testified that when the car failed to stop she boarded a following street car and rode on it to 46th Street. At that point she engaged a Black and White cab and rode to the end of the line. On cross-examination she testified that the cab in which she had ridden was a Yellow cab. Upon arrival at the end of the line she boarded the car from which plaintiff had fallen and took the number of the car, 316. She also took the number of the conductor's cap, which also was 316. She did not say anything to the conductor about the accident and had no conversation with him.

The action was commenced by plaintiff seven months after the accident and, according to its evidence, defendant had no information whatever until then that there was a claim that anyone was injured at the time and place alleged in the complaint. By that time the conductor in charge of car 316 on September 3, 1941, had left the employ of defendant and had gone to Tennessee. The motorman in charge of the car, William R. Gibson, testified that he had consulted the company records to refresh his recollection; that nothing of an unusual nature occurred at the time and place alleged in the complaint and that he saw nothing indicating that anyone had fallen while attempting to board the car. S. J. Singer testified that he had been working for defendant in various capacities for many years; that cap number 316 had been worn by him continuously for seventeen years and that such a number had never been issued to anyone else; that he did not act as a conductor for defendant during the year 1941.

Defendant presented proof that it had attempted to take the deposition of plaintiff by subpoena and by stipulation but that it had been unable to do so and that it had been unable to secure a medical examination. A search of the various directories failed to disclose the residence of plaintiff. On three occasions one of defendant's attorneys attempted to arrange with plaintiff's counsel to take the deposition of plaintiff but on each occasion plaintiff's counsel stated that he did not know the whereabouts of plaintiff. At the trial plaintiff testified that she had lived at 1128 East 14th Street in Los Angeles since January, 1942, and had never left the city at any time during that period.

[1-5] The rules governing the conduct of the trial court in passing upon motions for new trials and the rules governing the conduct of the reviewing court after action by the trial court are well established. A motion for a new trial is directed to the sound discretion of the trial judge, who must pass upon the credibility of the witnesses and the weight and probative force of their testimony. The trial court was not bound to accept as true the testimony of plaintiff's witnesses. Positive testimony may be contradicted by inherent improbabilities appearing therein and by inconsistent and inaccurate statements of the witnesses. The court may take into consideration all the circumstances shown in evidence in connection with the matter pending. Davis v. Judson, 159 Cal. 121, 128, 113 P. 147. Although the court may not arbitrarily reject the testimony of witnesses, it may weigh their testimony in the light of all the surrounding circumstances and if it concludes that the preponderance of the evidence is with the party presenting the motion for a new trial its action in granting the motion will not be disturbed on appeal where from all the evidence in the case a probable justification appears for discrediting the testimony of the witnesses for the party opposing the granting of the motion. Otten v. Spreckels, 24 Cal.App. 251, 141 P. 224; Owings v. Gatchell, 32 Cal.App.2d 482, 90 P.2d 368. This court may not place itself in the position of the trial court and weigh the evidence. Our function is to determine whether the trial court acted within its discretion when it discredited the testimony presented by plaintiff. With commendable frankness plaintiff's counsel refers to the rule that the discretion with which the trial court is vested in granting a new trial upon the ground of the insufficiency of the evidence to uphold the verdict will not be deemed to have been abused unless a decision in favor of the moving party would have no substantial support in the evidence. Laverne v. Dold, 17 Cal.App.2d 180, 61 P.2d 497. It cannot be held that a verdict for defendant in the instant case would be lacking in evidentiary support.

[6] We are satisfied that the court did not abuse its discretion in granting the new trial. The case will probably come before the trial court again with another jury and we consider it inappropriate under the circumstances of this case to specify and discuss the various matters in evidence and the inferences to be drawn therefrom (set forth in defendant's brief) which may have impelled the court to grant the new trial.

The order is affirmed.

MOORE, P. J., and McCOMB, J., concur.

61 Cal.App.2d 704

PULVERMACHER v. LOS ANGELES COORDINATING COMMITTEE FOR AID TO JEWISH REFUGEES et al.

Civ. 13859.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1943.

1. **False imprisonment 🔑20(1)**
Malicious prosecution 🔑49

Complaint, in action seeking damages for allegedly unlawfully procuring plaintiff's detention as insane person, alleging that arrest and imprisonment was for the sole purpose of attempting to suppress an exposé of defalcations of some of defendants, sufficiently negatived existence of probable cause as justification for acts of defendants.

2. **Pleading 🔑214(8)**

For purposes of demurrer, allegations of complaint are deemed to be true.

3. **Appeal and error 🔑842(1)**

The facts alleged in complaint for damages for having allegedly unlawfully procured plaintiff's detention as an insane person being undisputed, presented a "question of law" as to whether undisputed facts showed a want of probable cause.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

4. **False imprisonment 🔑20(1)**
Malicious prosecution 🔑49

Facts alleged, in complaint to recover damages for having procured plaintiff's detention as an insane person, showing that the one and only cause for arrest and imprisonment was for purpose of suppressing an exposé of defalcations of some of defendants necessarily, showed a want of "probable cause" as against general demurrer.

See Words and Phrases, Permanent Edition, for all other definitions of "Probable Cause".

5. **False imprisonment 🔑20(1)**
Malicious prosecution 🔑47

Provisions of statute relating to persons or institutions which may make a petition alleging that a person is mentally ill without incurring liability are exceptions to cause of action and are defenses to be pleaded by defendants, and plaintiff suing for damages for having procured her detention as an insane person was not required to anticipate such defenses and negative them in complaint. St.1939, p. 1551, § 5047.

6. **Limitation of actions 🔑31**

Where complaint seeking damages for having unlawfully procured plaintiff's detention as an insane person was filed October 3, 1940, cause of action based upon alleged false imprisonment at some short interval prior to the month of June, 1938, was barred by limitations.

7. **Courts 🔑99(2)**

Where trial court overruled a general demurrer to original complaint, it was not precluded thereby from making a contrary ruling on general demurrer to amended complaint which included allegations of original complaint.

8. **Pleading 🔑225(1)**

If demurrer to complaint seeking damages for having unlawfully procured plaintiff's detention as an insane person was sustained on ground that it did not allege lack of probable cause, plaintiff should have been given leave to amend, where it appeared that such amendment could have been made.

9. Pleading 🔑225(1)

After demurrer was sustained without leave to amend, it was not necessary that plaintiff request permission in trial court for leave to amend. Code Civ.Proc. § 472c.

10. Appeal and error 🔑102

An order sustaining a demurrer is not an appealable order.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Dora Pulvermacher against Los Angeles Co-ordinating Committee for Aid to Jewish Refugees, etc., and others, to recover damages on account of having allegedly procured the arrest and detention of plaintiff as an insane person. Judgment of dismissal, and, from such judgment and from an order of dismissal whereby court sustained the demurrer, plaintiff appeals.

Appeal from order of dismissal dismissed and judgment of dismissal reversed.

A. Brigham Rose, of Los Angeles, for appellant.

Loeb & Loeb and Hardy & Horwin, all of Los Angeles, for respondents.

PARKER WOOD, Justice.

Plaintiff appeals from a judgment of dismissal which was based upon an order sustaining defendants' demurrer to plaintiff's amended complaint without leave to amend. She also appeals from the order of dismissal "whereby the court sustained the demurrer."

The amended complaint alleged in substance as follows: That defendant, Los Angeles Co-ordinating Committee for Aid to Jewish Refugees, was an unincorporated association; that "some short interval prior to the month of June, 1938," plaintiff ascertained that "said Committee's personnel, particularly Freeda Mohr and Louis Booth, had assertedly misappropriated the funds" of the said committee; that this knowledge on the part of plaintiff came to the attention of defendants; that defendants thereupon, contriving to suppress disclosures of these matters by plaintiff, "maliciously, wantonly and without legal process or color thereof, and not in the due course of law, and in wanton and reckless disregard of plaintiff's liberty and constitutional rights," and "acting under the misrepresentation that plaintiff was being taken to a hospital to rest, proceeded to get the plaintiff, in this surreptitious manner, into a sanitarium," where she was "locked in," and "kept against her wishes and remonstrations" for sixteen days and was caused to suffer "a complete nervous breakdown from shock and humiliation"; that after she had procured her release from said "so-called sanitarium," she caused an investigation to be made respecting the "conduct of the defendants, which had provoked their endeavoring to imprison plaintiff without prior legal process," and ascertained that defendants had charged plaintiff with the receipt of moneys which she had not received; that said "investigation continued up to the month of October, 1939, at which occasion plaintiff was in the process of initiating an investigation into the acts of the defendants respecting this falsified record setting forth that plaintiff had received moneys which in fact she had not received, when the defendants, contriving to bring about a quashal of her investigation and to render her efforts to expose the same fruitless, again caused the plaintiff to be incarcerated as an alleged insane person, and in order to bring about and accomplish this purpose, defendants, on the 2nd day of November, 1939, caused the plaintiff to be forcibly and illegally arrested and conveyed against her will to the psychopathic ward of the Los Angeles County Hospital; that this latter arrest was procured in the following manner": That one Greenschpoon, allegedly a physician, appeared in behalf of the other defendants before a judge of the superior court on November 2, 1939, "on an ex parte application," which falsely alleged that plaintiff was mentally incompetent, notwithstanding that said Greenschpoon had never treated plaintiff or examined her, and upon this false petition the said judge issued a warrant for the apprehension of plaintiff, and she was arrested on said falsely procured process by a police officer and placed in the psychopathic ward of the Los Angeles County Hospital on November 2, 1939, and there imprisoned until a hearing in the superior court was had on November 10, 1939, "at which hearing a finding was had that plaintiff herein was perfectly sane, whereupon she procured her release"; that plaintiff "submits that she was not insane at any time, and that the arrest and imprisonment of the plaintiff, as herein alleged, was caused and secured by the defendants for the reason heretofore alleged, and for no other reason, namely, for the fraudulent purpose of attempting to suppress an expose' of the defalcations of some of the defendants, as hereinbefore alleged, and that the defendants for these purposes, and for no other reason, caused it to be charged that plaintiff was insane, with the intent of making it appear that plaintiff was suffering from delusive beliefs in respect to the matters hereinbefore alleged"; that "the arrests and imprisonment of plaintiff, in the manner aforementioned, were had and made in each instance by the defendants without proper or ordinary care, and without due examination or inquiry or bona fide mental or physical examination with a view to ascertaining whether plaintiff was in fact a sane or insane person, and that the acts on the part of the defendants were a direct and deliberate violation of their duties and obligations to the plaintiff; that these acts were a gross and culpable wrong and a false imprisonment for which defendants are liable to her in damages"; and that plaintiff was damaged in the sum of $15,000, and was entitled to exemplary damages in the sum of $30,000.

[1-4] Respondents (defendants) assert that the amended complaint is defective in that it does not show a want of probable cause. As above shown, the amended complaint stated that the arrest and imprisonment of the plaintiff were caused by defendants for the reasons alleged in the amended complaint, and "for no other reason, namely, for the fraudulent purpose of attempting to suppress an expose of the defalcations of some of the defendants as hereinbefore alleged, and that the defendants for these purposes, and for no other reason, caused it to be charged that plaintiff was insane." The allegations of the amended complaint affirmatively limit the cause of the arrest and imprisonment to the one reason alleged, and emphatically exclude all other circumstances as causes or reasons for the arrest and imprisonment of plaintiff. Although the allegations do not include the precise words, "that said acts were committed without probable cause," the allegations are equivalent to the usual allegation wherein the words, "want of probable cause," or "without probable cause," are used, and were allegations sufficient to negative the existence of any probable cause as justification for the acts of defendants in causing the arrest, imprisonment, and prosecution of plaintiff. In 34 Am.Jur. p. 772, section 116, it was stated: "It is not necessary to allege a want of probable cause in terms where there is a statement of facts necessarily showing it." For the purposes of the demurrer, the allegations of the amended complaint are deemed to be true. The facts alleged, being undisputed, present a question of law as to whether the undisputed facts show a want of probable cause. 34 Am.Jur. p. 795, sec. 161. In the malicious prosecution action of Jaffe v. Stone, 1941, 18 Cal.2d 146, 114 P.2d 335, 135 A.L.R. 775, the complaint alleged that the criminal proceeding upon which the action was based had been dismissed, but it did not allege (as defendants contended it should have alleged) that it had been "finally" dismissed. The court said at page 159 of 18 Cal.2d, at page 342 of 114 P.2d: "The complaint pleads the actual facts in a clear and understandable manner, alleging that the proceeding was 'dismissed.' 'Dismissal' was the facts; its finality is a matter of legal effect and involves a question of law." In the present case, it being true under the demurrer that the one and only cause for the arrest, imprisonment, and prosecution of plaintiff was the cause shown by the facts alleged, the facts alleged necessarily show a want of probable cause. The general demurrer should not have been sustained upon the ground that the amended complaint did not show a want of probable cause, and there was no special demurrer upon that ground.

Respondents contend further that the amended complaint fails to allege that defendants are not within the classes of persons excepted from liability, by section 5047 of the Welfare and Institutions Code, St.1939, p. 1551, in making a petition alleging that a person is mentally ill. Said section 5047 provides in part as follows: "When no relative, friend, or other person can be found in the county who is able and willing to make and file the petition herein provided, any peace officer, probation officer, physician attending the patient or physician attached to a public hospital or institution, if the person is a patient therein, may make and file the petition herein provided. When a petition is filed by any such person, neither the person making or filing the petition, nor his superiors, nor the department, hospital, or institution to which he is attached nor any of its employees, shall be rendered liable thereby either civilly or criminally." Respondents assert that such contention should not be disposed of by reference to the usual rule that a plaintiff is not required to anticipate defenses. They argue that public policy does not favor malicious prosecution actions in general; and that since a plaintiff is required to plead a want of probable cause in such actions, for the reason such actions are in disfavor, the plaintiff herein should be required to plead that defendants were not within the class of petitioners excepted from liability in said section 5047. As to the statement that a malicious prosecution action is in disfavor, the court said in the recent case of Jaffe v. Stone, supra, 18 Cal.2d 146, at page 159, 114 P.2d 335, at page 342, 135 A.L.R. 775: "It is finally urged in support of the judgment that malicious prosecution suits are not favored. The frequency with which this statement is made in these cases calls attention to the need of some explanation. Properly applied, it means that public policy is in favor of the apprehension and punishment of criminals, and limits the person complaining of criminal charges by placing upon him the burden of proving the basic elements of the tort. These elements, viewed on the other side, furnish full defenses to the public spirited accuser or prosecutor. But where the difficult burden of proof is met by the plaintiff, recovery is allowed. This being true, we should not be led so astray by the notion of a 'disfavored' action as to defeat the established rights of the plaintiff by indirection; for example, by inventing new limitations on the substantive right, which are without support in principle or authority, or by adopting stricter requirements of pleading than are warranted by the general rules of pleading." Whether or not a defendant is a person within the class of petitioners excepted from liability, under said section, is not an element of plaintiff's substantial right, and is a matter of defense peculiarly within the knowledge of the defendant

[5] In Jaffe v. Stone, supra, 18 Cal.2d 146, 114 P.2d 335, 135 A.L.R. 775, the defendants contended also that the complaint in that malicious prosecution action did not state a cause of action for the reason it did not allege that a new criminal proceeding had not been commenced after the former criminal proceeding had been dismissed. The court said, 18 Cal.2d at page 158, 114 P.2d at page 342: "But, like other defenses, this should be raised in the answer, not anticipated in the complaint. It would not involve a positive averment of fact, an element of plaintiff's cause of action; plaintiff would be simply negativing an exception to, or a qualification upon, these elements of his cause of action; he would have to single out that particular exception among others that might be raised as defenses. But the salutary rule of pleading frowns upon averments negativing or anticipating defenses, and requires that such matters be left to the answer. [Citing cases.] Accordingly we are satisfied that such an allegation cannot be deemed an essential element of the cause of action." In order to comply with the pleading requirement, for which respondents contend, that a plaintiff should negative the non-liability of the defendant under said section 5047, it would be necessary for a plaintiff to allege the non-existence of the several exceptions, qualifications, and different combinations of circumstances, provided in said section as conditions creating non-liability of petitioners. Allegations negating such exceptions would include: that the petitioner was not a peace officer, or a probation officer, or a physician who attended plaintiff, or a physician attached to a hospital or institution in which plaintiff was a patient. If the petitioner was such an officer or physician as those described in said section, plaintiff would be required, in order to negate the non-liability of such officer or physician, to make an allegation, contrary to plaintiff's contention that he, himself, was not insane, that there was a relative or friend or other person who could have been found in the county who was able and willing to make and file a verified petition that plaintiff was an insane person. Such an allegation would tend to indicate that there was probable cause, and would be in conflict to some extent with plaintiff's other allegation that there was no probable cause. To require a plaintiff to negative the exceptions under said section 5047 would greatly increase the present difficult burden upon a plaintiff by requiring him to allege facts peculiarly within the knowledge of defendant, and would be an unreasonable limitation on plaintiff's substantive right. The provisions of said section 5047 are exceptions to, or qualifications upon, the elements of a cause of action, and are defenses to be pleaded by defendant, and plaintiff was not

required to anticipate such defenses and negative them in the complaint.

[6] The contention of respondents, that the alleged cause of action based upon the alleged false imprisonment at "some short interval prior to the month of June, 1938," was barred by the statute of limitations, is sustained. The complaint was filed October 3, 1940. In his argument before the court counsel for plaintiff stated that he did not allege the incident of 1938 as a cause of action but as a part of the whole of the circumstances concerning the arrest of plaintiff on November 2, 1939.

[7-9] Defendants' general demurrer to the original complaint was overruled, and their special demurrer thereto was sustained with leave to amend. The amended complaint included the same allegations, in substance, as those which were in the complaint, and in addition thereto included allegations concerning further details as to the manner in which the second arrest, referred to in the complaint, was procured. Although the trial court overruled a general demurrer to the complaint, it was not precluded thereby (as appellant suggests it was) from making a contrary ruling on the general demurrer to the amended complaint which, as above stated, included the allegations of the complaint. Kelly v. Liddicoat, 1939, 35 Cal.App.2d 559, 96 P.2d 186. However, the general demurrer to the complaint having been overruled, the plaintiff would have been justified in this case in assuming that she would be given leave to amend if the court sustained the general demurrer to the amended complaint. If the demurrer to the amended complaint was sustained on the ground that said complaint did not allege "there was no probable cause," then plaintiff should have been given leave to amend inasmuch as it appears that such an amendment could have been made. After the demurrer was sustained without leave to amend, it was not necessary that plaintiff request permission in the trial court for leave to amend. Code Civ.Proc. sec. 472c; Wennerholm v. Stanford University School of Medicine, 1942, 20 Cal.2d 713, 719, 128 P.2d 522, 141 A.L.R. 1358.

[10] Respondents have taken exception in this court to the transcript on appeal on the ground that it does not contain a copy of the judgment roll. They referred particularly to the omission of a copy of the judgment, and objected to a consideration of the appeal unless such defect was remedied. After such objection was made, the court granted appellant's motion to augment the record on appeal by including a copy of the judgment in the transcript, and a copy of said judgment has been filed herein.

It appears that the appeal from the order of dismissal "whereby the court sustained the demurrer" is an appeal from the order sustaining the demurrer. An order sustaining a demurrer is not an appealable order. Ross v. O'Brien, 1934, 1 Cal.App.2d 496, 498, 36 P.2d 1108.

The appeal from the order of dismissal "whereby the court sustained the demurrer" is dismissed. The judgment of dismissal is reversed.

SHINN, Acting P. J., and SHAW, Justice pro tem., concur.

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62 Cal.App.2d 18

PEOPLE v. MOODY.

Cr. 3744.

District Court of Appeal, Second District, Division 2, California.

Dec. 20, 1943.

1. Criminal law 🔑878(3)

In a fist fight where an eye is lost by means other than by the force applied by defendant, acquittal of the charge of "mayhem" is not an acquittal of the crime of "assault by means of force likely to produce great bodily injury." Pen.Code, § 245.

See Words and Phrases, Permanent Edition, for all other definitions of "Assault to Produce Great Bodily Injury" and "Mayhem".

2. Criminal law 🔑878(3)

In prosecution for two offenses, where elements necessary to the major offense are not proved, acquittal of the junior offense is not necessarily required.

3. Criminal law 🔑878(3)

If there is evidence sufficient to support conviction of a lesser offense which is included within the greater offense, defendant may be adjudged guilty of the lesser offense notwithstanding the evidence shows he is not guilty of the greater offense.

4. Assault and battery ⚿67

A self-defense instruction with respect to the right and extent of a counter-assault should fix, as the standard by which to judge defendant, the actions of a reasonable man under all of the apparent circumstances.

5. Assault and battery ⚿67

Relative to self-defense it is error to instruct that in resisting his assailant defendant might use any force deemed necessary, since the test is whether the force exerted would be deemed necessary to insure his safety by a reasonable person similarly situated.

6. Assault and battery ⚿67

Fear that another was about to inflict bodily injury upon him did not justify defendant's resistance beyond that which would be deemed sufficient by a reasonable man to secure his own safety, but he must have been confronted with such acts as would have induced an ordinarily prudent person to believe that he was in immediate danger of great bodily injury.

7. Assault and battery ⚿67

When attacked, one has the right to stand his ground and defend himself, and may pursue his adversary if such pursuit is necessary to successful defense, but extent to which one may make resistance is a fact which may be determined by the extent or force which a reasonable person would employ under similar circumstances. Pen.Code, §§ 692, 693.

8. Assault and battery ⚿67

In prosecution for assault to produce great bodily injury, instructions are to be drawn within purview of statute relating to lawful resistance and not within statutes relating to justifiable homicide. Pen.Code, §§ 198, 245, 693.

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Jesse Moody was convicted of assault by means of force likely to produce great bodily injury, and he appeals.

Affirmed.

Philip S. Schutz, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Alberta Gattone, Deputy Atty. Gen., for respondent.

MOORE, Presiding Justice.

Appellant was indicted on two counts, namely, (1) for mayhem and (2) for assault by means of force likely to produce great bodily injury. He was acquitted on the first count and from his conviction of the second count and from the order denying a new trial he brings this appeal. The grounds of appeal are: (1) That the judgment of conviction under count II is inconsistent with the verdict of not guilty under count I and is therefore void; and (2) errors in the court's giving certain instructions and in modifying one offered by appellant.

Late in the evening of March 6, 1943, one Martinez, the complainant, was in a cafe in the city of Los Angeles where he had drunk about a quart of wine and some beer. As Martinez came from the toilet he engaged in a conversation with a boy and struck him. Appellant called Martinez to task; a fight ensued; Martinez was beaten to unconsciousness and his left eye was destroyed. During the course of the struggle Martinez approached with a knife with which he cut appellant's clothing. At no time did appellant use any weapons; neither did his fist strike Martinez in the eye. When the police ambulance called for Martinez he lay close to the foot of the building wall with his head upon a 2½ inch water pipe. Where his body had lain a pocket knife was found open with a blade about 3½ inches long.

[1-3] Appellant contends that there was but one controversy and that there was therefore but one offense; and that since the crime charged in the second count is a lesser offense than the crime of mayhem, the acquittal under the first count necessarily was an acquittal on the second. Such a contention is decidedly a fallacy. The jury evidently found that in the course of the fracas Martinez lost his eye by a means not applied by appellant. Had there been evidence that appellant struck Martinez in the eye, there might then be some basis for his present contention. But where in a fist fight an eye is lost by means other than by the force applied by the defendant, the loss of the eye is not to be deemed the result of the force applied and the ac-

quittal of the charge of mayhem is not an acquittal of the crime of assault by means of force likely to produce great bodily injury. There is an element in the offense of mayhem not necessarily involved in the crime of which appellant was convicted. People v. Kimmerle, 90 Cal.App. 186, 189, 265 P. 525. The Kimmerle case is a striking parallel with that at bar. The same identical charges were made and the same verdicts were rendered. As there, the jury determined that the complainant struck his eye on the jamb of the door, so here, the jury must have believed that Martinez struck his eye on the wall or the pipe. Where, in such a prosecution, elements necessary to the major crime are not proved to the satisfaction of the jury, the latter are not for that reason required to acquit the prisoner of the junior offense. People v. Smith, 117 Cal.App. 530, 533, 4 P.2d 268. Neither is the appellate court, in such event, obliged to relieve the accused of the conviction for the milder offense. People v. Edwards, 72 Cal.App. 102, 236 P. 944; People v. Clensey, 97 Cal.App. 71, 274 P. 1018. If there was evidence sufficient to support the verdict of a lesser offense which is included within the greater, he may be adjudged guilty of the former notwithstanding the evidence shows that he is not guilty of the more serious crime. People v. Vanderbilt, 199 Cal. 461, 464, 249 P. 867. Assuming that the force applied by appellant caused the loss of Martinez' eye, then he cannot complain because the verdict was more favorable than the evidence warranted. People v. Edwards, supra.

Appellant vainly attempts to distinguish the Kimmerle case by contrasting the fact that Kimmerle's victim suffered a fractured sinus from the blows dealt him with the status of Martinez' physique after the assault by Moody. While these men scuffled for some moments in the cafe, appellant was entreated to desist. After they had reached the outside the latter administered two blows to the right temple of Martinez, who sank unconscious to the ground where four minutes later he was found still oblivious of the world, his face covered with blood.

The court advised the jury with reference to the law of self-defense substantially as follows: That self-defense is founded on necessity; that to justify a counter-assault it must not only have appeared to the defendant as a reasonable man that he had reason to believe that he was in danger of his life or bodily harm, but that it must appear to him as such reasonable man that to avoid such danger a counter-assault was absolutely necessary; that the circumstances appearing must be sufficient to excite the fears of a reasonable man and that defendant must have acted under the influence of such fears alone; that the danger must be present, apparent, and imminent; that if he acts on such appearances he does so at his peril; that the law prescribes a standard of its own, to wit, the conduct of a reasonable man situated as defendant was; that if the jury should find that the infliction of one blow or more was all the force appearing to the defendant as a reasonable person to be necessary successfully to resist the assault of Martinez, then the infliction of any other blow would not be justified by the law of self-defense; and that if the jury should find that the blows upon Martinez were inflicted after it appeared to defendant, as a reasonable man, that Martinez had been incapacitated for inflicting further bodily injuries, defendant was not justified in administering blows in excess of those reasonably necessary to resist Martinez' assault.

Deeming himself not to be fully protected by the court's instruction, appellant requested the court to read the following instruction which the court modified by adding the italicized portions thereto: "The court instructs the jury that a person in the exercise of his right of self-defense, not only has a right to stand his ground and defend himself when attacked, but he may pursue his adversary until he has secured himself from danger, *using in all events, however, only such force as a reasonable person, situated as he was and knowing what he knew, would have used under like circumstances.*"

[4-7] Appellant contends that the instruction as presented by him contains a correct statement of the law and that the modification by the court nullified its meaning. An instruction with respect to the right and extent of a counter-assault should fix, as the standard by which to judge the defendant, the actions of a reasonable man under all of the apparent circumstances. In a prosecution of one who pleads that his act was done in self-defense it is error to instruct the jury that in resisting his assailant the defendant might use any force he deemed necessary; but they should be told that the sole test is whether the force exerted by the defendant would have been

deemed necessary to insure his safety by a reasonable person similarly situated. Also, it is proper to deny an instruction that defendant had the right to be the sole judge of the means with which, and the extent of the force by which, he is to make his counter-assault. People v. Albori, 97 Cal. App. 537, 544, 275 P. 1017; People v. Simikoff, 137 Cal.App. 373, 30 P.2d 560. Defendant's fear that Martinez was about to inflict bodily injury upon defendant did not justify the latter's resistance beyond that which would be deemed sufficient by a reasonable man to secure his own safety. He must have been confronted with such acts as would have induced an ordinarily prudent person to believe that he was in immediate danger of great bodily injury. People v. Lynch, 101 Cal. 229, 231, 35 P. 860. When attacked one has a right to stand his ground and defend himself and he may pursue his adversary if such pursuit is necessary to a successful defense; but the extent to which one may make resistance against an agressor is a fact which must be determined by the jury by keeping in mind the amount or extent of force which a reasonable person would employ under similar circumstances. The right to make a counter-assault and the extent thereof depend upon the existence or apparent existence of such conditions as would be deemed sufficient by a reasonable man under a similar situation. Secs. 692, 693, Penal Code.

[3] The contention that the court's instructions apply to homicide cases only is based upon a misconception of their meaning. Appellant is induced by the authorities cited by him (People v. Hatchett, 56 Cal. App.2d 20, 132 P.2d 51; People v. Kinowaki, 39 Cal.App.2d 376, 103 P.2d 203; People v. Orosco, 73 Cal.App. 580, 239 P. 82) to contend that his original instruction was a correct statement of the law. Each of his authorities dealt with the crime of murder. The instructions in each case were governed by sections 197 and 198, Penal Code. Each case was reversed because the accused was denied a correct instruction upon a point not covered by the court's charge.

Appellant was accused under section 245, which makes it a felony for a person to commit an assault upon another by any means of force likely to produce great bodily injury. In prosecutions under this section, lawful resistance to the agressor may be made by the injured party to "prevent the offense" against his person or his family. Sections 692, 693, Penal Code. Instructions on the trial of one accused under section 245 are to be drawn within the purview of section 693 and not of 198. This we apprehend is exactly what the trial court successfully undertook to do in the instant case.

The judgment and the order denying the motion for a new trial are affirmed.

McCOMB and W. J. WOOD, JJ., concur.

62 Cal.App.2d 30

In re BRIMHALL'S ESTATE.

BRIMHALL v. BRIMHALL.
Civ. 14165.

District Court of Appeal, Second District, Division 2, California.
Dec. 21, 1943.

1. Executors and administrators 🔑20(7)

Evidence supported finding that there was a mutual meeting of minds of parties to a property settlement agreement containing provision that each party waived right to act as administrator of the other's estate, and wife's petition for letters of administration of intestate husband's estate was properly denied and petition of husband's father for such letters was properly granted.

2. Husband and wife 🔑36

If there is a finding supported by substantial evidence that a just and fair disclosure of all that the wife should know for her benefit concerning the nature of the transaction has been made to her, such finding dispels the presumption of undue influence which arises when husband gains an advantage in a transaction with his wife.

3. Husband and wife 🔑36

If a transaction between spouses is fair and there has been a full and fair disclosure to the wife of all facts essential to her protection, it is not essential in order to overcome the presumption that the husband has exercised undue influence over his wife that there be evidence that she has received independent legal advice.

4. Executors and administrators ⚷20(7)

Evidence sustained implied finding that wife knew all facts necessary for her protection prior to execution of property settlement agreement containing provision that each party waived any right to act as administrator of the other's estate and that intestate husband did not take unfair advantage of wife, and agreement was valid notwithstanding wife had no independent legal advice prior to execution of agreement which was prepared by husband and his attorney.

5. Executors and administrators ⚷20(7)

The presumption that a written instrument is supported by consideration constituted "substantial evidence" and sustained implied finding that written property settlement agreement containing provision that each party waived any right to act as administrator of the other's estate was supported by consideration. Civ.Code § 1614; Code Civ.Proc. § 1963, subd. 39.

See Words and Phrases, Permanent Edition, for all other definitions of "Substantial Evidence".

6. Husband and wife ⚷36

A spouse may enter into any transaction with the other respecting property the same as if the spouses were unmarried, subject to the general rules controlling persons occupying confidential relations with each other. Civ.Code, § 158.

7. Husband and wife ⚷33

Where property settlement agreement dealt solely with spouses' property rights and did not contemplate a separation or divorce, the agreement was not terminated because the spouses subsequently cohabited as husband and wife. Civ.Code, § 158.

8. Executors and administrators ⚷17(3)

Where property settlement agreement provided that property "now in possession of" either spouse shall be "the separate property of the party so holding the same", and the spouses were living apart at husband's death intestate, there was no "community property" in the husband's estate so as to authorize wife's administration thereof, as against contention that the household furniture was community property and had not been disposed of by agreement.

See Words and Phrases, Permanent Edition, for all other definitions of "Community Property".

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceeding in the matter of the estate of Frank O. Brimhall, by Martha Brimhall, opposed by Orson S. Brimhall. From an order denying contestant's petition for letters of administration and granting petitioner's petition for such letters, contestant appeals.

Affirmed.

George W. Nilsson, of Los Angeles, for contestant and appellant.

Perry F. Backus, of Los Angeles, for petitioner and respondent.

McCOMB, Justice.

This is an appeal from an order of the superior court of Los Angeles County, sitting in probate, denying appellant's petition for letters of administration of the estate of Frank O. Brimhall and granting the petition of Orson S. Brimhall for such letters.

The essential facts are:

Decedent died January 24, 1943. Appellant was his wife at the time of his death. Respondent is the father of decedent. On September 19, 1942, appellant and decedent entered into a property settlement agreement* which contained provisions that each of the parties waived any and all right "to act as the administrator of the estate of the other".

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* The agreement was as follows:

"This agreement made this 19th day of September, 1942, between Frank O. Brimhall and Martha Brimhall, hereinafter designated as the husband and the wife respectively,

"Witnesseth:

"That whereas the parties hereto were lawfully married and now are husband and wife, and

"Whereas unhappy difficulties have arisen between said parties and they are now desirous of making a settlement of each and all of their property rights as between themselves, to the end that each of them may and will have and maintain his and her separate property and estate without let or hindrance from the other, and

"Whereas, there is now certain com-

Appellant relies for reversal of the order of the probate court on three propositions, which will be stated and answered hereunder seriatim:

First: *The property settlement agreement between appellant and decedent was invalid for the reasons that (1) there was no meeting of the minds of the parties, (2) the wife had no independent legal advice prior to the execution of the agreement which was prepared by the husband and his attorney, and (3) there was a lack of consideration for the agreement.*

This proposition is untenable.

1) Appellant testified that prior to the execution of the property settlement agreement she and her husband had domestic difficulties and he contemplated going into the Army; that she was employed but did not feel that she could keep up the payments on her home; that her husband suggested to her that they enter into a property settlement whereby she would convey her interest in their house to him and he would make the payments which might thereafter become due upon it; and that because of these circumstances she had entered into the property settlement agreement.

She further testified regarding the agreement: "So I told him that was perfectly all right with me", and that she remembered reading the agreement before she signed it.

[1] Clearly such testimony supports a finding that there was a mutual meeting of the minds of the parties to the agreement.

[2, 3] 2) It is an established rule in an action involving a transaction between a husband and his wife that if there is a finding, supported by substantial evidence, that a just and fair disclosure of all that the wife should know for her benefit and protection concerning the nature and effect of the transaction has been made to her, such finding dispels the presumption of undue influence which arises when the husband gains an advantage in a transaction with his wife. It is likewise established that if it is a fact that the transaction between the spouses is fair and just and there has been a full and fair disclosure to the wife of all facts

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munity property of these parties to wit: One Chevrolet Coupe, 1941 model, Engine No. AA958584 and 1941 License No. 57C474; 1942 Cover Plate, No. 1890680; and

"The household furniture and furnishings of the premises used as the home of these parties, being 1950 West 85th Street, Los Angeles, California; and, the interest of each of the parties hereto in the real property hereinafter described, and heretofore held by them in joint tenancy with each other, and as to the said properties it is agreed as follows:

"That from this date forth, the Chevrolet Coupe above mentioned shall be the separate property of the wife, and the real property hereinafter mentioned, and the interest of each of the parties as such interest as heretofore existed, shall from this date forth be and remain the separate property of the husband, and the husband shall relieve the wife from any and all indebtedness thereon. Each of the parties have this day executed the agreements and documents necessary to change the title of said properties as hereinabove required, and each agrees that he or she will in the future sign and deliver any agreement necessary to carry out the terms of this agreement.

"It is further agreed that each of the parties hereto do forever waive, discharge and release any and all obligations existing between them, excepting the obligations mentioned herein, and that any and all property of any kind or nature now in possession of, or hereafter acquired by either of the said parties, shall be the separate property of the party so holding or acquiring the same, and each of the said parties further waives any and all right to share in the estate of the other, or to act as the administrator of the estate of the other, it being the purpose and intent of this agreement that from this date henceforth, the respective rights of the said parties to the property or moneys of the other shall be the same as if the said parties had never at any time been married to each other.

"It is further understood by each of the parties hereto, that this agreement is not made with any intention that either of said parties may or shall obtain a divorce, and that the sole consideration for this agreement, is the transfer of property rights and the waiver claims of each against the other, if any there be, and not otherwise.

"This agreement shall inure to the benefit of the successors and assigns of the respective parties, and shall be binding on each and all thereof.

"Frank O. Brimhall,
"Husband.
"Mary Brimhall,
"Wife."

essential to her protection, it is not essential, in order to overcome the presumption that the husband has exercised undue influence over his wife, that there be evidence that she has received independent advice. (Smith v. Lombard, 201 Cal. 518, 524, 258 P. 55.)

[4] In the instant case there is substantial evidence to sustain the probate court's implied finding that appellant knew of all facts necessary for her protection prior to the time that she executed the property settlement agreement; that she executed the agreement with full knowledge of its contents; and that her husband did not take an unfair advantage of her. For example, appellant testified that she received the automobile and other property referred to in the agreement which was to be her separate property.

[5] 3) The property settlement agreement was supported by a consideration. The rule is established that a written instrument is presumed to be supported by a consideration. (Sec. 1614, Civil Code; Sec. 1963, subd. 39, Code of Civil Procedure.) This presumption constituted substantial evidence to sustain the trial court's implied finding that the property settlement agreement was supported by a good and sufficient consideration.

Second: *That the property settlement agreement was terminated because subsequent to the execution thereof appellant and her husband cohabited as husband and wife.*

[6] This proposition is also untenable. The law is established in California that a husband or wife may enter into any transaction with the other respecting property the same as if they were unmarried, subject to the general rules which control the actions of persons occupying confidential relations with each other. (Sec. 158, Civil Code; Stoff v. Erken, 25 Cal.App. 528, 530, 144 P. 312.)

There was a clause in the agreement which read thus:

"It is further understood by each of the parties hereto that this agreement is not made with any intention that either of said parties may or shall obtain a divorce, and the sole consideration for this agreement is the transfer of property rights and the waiver of claims of each against the other, if any there be, and not otherwise."

[7] It is evident that the agreement dealt solely with the property rights of the parties and did not contemplate a separation or divorce between them. Hence it was entirely immaterial, so far as this case is concerned, as to the status of their personal relations.

The cases of Brown v. Brown, 170 Cal. 1, 147 P. 1168; Peters v. Peters, 16 Cal.App. 2d 383, 60 P.2d 313, and Mundt v. Connecticut Gen. Life Ins. Co., 35 Cal.App.2d 416, 95 P.2d 966, which are relied upon by appellant, are inapplicable to the facts of the present case because in the cited cases the property settlement agreements were executed in contemplation of the parties obtaining divorces, and subsequent to the execution of such agreements the parties affected reconciliations. It was held in substance that the property settlement agreements were ineffective because the parties by their conduct, subsequent to the execution of such agreements, had abandoned them. In the instant case the facts are different. As indicated above, the property settlement agreement was not made in contemplation of the parties' obtaining a divorce or separating.

Third: *That appellant was entitled to be appointed administratrix because the household furniture was community property and had not been disposed of by the property settlement agreement.*

[8] This proposition is likewise untenable. The evidence discloses that from on or about October 4, 1942, when appellant's husband went into the Army, until the time of his death, the parties lived separate and apart. The property settlement agreement provided "that any and all property of any kind or nature *now in possession of*, or hereafter acquired by either" of the parties to the agreement shall be "the separate property of the party so holding or acquiring the same". Therefore, it is clear that at the time of decedent's death there was not any community property in decedent's possession and thus none in his estate.

For the foregoing reasons the order is affirmed

MOORE, P. J., concurs.

W. J. WOOD, Justice.

I concur. Appellant waived the right to act as administratrix when she signed the property settlement agreement. If it could be established that the parties failed to divide community household furniture, such failure would not revive her right to letters of administration.

PEOPLE v. CLAPP et al.

Cr. 3752.

District Court of Appeal, Second District, Division 1, California.

Dec. 10, 1943.

Hearing Granted Jan. 5, 1944.

1. Criminal law 🔑507½

There is no rule that jury should resolve reasonable doubt as to state's witness being accomplice in defendant's favor.

2. Criminal law 🔑805(3)

The phrase "reasonable doubt" is out of place in instructions to jury, except as provided by law. Pen.Code, § 1096a.

3. Criminal law 🔑507(6)

The test for determining who are accomplices is the same in abortion case as in any other case. Pen.Code, § 1111.

4. Criminal law 🔑507(6)

The fact that person performing abortion and woman on whom it is performed are guilty of separate and distinct crimes does not preclude prosecution of woman for identical offense committed by one performing operation, so as to render her an "accomplice" in commission of abortion. Pen.Code, §§ 274, 275, 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Accomplice".

5. Criminal law 🔑507(1)

The fact that certain acts are defined as crimes under different sections of Penal Code is immaterial in determining meaning of statute defining "accomplice" as one liable to prosecution for identical offense charged against defendant. Pen.Code, § 1111.

6. Criminal law 🔑507(1)

There is no general rule that where acts of different participants are declared by statute to constitute separate and distinct crimes, participants guilty of one crime are not "accomplices" of those guilty of the other crime, but all participants in any crime may be accomplices. Pen.Code, § 1111.

7. Criminal law 🔑507(1)

The fact that certain sections of Penal Code, such as that prohibiting conviction for abortion on victim's uncorroborated testimony, require corroboration of certain witnesses' testimony without exceptions, is of no signifiance in determining meaning and application of statute defining "accomplice", whose testimony must be corroborated to warrant conviction, as one liable to prosecution for identical offense charged against defendant. Pen.Code, §§ 1103a, 1108, 1110, 1111.

8. Criminal law 🔑507(1)

The word "identical" in statute defining accomplice, whose testimony must be corroborated to warrant conviction of crime, as one liable to prosecution for identical offense charged against defendant, means "same." Pen.Code, § 1111.

See Words and Phrases, Permanent Edition, for all other definitions of "Identical" and "Same".

9. Criminal law 🔑780(1)

The word "accomplice" in statute requiring that jury be instructed on all proper occasions that accomplice's testimony should be viewed with distrust must be construed according to context and approved usage of language, without restricting its application because of statutory requirements affecting sufficiency of evidence to justify and support conviction of crime. Code Civ.Proc. §§ 16, 2061, subd. 4; Pen.Code, §§ 1103a, 1108, 1110, 1111.

10. Criminal law 🔑507(1)

"Accomplices" are regarded as particeps criminis, notwithstanding single purpose for which word "accomplice" is employed in statute defining accomplice, whose testimony must be corroborated to warrant conviction of crime, as one liable to prosecution for identical offense charged against defendant. Pen.Code, § 1111.

11. Criminal law 🔑507(1)

Who are "accomplices", whose testimony must be corroborated by other evidence to warrant conviction of crime, depends on who are liable to prosecution for identical offense charged against defendant, under provisions of Penal Code, particularly sections thereof declaring all persons concerned in commission of crime principals therein and abrogating distinctions between accessories before fact and principals and between principals in first and second degrees. Pen.Code, §§ 6, 15, 30, 31, 654, 971, 1111.

12. Criminal law 🔑507(6)

A woman on whom abortion was performed was "accomplice" of persons performing operation, so as to require corroboration of her testimony to warrant their conviction of such crime. Pen.Code, §§ 274, 1111.

13. Criminal law 🔑1173(2)

In prosecution for abortion, where court fully instructed jury on law regarding accomplices and gave instruction pursuant to statute prohibiting conviction of abortion on victim's testimony, unless corroborated by other evidence, failure to give instruction specifically identifying victim as accomplice of defendants was not prejudicial to them. Pen.Code, §§ 274, 1096a, 1108, 1111; Code Civ.Proc. § 2061, subd. 4.

14. Abortion 🔑11
Criminal law 🔑511(9)

In prosecution for abortion, victim's testimony and corroborating testimony of two eyewitnesses, whom jury might have considered innocent of any wrongdoing and neither aiders nor abettors of alleged offense, was sufficient to support conviction. Pen.Code, §§ 274, 1108, 1111.

15. Criminal law 🔑1173(2)

In posecution for abortion, failure to instruct jury specifically that victim of crime was defendant's accomplice was not error warranting reversal of conviction as leading jury to believe that victim was not accomplice and that testimony of two eyewitnesses, whom defendants contended were accomplices, was sufficient to support conviction, thereby depriving defendants of benefit of instruction that one accomplice cannot corroborate another. Pen.Code, §§ 274, 1108, 1111.

◆

Appeal from Superior Court, Los Angeles County; Stanley Mosk, Judge.

Amos Franklin Clapp and R. W. Goode were convicted of abortion, and they appeal.

Affirmed.

A. H. McConnell and Archie Cope, both of Long Beach, for appellants.

Robert W. Kenny, Atty. Gen., T. G. Negrich and Frank Richards, Deputy Attys. Gen., and Fred N. Howser, Dist. Atty., and Jere J. Sullivan, Deputy Dist. Atty., both of Los Angeles, for respondent.

DORAN, Justice.

Defendants and appellants were found guilty by a jury of the crime of abortion, a violation of section 274 of the Penal Code. The appeal is from the judgment and the order denying a motion for a new trial.

The record reveals the facts to be as follows: Thelma Huntley, a married woman, called at the office of defendants, where she informed them of her condition and her wishes with regard thereto. Defendants, who are chiropractors, arranged to visit her home the next day and perform the operation. On the morning of the next day Thelma Huntley visited her mother-in-law Mrs. Alice Huntley; Mrs. Alice Thurman, Mrs. Alice Huntley's daughter, arrived later. There is nothing to indicate that this meeting was expected or prearranged. From there the three of them drove to Thelma Huntley's home. The two defendants arrived shortly thereafter and in the presence of Mrs. Alice Huntley and her daughter, Mrs. Alice Thurman, the operation was performed by the two defendants.

The three women above named testified for the prosecution. Defendants introduced no evidence.

[1, 2] It is urged on appeal, first, that a conviction cannot be had upon the uncorroborated testimony of an accomplice; second, that where there is no conflicting evidence as to whether a witness is an accomplice, and that fact stands undisputed in the testimony, the court should as a matter of law instruct the jury that such witness is an accomplice; and third, that "when there is a reasonable doubt as to a witness being an accomplice, the jury should resolve that doubt in favor of the defendant and find such witness to be an accomplice and the court should as a matter of law so instruct the jury".

In support of the last-mentioned contention People v. Sheffield et al., 108 Cal. App. 721, 293 P. 72, 77, is cited as authority. The opinion does not so hold. Nor indeed is there any authority for such a rule. The phrase "reasonable doubt" is out of place in the instructions except as provided by law. Section 1096a, Penal Code.

The court fully instructed the jury on the law regarding accomplices including the precautionary advice provided for in subdivision 4 of section 2061 of the Code of Civil Procedure. The court did not instruct the jury that Thelma Huntley or either of the other two women was an accomplice, but left that question for the jury to determine. It is the court's refusal to give defendants' requested instructions on this subject that furnishes appellants' principal contention on appeal.

On the other hand, it is respondent's contention that "the test for determining who are accomplices is the same in an abortion case as in any other case". Section 1108 of the Penal Code provides that "Upon a trial for procuring or attempting to procure an abortion * * * the defendant cannot be convicted upon the testimony of the woman * * * unless she is corroborated by other evidence." But, respondent argues, "It does not follow that, because a woman's testimony must be corroborated by reason of section 1108 of the Penal Code, she, therefore, stands in the relation of an accomplice to the defendant charged with the commission of the abortion. Although the testimony of a prosecutrix must be corroborated in order to convict, the reason for requiring the corroboration is predicated on an entirely different hypothesis from that falling within the rule relating to an accomplice's testimony.

"Prior to 1915 an accomplice was not defined in our Penal Code. Therefore we must be guided by the present definition, which declares an accomplice is one liable for prosecution for the identical offense charged against the defendant on trial. [Section 1111.] It will be observed that our code sections on abortion, as above referred to, provide that the person performing or attempting an abortion, and the woman upon whom the abortion is performed or attempted, shall be guilty of separate and distinct crimes. Therefore, the woman could not be prosecuted for *the identical offense* charged against the defendant and hence is not an accomplice as defined in our code. (Italics included.)

"The general rule is that where the acts of different participants are declared by statute to constitute separate and distinct crimes, the participants guilty of one crime are not accomplices of those who are guilty of a separate and distinct crime.

"A common example may be found in perjury cases, where it is held that the suborner is not an accomplice of the suborned. (People v. Nickell, 22 Cal.App. 2d 117, at [page] 124 [70 P.2d 659].) * * * People v. Davis, 210 Cal. 540, at [page] 557 [293 P. 32], * * *

"Therefore, the testimony of the woman upon whom the abortion was committed under Section 1108 of the Penal Code may be sufficient to supply the corroboration of an accomplice under section 1111 of the Penal Code, and vice versa.

"Since the amendment to section 1111 of the Penal Code in 1915 defining an accomplice, we can see no distinction in principle between the Davis case, supra, and the instant case. If the giver of a bribe is not an accomplice of the receiver of the bribe, it logically follows that the woman who solicits or permits another to commit an abortion upon her is not an accomplice of the person performing the abortion, for the offenses are not identical, but separate and distinct offenses under sections 274 and 275 of the Penal Code.

"There are other provisions contained in our code sections in which corroboration is required to sustain a conviction (sections 1103a, 1108 and 1110 of the Penal Code), but this does not mean that the testimony of a victim should be viewed with distrust. It is competent for the legislature to provide in what cases corroboration may be required, whether the person is an accomplice or not."

[3–6] That respondent's preliminary statement, viz.: the test for determining who are accomplices is the same in an abortion case as in any other case, is correct, there can be no question. Indeed the test is the same in all cases. It is from the failure to determine correctly what the test is, and then apply it, that confusion abounds. And that failure results from an improper interpretation of section 1111 of the Penal Code. Respondent's argument is afflicted with the same fallacy that persists in the decisions hereinafter referred to. Respondent argues, as noted above, that the person performing an abortion and the woman upon whom the abortion is performed shall be guilty of separate and distinct crimes, therefore the woman could not be prosecuted for the identical offense committed by the one who performs the operation. Such an unqualified statement is not the law. It is conceivable that both could be prosecuted under either statute, or it is conceivable that the subject of an abortion could be entirely innocent of any wrongdoing. The fact that certain acts are defined as crimes under different sections of the Penal Code is unimportant, indeed entirely immaterial, in determining the meaning and interpretation of section 1111. Nor is there a general rule as contended by respondent "that where the acts of different participants are declared by statute to constitute separate and distinct crimes, the participants guilty of one crime are not accomplices of those who are guilty of a separate and distinct crime". No authority is cited by respondent in support of such contention nor can any be found. But to the contrary, as will hereafter appear, all participants in any crime may be accomplices. The question as to who are accomplices must be determined and can only be determined properly by reference to related provisions of the code. They are as follows. Section 6 of the Penal Code provides that, "No act or omission, * * * is criminal or punishable, except as prescribed or *authorized* by this code, * * *." (Italics added.) Section 15 provides that, "A crime or public *offense* is an act committed or omitted in violation of a law * * *." (Italics added.) Section 30 provides that, "The parties to crimes are classified as: 1. Principals; and, 2. Accessories." Section 31 provides that, "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed." Section 971 provides: "The distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in cases of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal." Section 654 provides that, "An act or omission which is made punishable in different ways by different provisions of this code may be punished under either of such provisions, but in no case can it be punished under more than one; * * *". And to complete the quotations to be considered, section 1111 provides: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

[7, 8] From a careful consideration of section 1111 it is at once evident that the legislature in defining an accomplice did not contemplate an all-purpose definition but limited the definition to the single purpose of identifying a class of witnesses that, in any event, must be corroborated. In that regard it is provided that if the witness is "liable to prosecution for the identical offense charged against the defendant on trial", then, and in that event, such witness must be corroborated to warrant a conviction. The fact that certain sections, for example, section 1108, require corroboration and allow no exceptions is of no significance in determining the meaning and application of section 1111. It is within the power of the legislature to require such corroboration even though the subject of an abortion could be shown to be the victim of force or misplaced confidence, in which case such a witness would not be "liable to prosecution" and hence not an accomplice as defined by section 1111. It should be noted also that the use of the word "identical" in section 1111 involves no implications that suggest or require any different meaning than that for which it is usually employed. "Identical" means "same", with perhaps a little emphasis.

[9] It should be emphasized that section 1111 as well as sections 1103a, 1108 and 1110, referred to by respondent, have to do with the sufficiency of evidence to jus-

tify and support a conviction whereas subdivision 4 of section 2061 of the Code of Civil Procedure, which provides that the jury on all proper occasions is to be instructed that the testimony of an accomplice ought to be viewed with distrust, and which provision respondent seeks to avoid, is concerned with the credibility of witnesses and the value of evidence. There is no conflict among these last-mentioned provisions of the code, nor indeed is there any conflict among any of the provisions of the code herein considered. The word "accomplice" is not defined for general purposes in any of the codes; "accomplice" therefore as used in subdivision 4 of section 2061 of the Code of Civil Procedure must be "construed according to the context and the approved usage of the language" (sec. 16, Code Civ.Proc.). Such construction is comprehensive and there is no reason for restricting the application of such provision because of requirements affecting the sufficiency of evidence to justify and support a conviction.

[10] With regard to the use of the word "accomplice" in both the first and second sentences of section 1111, and notwithstanding the single purpose for which it is therein employed, there is nothing to suggest that the legislature had in mind any different meaning than that which, in its general acceptation, it inevitably implies. The stigma is not removed; no regeneration has taken place; nor has an accomplice been endowed with any of the attributes of respectability. To the contrary, the likely untrustworthiness of such individuals as witnesses remains the same so far as the law applicable thereto is concerned. They are now, as they always have been regarded, particeps criminis.

[11] The determination of who are "liable to prosecution for the identical offense" ipso facto determines who must be corroborated by other evidence. For the purpose of such a decision reference need only be made to the provisions of the Penal Code hereinabove referred to, namely, sections 6, 15, 30, 31, 654, 971, and in particular, sections 31 and 971. Therein the law is plainly set forth; and therein is to be found the obvious meaning and interpretation of section 1111. "Principals" are "parties to crimes" and sections 31 and 971 are practically if not literally all inclusive. There can be no escape therefore from the conclusion that sections 31 and 971 determine the meaning to be given to "accomplice" as used in section 1111, for sections 31 and 971, considered with relation to the other provisions herein referred to, determine who are liable to prosecution, not only for "identical" offenses, but as well for any offenses. And although as hereinbefore noted, "accomplice" is not defined except as provided in section 1111, nevertheless it is described by sections 31 and 971 in such unmistakable language that, in the final analysis, "accomplice" and "principal" are synonymous.

Notwithstanding the clear language of sections 31 and 971 of the Penal Code and the comprehensive purpose obviously intended by these provisions and their inevitable effect in the determination of what witnesses are accomplices, a tendency to legislate exceptions into the statutes by judicial decision appears to have developed a problem that is by no means trivial. This anomaly, however, is of recent origin, as the opinions hereinafter referred to will reveal. It appears to be the product of an unwarranted interpretation of an amendment to section 1111 of the Penal Code adopted in 1915. Before that time no concessions were made on behalf of accomplices, except perhaps in the case of In re Cooper, 162 Cal. 81, 121 P. 318. There the court was "satisfied that the overwhelming weight of modern authority is to the effect that, in the absence of statutory provision to the contrary, participation in an act of sexual intercourse on the part of an unmarried woman does not constitute 'adultery' on her part, but amounts simply to fornication." Id., 162 Cal. at page 84, 121 P. at page 319. It was contended, in that connection, by counsel for the state that defendant nevertheless aided and abetted her married codefendant and therefore was a principal; but, the court argued: "Of course, an unmarried person might be guilty as a principal of this offense, under section 31 of the Penal Code, by aiding and assisting in its commission in some other way than by living in a state of illicit intercourse with a married person; but we are considering here simply such aid and assistance as are involved in the mere fact of participation in the illicit intercourse." Id., 162 Cal. at page 85, 121 P. at page 320. Having summarily decided that, "the idea of guilt on the part of an unmarried participant of such an offense as this is thus excluded by the terms of the statute defining the offense", the court further declared that, "we think it must be held to follow that such participant cannot be held punishable as being an aider and abettor in the offense, even though he or she be held to be an accomplice under the provisions of section 31 of the Penal Code," (Id., 162 Cal. at page 86, 121 P. at page 320); and concluded with the observation that, "There is nothing in People v. Coffey, [161 Cal. 433], 119 P. 901 [903, 39 L.R.A.,N.S., 704], in conflict with this view".

In People v. Coffey, supra, the subject of accomplices is considered at length, including the historic background. There the court declares as follows: "* * *, we may derive a satisfactory definition of an accomplice from the language of section 31 of the Penal Code above quoted. Accomplices, then, are 'all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission.' Certainly, since the law has said that all such persons are so tainted with guilt that they may be indicted as principals, it cannot be denied that they are also accomplices. This definition, moreover, runs counter to no authority, since by all, every person of legal responsibility, who knowingly and voluntarily co-operates with or aids or assists or advises or encourages another in the commission of a crime is an accomplice, without regard to the degree of his guilt." And People v. Coffey was decided just about two months before the decision in Re Cooper, supra. With regard to the credibility of an accomplice, People v. Coffey is cited with approval in People v. Dail, August, 1943, 22 Cal.2d 642, 140 P.2d 828. People v. Kraker, 1887, 72 Cal. 459, 14 P. 196, 197, 1 Am.St.Rep. 65, held in effect that a defendant charged with receiving stolen property and the thief who had sold such property to the defendant, were accomplices, observing in that connection that "an accomplice includes all persons who have been concerned in the commission of an offense."

The amendment of section 1111 in 1915 has produced in a number of decisions certain language with reference to accomplices that, unless abrogated, can lead to mischievous if not serious results in the administration of justice. With due respect for the opinions therein expressed, nevertheless they are manifestly the product of a failure to give requisite consideration to the effect of sections 31 and 971, in particular, of the Penal Code. For example, In re Morton, 1918, 179 Cal. 510, 177 P. 453, 454, declared that, "The case of People v. Kraker, 72 Cal. 459, 14 P. 196, 1 Am.St.Rep. 65, upon which appellant relies in support of his proposition, is not in point, for the reason that, among others, it was decided before the amendment of 1915 of section 1111, which added the clause above quoted." Reference to section 1111 in Re Morton is pure dictum. People v. Davis, 210 Cal. 540, 293 P. 32, 39, is another example. There the principal question was whether the testimony of an admitted accomplice was corroborated. But, by way of dictum, the court declared, "that since 1915, under the amendment of that year to section 1111 of the Penal Code providing that an accomplice is one who is liable to the prosecution for the identical offense charged against the defendant on trial, the giver and receiver of a bribe are no longer accomplices one to the other (although that was formerly the law of this state, People v. Coffey, 161 Cal. 433, 119 P. 901, 39 L.R.A.,N.S., 704), inasmuch as the asking or receiving a bribe is made a separate offense from offering or giving a bribe, under section 68 of the Penal Code." There is no reference here to sections 31 and 971 of the Penal Code nor to the other provisions hereinbefore referred to. The sole reason given is that "asking or receiving a bribe is made a separate offense from offering or giving a bribe". But even on this basis such a conclusion is unwarranted for the reasons hereinbefore mentioned. The test as to who are accomplices does not depend upon whether certain conduct constitutes an offense under one or more or different provisions of the Penal Code. Hence the proposition, that the "asking or receiving" and the "offering or giving" of a bribe are separate offenses, is a false premise. Again, in People v. Layman, 117 Cal.App. 476, 4 P.2d 244, 246, the court held that the 1915 amendment to section 1111 were words of "limitation", which in effect repudiated the law so well illustrated and exemplified in People v. Coffey, supra. Referring to the reasoning in People v. Coffey, the court in the Layman case declared that, "The break in this chain of reasoning is made by interpreting the words 'one who is liable to prosecution for the identical offense charged,' as limited to one who is so liable because he is a principal in fact, and as not applying to one who is a principal only by the effect of section 31. So, it has been held, both parties to the crime of incest are accomplices, if adult and competent, because each is in fact a principal." By this process of reasoning, a "principal in fact" is created as a fiction and then distinguished from "a principal only by the effect of section 31." There is no answer to such reasoning but to point out its fallacy. The only "principal" that may properly be considered is the "principal" defined by law.

In order to uphold the reasoning and conclusion of the court with regard to the meaning of section 1111 as declared in People v. Davis, In re Morton and People v. Layman, all supra, sections 31 and 971 must be held to have been repealed by implication when, as a matter of fact and as a matter of law, the 1915 amendment to section 1111, to the extent required by the limited purpose of that section, merely codified the law respecting accomplices as defined in People v. Coffey, supra.

That the question here considered is of extreme importance may be gathered from a consideration of the evidence in People v. Wilson, 54 Cal.App.2d 434, 129 P.2d 149, and People v. Gibson, 33 Cal.App. 459, 166 P. 585. In these last two mentioned cases the defendant was accused of murder which resulted from an abortion. Evidence of the dying declaration of deceased was received and the question arose as to whether deceased was an accomplice and evidence of her dying declaration required corroboration. Under section 1108 in an abortion prosecution the testimony of such a witness, under oath and subject to cross-examination, must be corroborated to support a conviction. In a murder trial, the dying declaration, although made in view of impending death but without either the sanctity or solemnity of an oath, is received in evidence as an exception to the hearsay rule. Subject to such hazards and unsupported by sufficient corroboration would such evidence support a conviction of murder? The Supreme Court withheld determination of this question in denying a hearing in People v. Gibson, supra, 33 Cal.App. at page 463, 166 P. at page 586, with the following comment: "Our order denying a hearing in this court is not to be taken as an intimation of our approval of that portion of the opinion which intimates that the deceased could not be regarded as an accomplice whose testimony required corroboration under the provisions of section 1111 [of the] Penal Code. Nor is our denial to be taken as intimating an opinion one way or the other on the question of the application of section 1108 [of the] Penal Code."

[12] From the foregoing, and from an examination of the record herein, the conclusion is inevitable that Mrs. Thelma Huntley, as contended by appellants, was the accomplice of defendants. In that connection it is argued by appellants, as heretofore noted in substance, that "when there is no conflicting evidence as to a witness being an accomplice, and that fact stands undisputed in the testimony, the court should as a matter of law instruct the jury that such witness is an accomplice", (citing cases). It is also argued that Mrs. Alice Thurman and Mrs. Martha A. Huntley are in the same category; hence the same instruction should have been given as to them.

[13] As heretofore noted, the jury was fully instructed with regard to accomplices. And as to the witness Mrs. Thelma Huntley, upon whom the abortion was performed, the jury was instructed pursuant to section 1108 of the Penal Code. Assuming therefore, but only for the sake of argument, that an instruction specifically identifying such witness as an accomplice was imperative, nevertheless, in the circumstances, no prejudice is shown to have resulted. For all practical purposes the effect of the instructions given by the court was the same.

[14] As to the other two witnesses, the record reveals that they might well have been considered by the jury as innocent of any wrongdoing and regarded as neither aiders nor abettors of the alleged offense. This being true, the evidence is sufficient to support the verdict and judgment.

[15] But, it is appellants' contention that in the absence of a specific instruction that Thelma Huntley was an accomplice the jury might have reasoned that she was a "victim" and not an accomplice; that, while under such misapprehension, even in the light of the instruction that her testimony had to be corroborated, the jury could have believed the testimony of the other two women, whom appellants also contend were accomplices, was sufficient to support a verdict, thus, it is argued, depriving appel-

lants of the benefit of the instruction that one accomplice cannot corroborate another. Such argument is plausible but ineffective. It necessarily is based on the proposition that the jury was incapable of understanding and applying the instructions given, whereas the contrary is the rule.

There are no prejudicial errors shown by the record and for the reasons given the judgment and order appealed from are affirmed.

YORK, P. J., and WHITE, J., concur.

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61 Cal.App.2d 734

EASTERN-COLUMBIA, Inc., v. LOS ANGELES COUNTY et al.

Civ. 14066.

District Court of Appeal, Second District, Division 1, California.

Dec. 14, 1943.

As Amended Dec. 23, 1943.

Rehearing Denied Jan. 4, 1944.

Hearing Denied Feb. 10, 1944.

1. Taxation 🔑319(1)

Though magnitude of tax assessor's task to appraise and assess all of property within limited time between first Monday in March and first Monday in July of same year, affords no justification for illegal tax, it demonstrates necessity for assessor promulgating certain general rules and formulas of percentages of depreciation, construction costs, square foot area charges, and other factors to secure uniformity in valuations as required by law.

2. Evidence 🔑574

The fact that testimony of taxpayer's expert witnesses before board of equalization was in sharp conflict with assessed values of realty determined by assessor did not make it compulsory for board to adopt testimony of taxpayer's witnesses as determinative of market or assessed value of property because, giving such testimony its full weight, it did not establish the assessor's appraisals as a lack of equalization.

3. Taxation 🔑449(1)

The purpose of a county board of equalization is to see that all properties in county are "equalized", that is that assessor appraise all properties in county at a constant level of opinion as to market value and keep all properties in their proper relationship one to the other.

See Words and Phrases, Permanent Edition, for all other definitions of "Equalize".

4. Taxation 🔑535

The mere fact that assessment against particular realty, not discriminatory or inequitable on its face, is in excess of fair value of the property is not in itself evidence of fraud entitling taxpayer to refund.

5. Taxation 🔑535

Mistakes or overvaluations honestly made by assessor in assessing realty are not grounds for refund of a protested tax payment.

6. Taxation 🔑40(8)

There must be conscious failure to exercise fair and impartial judgment or resort to arbitrary methods varying from those employed in assessing other property of like character and situation and resulting in imposition designedly of unequal burden on property to invalidate a tax assessment.

7. Taxation 🔑453, 459, 490

If taxpayer feels aggrieved by assessor's valuation, taxpayer must apply to county court of equalization for relief, and decision of board made after due hearing and within limits of reasonable discretion is conclusive.

8. Taxation 🔑490

Decision of board of equalization is an independent and conclusive judgment, abrogating and taking place of assessor's judgment, and even though there be mistake or error, board's decision will not be set aside by court on review unless there is proof of actual fraud or such arbitrary, unreasonable or grossly oppressive action which willfully transgresses or disregards law and amounts to constructive fraud.

9. Taxation 🔑543(1)

Where tax assessment is not wholly void, taxpayer's action to recover portion of taxes paid as being excessive is a proceeding to review decision of board of equalization in nature of certiorari or review.

10. Taxation 🔑543(8)

In action to recover taxes paid on ground that assessment was excessive, trial court's function was to determine whether correct method of valuing land and improvements was followed, and then to ascertain whether there was substantial evidence before equalization board justifying assessment as made.

11. Taxation 🔑543(8)

In taxpayer's action to recover taxes paid under protest, the question before trial court was not whether through some miscalculation, mistake or oversight, there had been an erroneous valuation, but whether method pursued had resulted in an overcharge so disproportionate as to produce an illegal assessment and tax.

12. Taxation 🔑543(6)

In action by taxpayer to recover tax paid under protest, evidence sustained finding against taxpayer's claim that method of assessment adopted by assessor for improvements was based solely on estimated reproduction cost, new, less physical depreciation for each improvement, and that assessment was, therefore, discriminatory.

13. Taxation 🔑543(6)

In taxpayer's action to recover taxes paid under protest, evidence before board of equalization supported board's finding that system adopted by assessor was justified and that assessment was not excessive.

14. Taxation 🔑494(1)

The county tax assessor and board of equalization exercise judicial functions, and when they have acted within limits of reasonable discretion, their judgment cannot be controlled by court.

15. Taxation 🔑494(1)

The conclusion of assessing officers as to value of property for tax purposes, when honestly arrived at and when not made pursuant to some fixed rule or general system the result of which is necessarily discriminatory and inequitable, is conclusive on courts, however erroneous the conclusion may be.

16. Evidence 🔑512

In taxpayer's action to recover taxes paid under protest, refusal to permit taxpayer's expert witness to testify as to various factors which should have been considered by assessor in estimating value of the property, in order to determine correctness of method used by assessor in light of practices employed in business world in determining market value of realty, was not error.

17. Taxation 🔑543(8)

In taxpayer's action to recover taxes paid under protest on ground of overvaluation, extent of review was limited to ascertaining whether acts of assessor and board of equalization were open to a charge of fraud, and not what some one else, however eminent he might be in field of appraisal work and knowledge of market values, might think was proper method of assessment.

18. Taxation 🔑449(1)

County boards of equalization are creatures of the Constitution and are quasi judicial bodies. Const. art. 13, § 9.

19. Taxation 🔑543(2)

A taxpayer seeking to recover taxes paid under protest on ground of overvaluation must fully and fairly present question of value of his property to board of equalization before he can attack board's determination in court. Const. art. 13, § 9.

20. Taxation 🔑543(2)

A taxpayer seeking to recover taxes paid under protest on ground of overvaluation cannot make a perfunctory showing before board of equalization and reserve his real showing for a subsequent appeal to court. Const. art. 13, § 9.

21. Taxation 🔑543(8)

Where taxpayer's action to recover taxes paid under protest on ground of overassessment was in nature of certiorari or review, sole issue before court was whether decision of board of equalization was based on fraud or its equivalent, and the determination was required to be based on evidence at trial of proceeding before board of equalization.

22. Taxation 🔑543(2)

In action to recover taxes paid board of equalization cannot be held to have committed fraud either actual or constructive on evidence which was never presented to it.

23. Taxation 🔑543(2)

In taxpayer's action to recover taxes paid under protest on ground of overassessment, testimony of expert witness for plaintiff as to various factors which should have been considered by assessor in estimating value of property involved, though material before board of equalization, could not be considered by court where it was not offered in evidence before the board. Const. art. 13, § 9.

24. Constitutional law 🔑284(2)

Where mayor wrote letter to board of equalization regarding method of lowering assessed values of business property and suggesting that city be supplied with list of cases in which it might be interested, to which board replied that it could not comply wth suggestion, but made counter-suggestion that city have representatives at hearing before board and if they desired to be heard as to any particular assessment they might request continuance, record established that taxpayer seeking to recover alleged overpayment made under protest was not denied "due process of law".

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

25. Taxation 🔑543(7)

In taxpayer's action to recover tax paid under protest on ground of overvaluation of property assessed, finding that board of equalization heard and examined evidence introduced by both parties and that in denying application board acted fairly and impartially on all the evidence before them, was justified by record.

◆

Appeal from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Action by Eastern-Columbia, Inc., against County of Los Angeles and City of Los Angeles to obtain a refund on 1940–1941 taxes on certain land and improvements thereon, which taxes had been paid under protest. From a judgment for defendants, plaintiff appeals.

Affirmed.

Holbrook & Tarr, W. Sumner Holbrook, Jr., and Leslie R. Tarr, all of Los Angeles, for appellants.

J. H. O'Connor, County Counsel, S. V. O. Pritchard, Asst. County Counsel, Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., and Louis A. Babior, Deputy City Atty., all of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff has appealed from a judgment in favor of defendants in this action which was instituted to obtain a refund on 1940–1941 taxes levied on two parcels of land and improvements, and which taxes had been paid under protest to the tax collector of Los Angeles County.

There are four causes of action involved. The first and third have to do with what we shall hereinafter refer to as Parcel I; the first cause is concerned with the payment under protest of the first installment of taxes, while the third involves the second installment of such taxes. Similarly, the second and fourth causes of action deal with the payment under protest of the two tax installments on what will hereinafter be designated as Parcel II.

Parcel I.

Parcel I is located at 848 South Hill Street, in the City of Los Angeles. It consists of a five-story, single-occupancy, loft-type, Class A building, originally constructed in 1912 as a two-story and basement structure. In 1921 three stories were added and in 1924 a basement sprinkler system was installed.

We think it may fairly be said that the record contains no contradiction of the fact that for years prior to the first Monday in March, 1941, this structure remained vacant and that on May 16, 1941, plaintiff herein purchased the entire parcel for the sum of $42,500.

The challenged assessment levied against this property was as follows:

Land	$32,680
Improvements	16,230
Total	$48,910

Parcel II.

This property is located at the corner of Ninth and Broadway in downtown Los Angeles. It is improved with a 12-story and basement, single-occupancy building used by plaintiff as its main store building. This structure was erected in 1930 and from time to time was slightly altered. In the assessment which is here in question this property was assessed as follows:

Land	Lot I — $183,700	
	Lot II — 137,880	$321,580
Improvements		420,000
Total		$741,580

Believing itself aggrieved and over-assessed as to both parcels, plaintiff applied to the Board of Supervisors, sitting as the

County Board of Equalization, for a reduction of the assessment, on the ground that the aforesaid assessed valuations placed on plaintiff's property and improvements were grossly excessive and that the taxes were excessive, erroneous, discriminatory and inequitable. After hearing had before the County Board of Equalization, that tribunal denied plaintiff's application.

Thereafter plaintiff commenced this action, alleging that the assessed valuation placed on its land contained in Parcel I, in the sum of $32,680, was excessive and erroneous to the amount of $680; that the assessed valuation placed on the improvements attached to Parcel I, in the sum of $16,230, was excessive and erroneous in the amount of $11,230; that the assessment of Lots I and II in Parcel II, in the sums respectively of $183,700 and $137,880, was excessive and erroneous in the amount of $19,825 on Lot I; $14,255 on Lot II, and as to the improvements attached to Parcel II, the assessment of $420,000 was excessive and erroneous in the amount of $207,500.

Upon this appeal it is conceded by all parties, as was found by the trial court, that the assessor was required to assess both lands and improvements in 1941 at 50 percent of their respective market values.

We are impressed that the issue raised by plaintiff herein may be epitomized by saying that it is based on the claim, which it is contended is supported by the record of the trial, that, notwithstanding good and substantial evidence presented by plaintiff to the Board of Equalization, that board, in disregard of the evidence adduced, did arbitrarily and wilfully deny the application for redress and did accordingly intentionally impose upon plaintiff such an unfair and unequal burden of taxation as to amount to constructive fraud. In support of this claim plaintiff offered before the Board of Equalization evidence to substantiate the charge that the "land" value was too high and that the "improvements" value was grossly overestimated and was arbitrarily fixed by considering only reproduction cost of such improvements, less depreciation, divided by two.

Moreover, it is contended by plaintiff that the evidence adduced at the trial established the fact that at the hearing before the Board of Equalization plaintiff presented the affidavits of two appraisers, possessing impressive qualifications and experience, and which affidavits contained the respective opinions of deponents as to the market value of each of the two parcels in their entirety as well as when divided between the land and improvements. These affidavits also alleged on information and belief that the assessor's valuations on improvements had been erroneously arrived at by taking 50 percent of his computed reproduction cost of such improvements, less physical depreciation of the two buildings, and that such valuations were not arrived at by the assessor in accordance with the accepted principles used in determining market value of improved parcels. Before the Board of Equalization two appraisers, who made the aforesaid affidavits, testified as to the market value of both land and improvements included in both parcels, as did J. M. Sieroty, Vice President and General Manager of plaintiff company. Ben McElroy, an official of plaintiff corporation, also testified in its behalf.

On the basis that the assessed value of both land and improvements should be at 50 percent of their respective market values, the following is a tabulation of the assessment value of both parcels as reflected by the testimony of the first three of the just mentioned witnesses.

Parcel I.

Assessed by Assessor........	$ 48,910
Assessed value as testified to by Reese	37,500
Assessed value as testified to by Frisbie	38,750
Assessed value as testified to by Sieroty	42,500 (purchase price)

Parcel II.

Assessed by Assessor........	$741,580
Assessed value as testified to by Reese	537,500
Assessed value as testified to by Frisbie	512,500
Assessed value as testified to by Sieroty	500,000

Plaintiff also offered in evidence at the hearing before the Board of Equalization a diagram comparing the assessed value of its property at the corner of Ninth and Broadway (Parcel II) with the assessed value of the next adjoining "inside" lots. There was also introduced in evidence certain records of the assessor's office commonly referred to as "the building slips" on the property in question. With reference to the attack made upon the assessor's method of computing the assessed valuation and which charges were made "on information and belief", it should be noted that when the witness Mr. Frisbie, who had made one of the affidavits, was asked on cross-examination whether he knew of his own knowledge what method the assessor had used in making the assessments here involved, he replied, "No, I do not. I had no opportunity to study the forms"; while Mr. Reese, who made the other affidavit, when asked the same question, replied, "Not on these particular properties, no, sir". The gist of the attack made upon the assessor's method was that the same was arrived at on the basis of reproduction cost, less depreciation, as set out on "building slips", without consideration of any other matters and without taking into consideration any other factors that go to make up the value of improvements.

At the hearing before the Board of Equalization the assessor offered in affidavit form the testimony of Edward K. Potter, employed in the office of the assessor of Los Angeles County since 1916 and who has since 1922 been in charge of the appraisals of buildings. With reference to the assessment here involved, his testimony was that the same was arrived at by pursuing the following procedure, "We noted the location of the building, that is, whether proper, marginal or poor, we noted its functional plan, whether modern, average, fair or poor, its architectural attractiveness, whether good, fair or poor, its condition, whether excellent, average, fair or poor, its conformity, whether proper or improper. We had before us an appraisal made by C. C. Brothers, who is an expert appraiser employed by the Los Angeles County Surveyor's office, as to the market value of the property taken as a whole, including both land and improvements, and we considered that appraisal as one of the elements to be considered when we made up the assessment upon the particular property here in question. The land department of the Assessor's office made an appraisal of the land here in question and we had before us the appraisal which that department made of the land and considered it as one of the elements to be considered in making up the assessment with reference to the building. We employed the figure placed upon the land by the land department of the Assessor's office in order that we might consider the improvements as residual. We made a study of the cost of constructing buildings and other improvements and we computed what in our opinion was the replacement cost of the improvements upon this property new, and we then made a computation as to what the replacement cost of the improvements here in question were new less depreciation. This computation was before us in making up the assessment upon the improvements here in question and we considered the matter of replacement cost less depreciation as but one of the elements to be considered in fixing the value which we did fix upon this property". The affidavit of this witness further shows that the assessor had made a detailed study of the income of 270 large office and department store buildings, including plaintiff's building on Parcel II, and the assessment made herein took that study into account.

With reference to Parcel I, which is the Hill Street property, there was offered in evidence before the Board of Equalization the statement of J. W. Hartman, Assistant Assessor of Los Angeles County, who, after stating his qualifications which included the fact that he had been in the employ of the assessor's office since September, 1924, went on to state that the Los Angeles County assessor's office appraises annually 1,250,000 parcels of land, 800,000 items of personalty, with 54,000 new structures. With reference to the "method" adopted by the assessor, Mr. Hartman stated that one factor shown on the "building slips" is the square footage; that the field appraiser establishes a unit-value factor and makes a mathematical calculation upon the building slip, multiplying the square footage by the unit-value factor; that the "building slip" does not and cannot show all of the factors taken into consideration in determining the unit-value factor. He further stated that the total figure shown on the slips does not represent replacement or reproduction cost; that the figure represents the fair value of the structure. He further stated that the appraisers consider (1) the site and the surrounding territory, (2) the assessed value of "parcels", (3) construction costs, (4) sales and listings, (5) income and kindred factors. Mr. Hartman then stated that the preliminary appraisal thus made is then revised and co-ordinated by the supervisors in the department of the assessor to equalize the results all the way across the face of the county.

[1-11] While the magnitude of the assessor's task to appraise and assess all of this property, within the limited time

elapsing between the first Monday in March and the first Monday in July of the same year, affords no justification for an illegal tax, it does demonstrate the necessity for him to promulgate certain general rules and formulas of percentages of depreciation, construction costs, square foot area charges and other factors in order to secure uniformity in valuations as required by law. Indeed, his right so to do, as well as "methods" adopted similar to the ones used in the present case, received the imprimatur of the Supreme Court of this State in the case of Rittersbacher v. Board of Supervisors, 220 Cal. 535, 543, 32 P.2d 135. While the testimony of expert witnesses produced by plaintiff before the Board of Equalization was in sharp conflict with the assessed value arrived at by the assessor, that fact does not make it compulsory for the board to adopt the testimony of plaintiff's witnesses as determinative of the market value or assessment value of the property in question. This for the reason that giving such testimony its full weight, it does not establish the assessor's appraisals as a "lack of equalization". The purpose of the Board of Equalization is to see that all properties in the county are "equalized"; that is to say that the assessor appraise all properties in the county at a constant level of opinion as to market value and keep all properties in their proper relationship one to the other. It therefore follows that the mere fact that an assessment against particular property, not discriminatory or inequitable on its face, is in excess of the fair value of the property, is not in itself evidence of fraud. In accord with what we have just said, there is contained in Hammond Lumber Company v. County of Los Angeles, 104 Cal.App. 235, at page 240, 285 P. 896, at page 898, the following language, "Hence mistakes or overvaluations honestly made are not grounds for refund of a protested charge." There must be a conscious failure to exercise a fair and impartial judgment, or a resort to arbitrary methods, different from those employed in assessing other property of like character and situation; thereby resulting in designedly imposing an unequal burden on the property of the complainant, before an assessment will be invalidated. Hammond Lumber Co. v. County of Los Angeles, supra, 104 Cal. App. at page 240, 285 P. 896, and numerous cases therein cited. Where, as in the instant case, the taxpayer feels he has just cause for complaint, the law has set up a tribunal composed of the Board of Supervisors, sitting as a Board of Equalization, to determine the facts. When such board, after due hearing, and within the limits of reasonable discretion, has made its findings on the facts such decision is final and conclusive. Before the decision of the Board, constituting as it does an independent and conclusive judgment abrogating and taking the place of the judgment of the assessor, will be set aside by the courts on review, even though there be error or mistake, there must be proof of actual fraud, or such arbitrary, unreasonable or grossly oppressive action, which wilfully transgresses or disregards law, and amounts to constructive fraud. Hammond Lumber Co., v. County of Los Angeles, supra, 104 Cal.App. at page 241, 285 P. 896. Where, as here, the assessment is not wholly void, an action such as the present one, though partaking of an action to recover a tax paid under protest is in fact, and properly so, a proceeding to review the decision of the Board of Equalization. In such a proceeding the function of the trial court therefore was to determine whether a correct method of valuing the land and improvements was followed, and then, to ascertain whether there was substantial evidence before the Equalization Board to justify the assessment as made. Hammond Lumber Co., v. County of Los Angeles, supra, 104 Cal.App. at pages 241 and 242, 285 P. 896. In other words, as was said in Hammond Lumber Co. v. County of Los Angeles, supra, 104 Cal.App. at page 243, 285 P. at page 900: "The question before the trial court was not whether, through some miscalculation, mistake, or oversight, there had been an erroneous valuation, but whether the method pursued had resulted in an overcharge so disproportionate and exorbitant as to produce an illegal assessment and tax."

[12, 13] From what we have heretofore said, it is manifest that there was substantial evidence before the trial court to support its finding against plaintiff upon the latter's allegations and claims that the system adopted by the assessor for the assessment of improvements was "based solely upon the estimated reproduction cost new, less physical depreciation, of each particular improvement", and was therefore a "discriminatory, erroneous and illegal system". We are also persuaded from a reading of the record that it must be held that before the Board of Equalization there was evidence of sufficient substantiality to support the finding that under the system adopted by the assessor he was justified in making the assessment he did, which assessment was upheld by the board.

[14-16] At the trial plaintiff offered the testimony of Thurston Ross as an expert witness. This testimony was proffered on the theory that it would "assist the court in determining the correctness of the methods used by the assessor, in the light of the practices employed in the business world in determining market value of real estate". The testimony in question was rejected by the court. In so doing, we are convinced, the court committed no error. Both the assessor and the Board of Equalization exercise judicial functions, and when they have acted within the limits of reasonable discretion, their judgment cannot be controlled by the courts. It is only when the conclusions of assessing officers, as to the value of property for purposes of taxation, are not honestly arrived at, or are made in pursuance of some fixed rule or general system, the result of which is necessarily discriminatory and inequitable, that the courts will interfere. And this is true, however erroneous the conclusions of these officers may be. Birch v. County of Orange, 59 Cal.App. 133, 136, 210 P. 57. Market values after all become to a very large extent a matter of opinion. And in the just cited case, which is strikingly similar to the one at bar, the court said at page 139 of 59 Cal.App., at page 59 of 210 P.: "Having determined that the assessor did not adopt an unauthorized method in arriving at the value of plaintiffs' property for assessment purposes, it at once is apparent that the court committed no error in sustaining objection to questions asked of a witness by whom it was proposed to show the various factors that should be considered in estimating the value of oil-producing property." By the same token, the trial court herein was not in error when it refused to receive the testimony of the expert witness, Thurston Ross, through whom it was proposed to show what were the various factors which should have been considered by the assessor in estimating the value of plaintiff's property.

[17] The extent of the court's review was limited to ascertaining whether the acts of the assessor and the Board of Equalization are open to the charge of fraud, actual or constructive. The question is not what someone else, however eminent he may be in the field of appraisal work and knowledge of market values, may think is the proper method, but involves simply the determination as to whether the method used by the assessor was legitimate and fair, and was a reasonable method to use in arriving at the value of the property in question.

[18-23] County Boards of Equalization are creatures of the Constitution itself (Article XIII, section 9, California State Constitution), and are quasi judicial bodies. Therefore, the taxpayer must fully and fairly present the question of the value of his property to them before he is entitled to attack their determination in court. Were the rule otherwise, the taxpayer could make a perfunctory showing before the board and reserve his real showing for a subsequent appeal to the courts. This is not permissible. Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473, 284 P. 1072. As we have pointed out, a proceeding such as the instant one, savors of certiorari or review. The sole issue before the court was, therefore, whether the decision of the Board of Equalization was based on fraud or the equivalent of fraud. And that determination must be based upon the evidence at the trial of the proceeding had before the board. The Board of Equalization cannot be held to have committed fraud, either actual or constructive, upon evidence which was never presented to it. Wild Goose Country Club v. County of Butte, 60 Cal.App. 339, 212 P. 711. While the expert testimony of Mr. Ross would have been pertinent and material before the Board of Equalization, not having been there offered it cannot be received in a later judicial review, where the conduct of the board must be determined from the evidence presented to it.

[24] It is next contended by appellant that it was denied due process of law at the hearing before the Board of Equalization. In support of such claim appellant charges that the board permitted officials of the city of Los Angeles to communicate with it twice while sitting as such board, all of which assertedly took place out of the presence of appellant taxpayer and its counsel; without their knowledge and without opportunity of cross-examination or refutation. In this regard the record discloses that in the spring of 1941 a meeting was held which was attended by a group of city and

county officials. It appears that at such meeting there was a discussion of varied matters in which the city and county were jointly interested and the city representatives were interested in the question of whether the total assessed valuation of property in the city or county was to be increased or decreased. The discussion seems to have involved only the interest of the city in being heard if the assessment value of business property was to be lowered. Thereafter and on July 3, 1941, the mayor of the city of Los Angeles addressed a letter to the Board of Supervisors regarding the method which, in his opinion, should be pursued in the presentation of evidence which the city might care to introduce before the Board of Equalization. It was suggested that the city be supplied with a list of cases in which it might be interested so that the city officials might have an opportunity for the presentation of evidence. This letter was read to the Board of Supervisors at a meeting held July 7, 1941. Obviously, the trial court concluded that the suggestion of the city that it be allowed opportunity to present evidence was recognized by the Board of Supervisors as a reasonable one and the members of the board, together with the county assessor, engaged in a discussion and made comments thereon. It is noteworthy however, that Mr. John R. Quinn, Los Angeles County Assessor, pointed out that after the property owner's case had been concluded it would not be fair, nor legal, nor proper to notify the city and then have its representatives introduce such evidence as it might desire. Commenting favorably upon this statement of the assessor, Supervisor McDonough moved that the county counsel reply to the mayor's letter advising him that "the evidence, if any, should be included in the case at the time that the board is hearing it and then take the whole thing under advisement". By vote of the Board of Supervisors the county counsel was authorized and did reply to the letter of the mayor. The gist of such reply so far as here pertinent was that "By reason of the fact that the Board of Equalization occupies a quasi-judicial position before whom the property owner is entitled to be confronted with the evidence against him and to offer evidence in rebuttal, literal compliance with that part of your request outlined in the last two paragraphs of your letter is practically impossible". The county counsel suggested that the city have a representative present at hearings before the Board of Equalization and should they desire to be heard in connection with any particular assessment they might request a continuance to a future date, of which date the property owner would have notice, an opportunity to be present, and to be further heard in rebuttal. Thereafter, in response to a second communication from the mayor to the Board of Supervisors, Supervisor Hauge made this statement, "Mr. Chairman, I think that is all beside the question as a Board of Equalization. I don't believe that this board can possibly yield and do it correctly to any outside influence as to its judgment pertaining to equalization. In the main I approve of the letter". Following further and brief discussion it was moved and voted that the communication of the mayor be received and filed.

Under all the circumstances as presented by the record, we are persuaded that the trial court was justified in its finding that the entire episode or series of episodes relied upon by appellant had no effect whatsoever upon the outcome of appellant's case before the Board of Equalization. No prejudice to appellant having resulted, a reversal of the judgment herein is neither authorized nor justifiable.

[25] Appellant's contention that members of the Board of Equalization did not "so much as glance" at certain proffered evidence before it, is equally without merit. Three members of the Board of Equalization were called by appellant at the trial and cross-examined at length in this regard. The court heard this evidence which justified its finding that "said members of the Board of Equalization heard and examined the evidence which was introduced by both parties, both that which was oral and that which was introduced by way of affidavit and exhibit, and in denying said application said Board of Equalization acted fairly and impartially upon their consideration and determination of all the evidence before them".

For the foregoing reasons the judgment is affirmed.

YORK, P. J., and DORAN, J., concur.

Hearing denied; SHENK, EDMONDS, and SCHAUER, JJ., dissenting.

61 Cal.App.2d 780

LADY v. WORTHINGHAM.

Civ. 13814.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1943.

Hearing Denied Feb. 10, 1944.

1. Appeal and error 🔑1218

In action by attorney on note where all facts presented by attorney on motion for an order recalling remittitur on ground that decision was made inadvertently or on mistake of facts were before appellate court when original appeal was determined with exception of fact relative to investigation of attorney's conduct by state bar, the motion would be denied.

2. Courts 🔑89

The decisions and judgments of District Court of Appeal and the Supreme Court are not subject to review by the state bar or a committee thereof.

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Judge.

On motion of William Ellis Lady for an order recalling the remittitur.

Motion denied.

Prior opinion, 57 Cal.App.2d 1020, 135 P.2d 205.

See, also, 55 Cal.App.2d 396, 130 P.2d 435.

William Ellis Lady and Webster Hazlehurst, both of Los Angeles, for plaintiff and appellant.

Howe & Finch, of Palo Alto, and Horowitz & McCloskey, of Los Angeles, for defendant and respondent.

McCOMB, Justice.

This is a motion by appellant for an order recalling the remittitur issued herein on the ground that the decision of this court affirming the judgment of the Superior Court was made (1) inadvertently, and (2) under a mistake as to the facts of the case.

The undisputed facts are:

On March 8, 1943, we affirmed a judgment of the Superior Court from which appellant had appealed to this court (Lady v. Worthingham, 57 Cal.App.2d 557, 135 P.2d 205). An application for a rehearing was not filed by appellant with us. However, on April 15, 1943, appellant filed a petition in the Supreme Court for a hearing, which petition was denied May 6, 1943. On May 8, 1943, remittitur issued from this court to the Superior Court.

On June 8, 1943, appellant paid to respondent her costs incurred on appeal and respondent delivered to appellant a satisfaction of judgment for said costs. June 11, 1943, a satisfaction of judgment, executed personally by appellant, was filed in the Superior Court. June 24, 1943, the State Bar of California after investigating the facts surrounding the case of Lady v. Worthingham, supra, wrote appellant a letter[*] stating that a formal proceeding would not be instituted against him by the State Bar.

November 1, 1943, appellant filed with the Supreme Court a document entitled "Further petition of appellant for hearing after decision by the District Court of Appeal, Second Appellate District, Division Two, and after hearing denied by Supreme Court." This petition was denied by the Supreme Court November 29, 1943.

On November 18, 1943, the present motion was filed with this court.

The affidavit supporting the present motion contained substantially the same facts as those alleged in the petition filed November 1, 1943, with the Supreme Court.

The only facts appearing on the present motion which did not appear in appellant's original petition for a hearing in the Supreme Court, filed April 15, 1943, are that the State Bar has investigated appellant's conduct relative to the above entitled case, and has concluded not to institute a formal proceeding against him.

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[*] The letter mentioned read as follows:

"William Ellis Lady, Esquire
820 Hollingsworth Building
Los Angeles 14, California

Dear Mr. Lady:

The matter in connection with a State Bar investigation in which you were requested to appear, came regularly before this committee at its meeting on June 22, 1943. The committee has carefully considered the facts brought to its attention, and has concluded that no formal proceedings should be instituted by the State Bar.

Very truly yours,
Local Administrative Committee
No. Two, for Los Angeles County
By Thelma R. Anderson, Secretary."

This is the sole question necessary for us to determine.

Was this court's judgment predicated upon (1) inadvertence or (2) a mistake of fact?

[1] This question must be answered in the negative. All of the facts presented by appellant on this motion were before us when the original appeal was determined by this court with the exception of the facts relative to the investigation of appellant's conduct by the State Bar.

The facts pertaining to the investigation before the State Bar do not in any way bear upon the original decision in the instant case for the reason that:

First: The only question decided by the State Bar was that a "formal proceeding" should not be instituted against appellant. It is to be noted that there is nothing in the record to indicate that the State Bar, or an investigating committee thereof, reached a different conclusion upon the facts than the conclusion reached by the trial court and affirmed by us;

[2] Second: So far as the decisions of this court and the Supreme Court are concerned, it is utterly immaterial what conclusion the State Bar, or any investigating committee thereof, may have reached relative to a judgment of this court or of the Supreme Court. The decisions and judgments of the District Court of Appeal and the Supreme Court are not subject to review by the State Bar or a committee thereof.

For the foregoing reasons the motion is denied.

MOORE, P. J., and W. J. WOOD, J. concur.

Hearing denied; CARTER, J., dissenting; SCHAUER, J., not participating.

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23 Cal.2d 324

WEBB v. PILLSBURY et al.

L. A. 18454.

Supreme Court of California.

Dec. 16, 1943.

1. Assignments 🔑22

Assignability of things in action is now the rule, nonassignability, the exception, and the exception is confined to wrongs done to the person, reputation, or feelings of the injured party.

2. Executors and administrators 🔑129(3)

The primary object of statute requiring administrator to bring an action for the recovery of property conveyed by deceased in fraud of creditors is to enable the administrator, as trustee, to reduce the asset to possession and administer it for the benefit of creditors under direction of probate court. Probate Code, § 579.

3. Executors and administrators 🔑171

The purpose of statute requiring administrator to bring action to recover property conveyed by deceased in fraud of creditors is not defeated by administrator's voluntary assignment of his statutory rights to the sole creditor of the estate with the approval of probate court. Probate Code, § 579.

4. Executors and administrators 🔑171

An assignment by administrator with approval of the court is valid although not specifically authorized by statute, since the rule that administration proceedings are purely statutory does not mean that the authority of those charged with conduct of such proceeds is regulated solely by statute.

5. Executors and administrators 🔑171

An administrator of an insolvent estate may assign his statutory right to set aside fraudulent conveyances of his intestate, if authorized to do so by the probate court where no harm can result to creditors. Probate Code, § 579.

6. Executors and administrators 🔑129(3)

Where deceased contracted to pay plaintiff a fixed amount monthly for life and a lump sum upon deceased's death, that the lump sum was declared to be a direct charge upon deceased's estate did not deprive plaintiff of her right as a "creditor" of the estate, for whose benefit the administrator was required to bring an action to recover property conveyed by deceased in fraud of creditors. Probate Code, § 579.

See Words and Phrases, Permanent Edition, for all other definitions of "Creditor".

7. Executors and administrators 🔑171

Where plaintiff's claim against estate of deceased was compromised by a cash payment and an assignment of administrator's right of action to recover property conveyed by deceased in fraud of creditors, plaintiff's right to maintain action could not be defeated by asserting that the existence of allowed claims was a prerequisite thereto and that no claims were allowed. Probate Code, § 579.

8. Appeal and error 🔑843(2)

Where contract between plaintiff and deceased provided for monthly payments from deceased to plaintiff and a lump sum upon death of deceased, and as amended contract contained no provision concerning marriage, it was not necessary to determine whether contract as originally drawn was void as being in restraint of marriage.

9. Executors and administrators 🔑129(3)

A complaint, in action to recover property conveyed by deceased in fraud of creditors, alleging a contract by which deceased agreed to pay plaintiff a certain amount each month and a lump sum upon his death, was not defective on ground that no consideration was given by plaintiff for the agreement, where the modified agreement recited the consideration and it was alleged that the original agreement was lost from which it might be implied that it was in writing and therefore presumed to have been made for a consideration. Civ.Code, § 1614; Probate Code, § 579.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Letitia Dorothy Webb against A. C. Pillsbury and another to set aside certain conveyances as in fraud of grantor's creditor and to quiet title. From a judgment of dismissal, plaintiff appeals.

Reversed.

Prior opinion 133 P.2d 43.

Frank P. Doherty and Haight, Trippet & Syvertson, all of Los Angeles, for appellant.

Chas. W. Fourl and George I. Devor, both of Los Angeles, for respondent.

GIBSON, Chief Justice.

Plaintiff appeals from a judgment of dismissal entered after demurrer to her complaint in an action to set aside fraudulent conveyances and to quiet title to real property was sustained without leave to amend.

It is alleged that in 1924 plaintiff entered into a contract with Franklyn L. Hutton whereby Hutton agreed to pay plaintiff $1,000 a month for the period of her natural life and the sum of $100,000, in lieu of monthly payments, if he should predecease her. The agreement provided that in the event plaintiff married before Hutton's death, the monthly payments and the sum payable on Hutton's death were to be reduced to $500 and $50,000 respectively. Thereafter plaintiff was married and divorced. In 1929 the parties entered into an agreement modifying the contract of 1924. Under the agreement as modified Hutton promised to pay plaintiff during her lifetime the sum of $1,000 a month and agreed that he would provide by will or otherwise for the payment of the sum of $100,000 in lieu of monthly payments, in the event he predeceased her. In consideration therefor plaintiff conveyed certain described real property to Hutton. The agreement further provided that if Hutton failed to make provision for the payment of the sum of $100,000, "the said sum * * * is hereby made and declared to be a direct charge against his estate."

On April 30, 1940 (approximately seven months before his death), Hutton conveyed certain real property in trust to defendant bank. The trust instrument provided that a designated parcel of the property was to be conveyed forthwith to defendant Pillsbury as compensation for services previously rendered and that the remaining property was to be held in trust for Hutton and Pillsbury under a real estate development and subdivision plan. Provision also was made therein for the transfer of the corpus of the trust to the survivor upon the death of either beneficiary. It is alleged that these conveyances were made without a fair consideration at a time when the fair salable value of the trustor's assets was less than the amount required to pay his probable liability on existing debts as they became absolute and matured. Hutton was insolvent at the date of his death on December 5, 1940, and he made no provision by will or otherwise for the payment to plaintiff of the agreed sum. Plaintiff filed a timely creditor's claim in the probate proceeding. No other creditor filed a claim against the estate and the time within which claims could be filed expired on October 16, 1941. Plaintiff requested the administrator to prosecute an action against defendants to set aside the conveyances of April 30th as in fraud of creditors, but her request was refused. Thereafter, however, plaintiff's claim was compromised by the administrator with the approval of the probate court. Under the compromise, plaintiff received the sum of $23,500, a conveyance of all right, title and interest of the estate and of the administrator in the controverted real property, and an assignment of any and all causes of action held by the estate and the administrator to recover the property from defendants.

The complaint alleges three separate causes of action. In the first count plaintiff sues as assignee of the administrator's statutory right to set aside conveyances made by the decedent in fraud of creditors; in the second count she claims ownership of the real property as grantee of the estate and seeks to quiet title thereto; and in the third count she claims to be a creditor of the estate and as such asserts a right to set aside the alleged fraudulent conveyances.

The principal question on this appeal is whether an administrator may, with the approval of the probate court, assign to a creditor his statutory right to set aside the fraudulent conveyances of his intestate. Section 579 of the Probate Code provides that "If the decedent, in his lifetime, * * * made a conveyance that by law is void as against creditors * * * and there is a deficiency of assets in the hands of the executor or administrator, the latter, on application of any creditor, must commence * * * an action for the recovery of the same for the benefit of the creditors."

[1] The statute neither expressly provides for nor prohibits assignment of the right of action. It is, however, established that "assignability of things [in action] is now the rule; nonassignability, the exception; and this exception is confined to wrongs done to the person, the reputation, or the feelings of the injured party. * * *" 3 Cal.Jur. 242, sec. 5; see, also, Jackson v. Deauville Holding Co., 219 Cal. 498, 500, 27 P.2d 643; Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 464, 274 P. 959. It has been held, accordingly, that a creditor may assign a right of action to set aside a fraudulent conveyance. Emmons v. Barton, 109 Cal. 662, 667, 42 P. 303; Brandon v. Faria, 99 Cal.App. 594, 598, 279 P. 192; see, also, cases cited in 27 C.J. 478; [37 C.J.S., Fraudulent Conveyances, § 77]. And although there is authority to the contrary, it has been held that a trustee in bankruptcy whose position is analogous to that of the administrator of an insolvent estate, may assign his statutory right to set aside conveyances made by the bankrupt in fraud of creditors. 1 Glenn, Fraudulent Conveyances and Preferences, 249, sec. 132; In re Downing, D.C., 192 F. 683, affirmed in 2 Cir., 201 F. 93, 119 C.C.A. 431; Strong v. Durdle, 94 Wash. 157, 162 P. 6; see In re Rosen, D. C., 15 F.Supp. 516.

[2, 3] Section 579 of the Probate Code recognizes that the right to recover property conveyed by a decedent in fraud of creditors is an asset of his insolvent estate and that the executor or administrator is a trustee thereof for the benefit of creditors. The primary object of the statute is to enable the trustee to reduce that asset to possession and administer it for the benefit of creditors under the direction and supervision of the probate court. Hills v. Sherwood, 48 Cal. 386, 393. It has been held, however, that a creditor may not maintain an action to set aside a fraudulent conveyance, at least until the creditor has exhausted all means of procuring such an action to be brought by the executor or administrator. Emmons v. Barton, 109 Cal. 662, 667, 668, 42 P. 303; Beswick v. Churchill Co., 22 Cal.App. 404, 134 P. 722; Beswick v. Dorris, C.C., 174 F. 502; Putney v. Fletcher, 148 Mass. 247, 19 N.E. 370. Thus the statute has as a secondary object the prevention of complications that would result if several creditors were to pursue the remedy and seek to apply the property to their individual claims. In Beswick v. Dorris, C.C., 174 F. 502, 508, it was said: "* * * the court having the estate in its keeping should be given opportunity to say whether the action shall be brought by the representative of that estate before the creditor is at liberty to pursue an alternative remedy." The purpose of the statute is not defeated, where, as here, the administrator voluntarily assigns his statutory right to the sole creditor with the approval of the probate court.

Defendants rely upon an early Michigan case in support of their contention that the right of an administrator to set aside the fraudulent conveyances of his intestate may not be assigned. Morris v. Morris, 5 Mich. 171. The court there advanced two reasons for holding the right nonassignable under a statute similar to section 579: (1) A court of equity will not countenance the assignment of a cause of action for a tort, or to set aside a conveyance, or other act, as fraudulent. (2) Unless the fruits of litigation come into the hands of the administrator, the creditors will not obtain an equal distribution. The first reason does not merit consideration in a jurisdiction which recognizes the assignability of causes of action sounding in fraud. Jackson v. Deauville Holding Co., 219 Cal. 498, 500, 27 P.2d 643; Wikstrom v. Yolo Fliers Club, 206 Cal. 461, 464, 274 P. 959. The second reason is not applicable where, as here, the assignee is the sole creditor of the estate and the only person prejudiced by the challenged conveyance.

[4] Defendants also argue that since an administrator is the creature of statute, he cannot make an assignment unless specifically authorized by statute. As previously noted, however, the probate court authorized the assignment and the administrator derived his power to act from the order of the court. Los Angeles County

v. Morrison, 15 Cal.2d 368, 371, 101 P.2d 470, 129 A.L.R. 443. The rule that administration proceedings are purely statutory does not mean that the authority of those charged with the conduct of such proceedings is regulated solely by statute. Maddock v. Russell, 109 Cal. 417, 422, 42 P. 139.

[5] We conclude, therefore, that an administrator of an insolvent estate may assign his statutory right to set aside fraudulent conveyances of his intestate if authorized to do so by the probate court where no possible harm can result to creditors.

[6, 7] It is next contended that plaintiff was never a creditor within the meaning of section 579 of the Probate Code, but merely held an equitable lien against the estate. There is no merit in this contention. The contract created an obligation to pay plaintiff designated sums on certain conditions and the fact that the sum of $100,000 was declared to be a direct charge upon the estate did not deprive plaintiff of her rights as a creditor. It is further asserted that there were no claims allowed in the estate and that the existence of allowed claims is a prerequisite to the right of an administrator to set aside conveyances under section 579. 11b Cal.Jur. 404, sec. 976. The complete answer to this contention is that the plaintiff's claim was not rejected but was compromised by the cash payment and the assignment, which amounted to an allowance of the claim.

[8, 9] Defendants argue that the complaint is defective for the reason that it shows on its face that the contract which is the basis of plaintiff's claim is against public policy and void as being in restraint of marriage. The second agreement contains no conditions concerning marriage, and since plaintiff's claim is founded on the agreement as modified it is unnecessary to consider the effect of the original provisions regarding marriage. It is also claimed that the complaint is defective in that it does not appear that there was any consideration given by plaintiff for the agreement. The second, or modification agreement, attached to the complaint as an exhibit, expressly recites the consideration given by plaintiff. There is no specific allegation in the complaint that consideration was given for the original contract. It is alleged, however, that the contract was lost, from which it may be implied that it was in writing, in which event it would carry the presumption that it was made for a consideration. Civ.Code, § 1614. Should it develop in the trial court that plaintiff's claim is not based solely upon the modification agreement but is dependent in part upon the original contract, any ambiguity or uncertainty as to whether the first contract was in writing can be clarified by amendment.

The judgment is reversed.

SHENK, CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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23 Cal.2d 303

LINDELL CO. v. BOARD OF PERMIT APPEALS OF CITY AND COUNTY OF SAN FRANCISCO et al.

S. F. 16947.

Supreme Court of California.

Dec. 15, 1943.

Rehearing Denied Jan. 13, 1944.

1. Courts 🔑207(4)

Mandamus proceeding to compel San Francisco Board of Permit Appeals to cancel its action overruling issuance of 31 building permits and reinstate such permits presented matters of such public importance by reason of wartime emergency as to warrant assumption of original jurisdiction by Supreme Court in its discretion to obviate delay in final disposition of proceeding. Rules of the Supreme Court, rule 56.

2. Mandamus 🔑72

Mandate is not available to control the exercise of official discretion or judgment, or alter or review action taken in the proper exercise of such discretion or judgment.

3. Municipal corporations 🔑57

San Francisco as a charter city which has brought itself within the condition of the municipal affairs amendment to California Constitution has the power of municipal home rule with respect to all matters of local or internal concern. Const. art. 11, §§ 6, 8.

4. Municipal corporations ⚷621

The issuance of permits for erection of buildings within its territorial limits is a "municipal affair" over which San Francisco, as a city having the power of municipal home rule with respect to matters of local or internal concern, has supreme control. Const. art. 11, §§ 6, 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Affair".

5. Municipal corporations ⚷621

The municipal department having power to grant permits sought under authority of the 1932 San Francisco charter as amended is vested by ordinance with a sound discretion generally in granting, denying, revoking, or refusing to revoke a permit. St.1937, p. 2803, § 24.

6. Municipal corporations ⚷621

San Francisco ordinances providing that on account of wartime housing emergency administrative officials "may" waive certain building regulations, and regulations applying to the use and occupancy of buildings merely sanction the authority of granting power to issue permits where compliance with building regulations is precluded by wartime restrictions and do not affect the sound discretion vested in granting power to issue or deny a permit. St.1937, p. 2803, § 24.

See Words and Phrases, Permanent Edition, for all other definitions of "May".

7. Municipal corporations ⚷621

The San Francisco Board of Permit Appeals is an administrative tribunal empowered to exercise full discretion in passing upon matters submitted to it in its appellate jurisdiction for decision. St.1931, p. 3001, § 39.

8. Municipal corporations ⚷621

San Francisco Board of Permit Appeals was not restricted in its consideration of appeal by interested parties from action of Central Permit Bureau in issuing building permits for erection of a defense housing project in a first class residential district, particularly where appeal presented disputed issues of fact as to how proposed project would affect the public health, safety or general welfare. St.1937, p. 2803, § 24; St.1931, p. 3001, § 39.

9. Municipal corporations ⚷621

On appeal by interested parties from action of Central Permit Bureau in issuing building permits, San Francisco Board of Permit Appeals was not limited to a determination of whether ordinances regulating permit procedure had been complied with but had jurisdiction to hear the entire controversy, draw its own conclusions from the conflicting evidence before it and, in the exercise of an independent judgment in the matter, affirm or overrule Central Permit Bureau's action. St.1937, p. 2803, § 24; St. 1931, p. 3001, § 39.

10. Mandamus ⚷72

Though courts may compel a public administrative agency vested with discretionary power to act, ordinarily mandamus will not lie to compel such agency to act in any particular manner so as to substitute court's discretion for discretion vested in administrative agency.

11. Mandamus ⚷87
Municipal corporations ⚷621

Rehearing by San Francisco Board of Permit Appeals of an appeal from action of Central Permit Bureau in issuing building permits did not constitute an abuse of discretion subject to correction in mandamus proceeding but represented merely exercise of a continuing jurisdiction incident to final determination of the case in pursuance of ordinance expressly authorizing rehearings. St.1931, p. 3001, § 39.

12. Municipal corporations ⚷621

Ordinance expressly authorizing rehearings by San Francisco Board of Permit Appeals is wholly consistent with the broad discretion conferred by San Francisco charter upon the board in passing upon a case on appeal. St.1931, p. 3001, § 39.

13. Municipal corporations ⚷621

Application to San Francisco Board of Permit Appeals for rehearing of appeal from Central Permit Bureau setting out newly discovered evidence as ground for rehearing substantially complied with rule of procedure for obtaining rehearing adopted by the board and afforded sufficient basis for granting rehearing, though application failed to show why newly discovered evidence was not produced at original hearing. St.1931, p. 3001, § 39.

14. Municipal corporations ⚷621

The broad power to grant rehearings expressly granted to San Francisco Board of Permit Appeals by charter provision and related ordinances without prescribing any limitation as to grounds therefor should not be interpreted with such refinement so as to hamper just disposition of cases by the board. St.1931, p. 3001, § 39.

15. Courts ⚿85(2)

A rule of procedure adopted for guidance and convenience of both administrative tribunal and litigants and designed to facilitate the dispatch of business by such tribunal must receive an interpretation commensurate with its purpose.

16. Mandamus ⚿168(2)
Municipal corporations ⚿621

The sufficiency of application to San Francisco Board of Permit Appeals for rehearing of appeal from Central Permit Bureau was a matter within board's jurisdiction calling for exercise of discretion and in absence of showing of an abuse of discretion, it will be presumed that board did not act arbitrarily in granting rehearing so as to be subject to judicial control by writ of mandate. St.1931, p. 3001, § 39; Code Civ.Proc. § 1963, subd. 15.

17. Municipal corporations ⚿621

San Francisco Board of Permit Appeals was bound to give due heed to all public considerations and private interests in passing upon appeal from action of Central Permit Bureau in issuing building permits for defense housing project in first class residential district. St.1931, p. 3001, § 39.

18. Municipal corporations ⚿621

Application for rehearing before administrative tribunal so constituted as the San Francisco Board of Permit Appeals should not be construed with the same strictness required in a motion for new trial before a court of law. St.1931, p. 3001, § 39.

19. Estoppel ⚿62(5)
Municipal corporations ⚿621

Completion of a considerable part of construction work under building permits before expiration of ten-day period allowed for appeal did not operate as an equitable estoppel against cancellation of permits by San Francisco Board of Permit Appeals, but presented merely a matter for determination by the Board in the exercise of its sound discretion. St.1931, p. 3001, § 39.

20. Municipal corporations ⚿621

Contention that San Francisco Board of Permit Appeals affirmed issuance of building permits for defense housing project in first class residential district in erroneous belief that federal authorities had selected site in question for location of a housing project and that unless permits were granted federal aid and priorities for such project in San Francisco area would be withdrawn afforded valid basis for rehearing by the board. St.1931, p. 3001, § 39.

21. Municipal corporations ⚿601

The materiality of digression from a settled section plan is a proper matter of consideration in connection with enforcement of zoning regulations.

22. Municipal corporations ⚿621

Whether building permit will be granted though in violation of recorded restrictions applicable to district is a matter of grace wholly within the scope of discretionary power of board having power to grant or deny permits.

23. Municipal corporations ⚿621

That certain action was taken by San Francisco Board of Permit Appeals raised the presumption that the existence of the necessary facts had been ascertained and found. St.1931, p. 3001, § 39.

24. Officers ⚿103

Action by an administrative board, when the authoritative law intends it to be final, may not thereafter be revoked, but when such action becomes final depends upon the scheme of the law by which the power is conferred.

25. Mandamus ⚿87

Record did not disclose that San Francisco Board of Permit Appeals having originally affirmed issuance of building permits for defense housing project in restricted first class residential district abused its discretion by granting a rehearing and upon further investigation cancelling such permits so as to be subject to judicial control by writ of mandate. St.1931, p. 3001, § 39; St.1937, p. 2803, § 24; Const. art. 11, §§ 6, 8.

◆

In Bank.

Original proceeding in mandamus by Lindell Company against Board of Permit Appeals of the City and County of San Francisco and others to compel the Board of Permit Appeals to cancel its action in overruling the issuance of building permits to petitioner and to reinstate such permits.

Alternative writ discharged and peremptory writ denied.

Johnson & Harmon, of San Francisco, for petitioner.

Young, Hudson & Rabinowitz, of San Francisco, as amici curiæ on behalf of petitioner.

John J. O'Toole, City Atty., Walter A. Dold, Chief Deputy City Atty., Morris Lowenthal, Ralph Scott, and Boyd Oliver, all of San Francisco, for respondents.

CURTIS, Justice.

This is an original proceeding in mandamus to compel the respondent Board of Permit Appeals of the City and County of San Francisco to cancel its action in overruling the issuance of building permits to the petitioner, and to reinstate said permits and affirm the action of the Central Permit Bureau in granting them.

The petition was filed on September 27, 1943, and an alternative writ was issued returnable on October 5, 1943. The respondents—the Board of Permit Appeals of the City and County of San Francisco, the individual members of said board, and H. C. Vensano as Director of Public Works of said city and county—filed an answer and return. Also interposed herein were the demurrer and answer of certain real parties in interest, whose identity will be more particularly noted later in this opinion. The matter in controversy was then ordered submitted for decision. While the pleadings as so framed present certain factual disputes, these points of contradiction require no special mention here in view of the questions of law involved which are determinative of this proceeding.

Briefly stated, the following recital of events constitutes the basis of the petitioner's claim to relief: In October, 1942, in an effort to further action to relieve the existent inadequacies of the local housing situation, San Francisco's Board of Supervisors passed and said city's Mayor approved an "emergency ordinance" (Bill No. 1936, Ordinance No. 1829, Series of 1939) which provided "for the waiver of health, safety and fire regulations pertaining to the occupancy of houses, homes and other structures for human habitation during the present war emergency." This ordinance empowered all "officials, commissions, bureaus and departments charged with the enforcing of building and housing regulations * * * [to] waive" any pertinent rule or regulation upon application by any owner, occupant, lessee or tenant, made to the proper department through the Central Permit Bureau. A prior ordinance, passed and approved in April, 1942, by the proper city authorities as above mentioned, had already provided for the "waiver of certain building regulations due to war emergency." (Bill No. 1657, Ordinance No. 1577, Series of 1939.) This ordinance, likewise declared effective for the duration of the present war "unless * * * sooner repealed," recited in substance that because of the impossibility of obtaining many standard materials, "the substitution of other materials, both in quantity and kind, or different in design," would be permitted, so long as such variance would not, "in the opinion of the department, board or officer concerned, result in unsafe or insanitary construction, or create a nuisance or endanger the public health, safety or welfare."

Section 55 of the Building Code of San Francisco (San Francisco Municipal Code, part II, chapter I, article 3) required at all times the procurement of a building permit from the Central Permit Bureau preliminary to the commencement of any such construction work; section 56 of said building code outlined the procedure to be followed in making application for the necessary permit; and section 59 of said building code provided that "the Department of Public Works shall ascertain whether such [previously filed] plans and specifications embody all requirements applicable by law and ordinance in such case, and if the requirements be met shall issue a building permit to the applicant."

Because of the existing shortage of housing facilities to accommodate defense workers in this city, the San Francisco Regional Office of the National Housing Agency, after a survey and investigation made just prior to January 1, 1943, advised the home office in Washington, D. C., of the pressing need for additional houses in this locale in order that defense work might proceed with reasonable efficiency. It was recommended that authority be given for the erection of 1,000 additional single family dwellings. About January 22, 1943, the National Housing Agency approved this recommendation in its specification that 1,000 single family units be erected forthwith in San Francisco and, in pursuance of this program, it directed the Federal Housing Administration to take such action as would be necessary to facilitate prompt construction through private initiative. The latter agency immediately made an investigation of suitable areas respecting which it would be willing to advance financing for the construction to be undertaken, and allegedly certified to the War Production Board certain sections in the city as appropriate sites.

The petitioner, a San Francisco builder, acquired property within one of these purportedly acceptable areas—the residential tract known as Miraloma Park—and had plans and specifications prepared for the erection thereon of 31 single family dwellings. The War Production Board granted priorities for materials for the proposed construction—an essential prerequisite to the initiation of any building program in this war period. Thereafter, in conformity with the terms of the above-mentioned pertinent ordinances and the sections of the Building Code of San Francisco, and about July 21, 1943, the petitioner applied to the Central Permit Bureau of said city for building permits for 27 of the dwellings. On August 24, 1943, like application was made for four additional permits. Each application complied fully with the procedural requirements of the local building laws and was accompanied by two complete sets of plans and specifications, as well as by the necessary fees. On July 29, 1943, the 27 permits first requested of the Central Permit Bureau were granted to the petitioner, and on September 2, 1943, the four additional permits were likewise approved. Following these respective rulings in its favor, the petitioner promptly started corresponding construction work, purchasing and moving materials onto the property, hiring and assembling workmen, and laying foundations for the dwellings as specified.

On August 4, 1943, an appeal from the action of the Central Permit Bureau in ordering the issuance of the first 27 permits to the petitioner for the erection of dwellings in Miraloma Park was taken to the Board of Permit Appeals of the City and County of San Francisco by one John L. Edwards, a home owner and resident of said tract, and by the Miraloma Park Improvement Club, Inc., as real parties in interest. The appeal was heard on August 11, 1943, and on September 1, 1943, the Board of Permit Appeals gave its decision affirming the action of the Central Permit Bureau, whereupon the petitioner continued with its construction work.

On September 4, 1943, the protestants filed with said Board of Permit Appeals a petition for rehearing of the appeal from the granting of the aforementioned 27 permits. In the application for rehearing they charged the petitioner with premature commencement of the construction work, with the location of the building project independent of the direction of any federal agency, and with the violation of certain building restrictions in Miraloma Park District—matters which the petitioner claims were fully considered at the original hearing of the appeal. This application for rehearing was granted, and during the pendency thereof the petitioner was required to, and did suspend, its construction work. On September 10, 1943, the protestants filed an appeal from the action of the Central Permit Bureau in granting permits for the erection of the four additional dwellings, and the hearing with respect to this latter ruling was consolidated with the rehearing of the first appeal. On September 15, 1943, the consolidated hearing and rehearing was held, and on September 22, 1943, the Board of Permit Appeals rendered its decision reversing its prior ruling and ordering the cancellation of all 31 permits.

[1, 2] The petitioner thereupon applied directly to this court for a writ of mandate commanding the Board of Permit Appeals to reinstate the 31 permits covering the above-detailed construction work in the Miraloma Park District. This court, in the exercise of its discretion, deemed the questions here involved, by reason of the existent wartime emergency, to present matters of such public importance as to warrant its assumption of original jurisdiction in issuing the alternative writ, and thus obviate any delay in the final disposition of this proceeding. Rule 56 of the Supreme Court, 22 Cal.2d 35; 16 Cal.Jur. 863, 864, sec. 62; 34 Am.Jur. 823, 824, secs. 25-26; Voorhees v. Morse, 1 Cal.2d 179, 34 P.2d 153. However, mature consideration of the problem as submitted for decision, in view of the settled principle that the remedy of mandate is not available to control the exercise of official discretion or judgment, or to alter or review action taken in the proper exercise of such discretion or judgment, now compels the conclusion that the peremptory writ here sought by the petitioner must be denied.

[3, 4] San Francisco as a charter city which has brought itself within the condition of the "municipal affairs" amendments of 1914 to the California Constitution (art. XI, secs. 6 and 8) has the power of "municipal home rule" with respect to all matters of local or internal concern.

San Francisco Charter of 1932, Stats. 1931, pp. 2973, 2978; 18 Cal.Jur. 783, sec. 95; Butterworth v. Boyd, 12 Cal.2d 140, 82 P.2d 434, 126 A.L.R. 838; West Coast Adver. Co. v. San Francisco, 14 Cal.2d 516, 95 P.2d 138. In line with such principle of autonomous government, said city, by appropriate charter and ordinance provisions, has set up a plan of procedure regulating the issuance of permits for the erection of buildings within its territorial limits, undeniably a "municipal affair" over which it has supreme control. Brougher v. Board of Public Works, 107 Cal.App. 15, 24, 290 P. 140.

[5] Section 24 of the presently effective Charter of San Francisco—the Charter of 1932, as amended, St.1937, p. 2803—provides that "the board of supervisors shall regulate, by ordinance, the issuance and revocation of licenses and permits for the * * * operation of businesses or privileges which affect the health, fire-prevention, fire-fighting, crime, policing, welfare or zoning conditions of or in the city and county" and shall specify which department shall make the necessary investigations and inspections and issue or deny the permits and licenses therefor. In line with this provision of the organic law, the Central Permit Bureau is designated as the agency empowered to grant or refuse building permits (San Francisco Municipal Code, part II, chapter I, Building Code, art. 3, secs. 55-56) and its scope of action is defined in the permit procedure regulation as follows: "In the granting or denying of any permit, or the revoking or the refusing to revoke any permit, the granting or revoking power may take into consideration the effect of the proposed business or calling upon surrounding property and upon its residents, and inhabitants thereof; and in granting or denying said permit, or revoking or refusing to revoke a permit, may exercise its sound discretion as to whether said permit should be granted, transferred, denied or revoked." Ordinance No. 3.0411, sec. 3; San Francisco Municipal Code, part III, art. I, Permit Procedure, sec. 26. This comprehensive language affecting the issuance of *all* permits sought under authority of the relevant San Francisco Charter and ordinance provisions in plain terms vests the granting power with a "sound discretion" generally.

[6] Nor is the situation altered as the result of the enactment of the two aforementioned emergency measures, the validity of neither of which is contested by any party to this proceeding. These "waiver" provisions do no more than *sanction* the authority of the granting power to issue permits where compliance with building rules and regulations is precluded by wartime restrictions. The terminology is entirely *permissive* in character, as reference to the following pertinent portions will indicate.

Considering first Ordinance No. 1829, supra, pertaining to the waiver of health, safety and fire regulations, section 1 expressly states that the administrative officials charged with the enforcement of building and housing standards "*may waive* any ordinance, rule or regulation" applying to the use and occupancy of buildings "when *in the judgment* of [the] officer, board, bureau or commission the same is *necessary* in order to provide suitable habitation" for persons who cannot otherwise obtain housing or habitations; section 2 specifically forbids the waiver or setting aside of any "rule, law or regulation" when "such waiver or annulment of such rule, law or regulation would create a public or private nuisance or endanger the public health, safety or welfare of the people of the City and County of San Francisco"; section 3 requires that before any such rule, law or regulation is waived, annulled or set aside the petitioner shall make an application with the proper department setting forth in detail the nature and character of the requested waiver; section 4 authorizes the departments, boards, commissions and officers to make rules for the regulation of any waiver provided for in the ordinance; and section 5 provides that any waiver that is granted shall give no permanent right to the applicant "beyond the termination of the present war emergency, or beyond the repeal of [the] ordinance," and in any event "such waiver may be immediately revoked at any time by the department board, commission or officer which granted such waiver when *in the absolute discretion* of such department, board, commission or officer (a) such waiver is no longer necessary, or (b) such waiver if continued would create a public or private nuisance or would endanger the public health, welfare and safety of the people of the City and County of San Francisco." (Italics ours.) As to Ordinance No. 1577, supra, pertaining to the waiver of certain building regulations, section 1 specifies that whenever any building is about to be constructed and certain materials are provided by the building laws of San Francisco to be used in the construction, "and by reason of the rules, regulations or orders of the War Production Board of the United States * * * it is impossible to obtain or use the materials of the kind and quality or in the quantity, or of the design provided for by said building laws," the departments, boards or officers charged with the duty of issuing a permit for the construction *"may permit* the substitution of other materials * * *; provided the use of said other materials, or the change in design thereof, will not, *in the opinion* of the department, board or officer concerned, result in unsafe or insanitary construction, or *create a nuisance or endanger the public health, safety or welfare*" (Italics ours); section 2 provides that the head of each department whose approval is necessary for the granting of the permit must give approval for the substitution of materials; and section 3 requires that no substitution be allowed unless the proposed substitution appears in the plans and specifications.

Harmonious and co-extensive with the wide discretionary power thus vested in the Central Permit Bureau is the plan of appeal from decisions of that agency as established by pertinent San Francisco charter and ordinance provisions. Section 39 of the San Francisco charter creates the Board of Permit Appeals as the reviewing agency here concerned and defines its powers, duties and jurisdiction. After doing so, it provides as follows: "Any applicant for a permit or license who is denied such permit or license by the department authorized to issue same, or whose license or permit is ordered revoked by any department, or any person who deems that his interest or property or that the general public interest will be adversely affected as the result of operations authorized by or under any permit or license granted or issued by any department, may appeal to the board of permit appeals. Such board shall hear the applicant, the permit-holder, or other interested parties, as well as the head or representative of the department issuing or refusing to issue such license or permit, or ordering the revocation of same. After such hearing and such further investigation as the board may deem necessary, it may concur in the action of the department authorized to issue such license or permit, or, by the vote of four members, may overrule the action of such department and order that the permit or license be granted, restored or refused." Related provisions treating of "Permit Procedure" before the Board of Permit Appeals are found in the San Francisco Municipal Code, part III, article 1, sections 8-16, inclusive. In passing, mention should be made of two of these sections. Section 8 provides in part as follows: "Pending decision by the Board of Permit Appeals, the action of the department in granting, revoking, or authorizing the transfer of any permit shall be suspended." Section 16 recognizes the propriety of rehearings in the following language: "Rehearings may be had only upon motion of a member of the Board and upon the vote of at least four (4) members thereof."

[7, 8] As so constituted the Board of Permit Appeals in its appellate jurisdiction, like the Central Permit Bureau in its original consideration of the case, is an administrative tribunal empowered to exercise full discretion in passing upon the matter as submitted for decision. Indicative of such respective freedom of function is the observation that neither the San Francisco charter nor related sections of the Municipal Code governing permit procedure provide for the making of any findings of fact by the Central Permit Bureau; nor is there any provision anywhere for the statement in writing of the reasons of the bureau or the board for granting or denying a permit. Moreover, the above quotation from section 39 of the charter clearly contemplates a *full* hearing of the case brought before the Board of Permit Appeals, where after considering the matter on its merits as presented by the applicant, the "head or representative of the department" in vindication of the result reached at the initial hearing, and the interested parties therein, said board is authorized to make final disposition of the application for the permit. In view of such elaborate provision for the hearing on appeal it cannot be argued that the designated appellate board—the Board of Permit Appeals—was in any way limited or restricted in its consideration of the instant case, in the light of the disputed issues of fact as to how the proposed construction of the defense housing project in Miraloma Park, a first-class residential district, would affect the public health, safety or general welfare. Certainly the Board of Permit Appeals, in reaching a decision in the matter, possessed at least the discretion which the Central Permit Bureau had—particularly when it is remembered that the protesting property

owners, as interested parties under the express specification of the charter, were at the hearing before said board for the first time given an opportunity to express their views in protection of their interests in the district.

[9] In these circumstances the contention of the petitioner that the authority of the Board of Permit Appeals was confined to a determination of whether there has been compliance with the municipal ordinances regulating permit procedure, as presumably found by the Central Permit Bureau in granting the permit, is untenable. The cases upon which the petitioner relies to support its argument as to the limited appellate function of the board are inapplicable here for they concern situations where the administrative officials were compelled to act in a particular way either because they were without discretion in the premises upon the happening of the prescribed contingency (Stockton & V. R. Co. v. Stockton, 51 Cal. 328; Sheehan v. Board of Police Com'rs, 47 Cal.App. 29, 190 P. 51) or else having a mere "supervisorial discretion," the facts as admitted or established were susceptible of but the single construction that the aggrieved party was entitled to the relief sought. Tulare Water Co. v. State Water Comm., 187 Cal. 533, 202 P. 874. In the present case, the Board of Permit Appeals, invested by charter provision and related municipal ordinances with complete power to hear and determine the entire controversy was free to draw its own conclusions from the conflicting evidence before it and, in the exercise of its independent judgment in the matter, affirm or overrule the action of the Central Permit Bureau.

[10] It is the general rule that the writ of mandamus may not be employed to compel a public administrative agency possessing discretionary power to act in a particular manner. The court in response to appropriate application may compel such agency to act, but it may not substitute its discretion for the discretion properly vested in the administrative agency. 16 Cal.Jur. 809, § 28, and cases there cited; 34 Am.Jur. 856, § 68, with supporting authority. In a proceeding of this character, challenging the propriety of decision of an administrative board, the attitude of the courts is well stated in the following language found in the case of Maxwell v. Civil Service Commission, 169 Cal. 336, 339, 146 P. 869, 871: "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. * * * Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere." Like expression of this general policy of the courts toward administrative agencies may be found in Pratt v. Rosenthal, 181 Cal. 158, 164, 183 P. 542; Mann v. Tracy, 185 Cal. 272, 274, 196 P. 484; Bank of Italy v. Johnson, 200 Cal. 1, 31, 251 P. 784; Mitchell v. McKevitt, 128 Cal. App. 458, 465, 17 P.2d 789; Dierssen v. Civil Service Commission, 43 Cal.App.2d 53, 59, 110 P.2d 513; and Hansen v. State Board of Equalization, 43 Cal.App.2d 176, 179, 110 P.2d 453.

[11] To meet the condition implicit in this statement of the settled law in California as reflected in the above cases, the petitioner claims that the Board of Permit Appeals acted arbitrarily, unreasonably and capriciously in granting a rehearing in this matter and then reversing its previous ruling in affirmance of the action of the Central Permit Bureau; that such procedure amounts to an abuse of discretion by the administrative board, which is subject to correction in a mandamus proceeding. 18 Cal. Jur. 902, sec. 195. In this connection the petitioner maintains that the board having considered at its original hearing and passed upon all the related questions of fact—such as the effect of the erection of the low cost housing units upon the value of the surrounding property in the district, the probability of such construction changing the character of the neighborhood and developing a slum area therein at the termination of the war, the materiality of the necessary variance in building standards with reference to various tract restrictions, the distance of local war plants and defense industries from the Miraloma Park land in contrast to their proximity to other available sections of the city, the added strain upon the existent transportation facilities, as well as upon the police and fire service furnished the district incident to the completion of the new living quarters and the resultant influx of people seeking such accommodations—said board was without authority to review such contested issues and revoke its prior determination of the case. To sustain its position in this regard the petitioner cites certain New York decisions holding that an administrative board like the respondent board is devoid of power to reopen and rehear a proceeding *which has once been terminated.*

People ex rel. Swedish Hospital v. Leo, 120 Misc. 355, 198 N.Y.S. 397, affirmed, 215 App.Div. 696, 212 N.Y.S. 897; McGarry v. Walsh, 213 App.Div. 289, 210 N.Y.S. 286; Town of Greece v. Smith, 256 App. Div. 886, 9 N.Y.S.2d 21. The foregoing italicized language reveals the distinct premise of such decisions. Typical is the basic case of People ex rel. Swedish Hospital v. Leo, supra, concerning the power of the Board of Standards and Appeals of the City of New York in dealing with an appeal to it from the action of the Superintendent of Buildings refusing a permit for an automobile garage under zoning regulations. In accordance with its own precise rule of procedure specifying the manner for *the final disposition of a case before it,* said board *by formal resolution* affirmed the decision on appeal and denied the application. A few weeks thereafter the board *reopened* the proceeding and after a hearing upon the same evidence and circumstances, it reversed its previous determination and granted the application sought. The rules governing the practice of the board made no provision for such rehearing once the matter had been *finally closed* upon adoption of the resolution prescribed as expressive of the board's ruling *terminating* the case. In the light of its thus limited jurisdiction in the hearing and disposition of appeals, the board's reconsideration of its prior decision constituted an act in excess of its power and was therefore invalid. Such situation is totally unlike the instant case as disclosed by the record herein, where the rehearing by the Board of Permit Appeals represented not the reopening of a matter once closed but simply the exercise of a *continuing jurisdiction* incident to its *final* determination of the case, in pursuance of section 16 of the San Francisco Municipal Code, part III, article 1, supra.

[12] Said section 16, as above quoted, *expressly authorizes a rehearing* upon motion of a member of the board and the vote of at least four (of the five) members thereof. This ordinance provision is wholly consistent with the broad discretion conferred upon the board in passing upon a case on appeal under authority of section 39 of the San Francisco Charter, supra, providing that after "hearing and *such further investigation as the board may deem necessary,* it may concur in the action of the department authorized to issue * * * [the] permit, or, by the vote of four members, may overrule the action of such department and order that the permit * * * be granted, restored, or refused." In the exercise of its lawful right to thus grant a rehearing, the Board of Permit Appeals, by its own rule adopted in supplementation of the governing municipal regulations, has specified that the "application must be filed within ten days from the date of decision as to which a rehearing is sought" and has detailed the following procedural conditions: "The applicant * * * shall submit a written request setting forth succinctly the grounds upon which such rehearing is requested. * * * If new evidence is relied upon as a ground for rehearing the application shall show: (1) the nature and character of the new evidence; (2) the names of the witnesses or a description of the documents to be produced; and (3) why the evidence was not produced at the original hearing. Failure to exercise due diligence to produce the evidence at the previous hearing will be deemed ground for the denial of the petition."

The record discloses that three days following the board's adverse ruling upon their appeal in connection with the Central Permit Bureau's granting of 27 permits to the petitioner for the construction of war housing units of Miraloma Park District, the above-mentioned real parties in interest made written application to the board for a rehearing upon the following grounds: (1) That the petitioner had violated section 55 of the Building Code, supra, by commencing construction work on its Miraloma Park property prior to the issuance of permits by the designated municipal authority (sec. 59 of the Building Code, supra), and that because of this unlawful act the petitioner succeeded in completing a considerable portion of the building project before the protestants had an opportunity to be heard by way of an appeal in this matter; (2) that while the houses were being "financed by F. H. A. loans, the location of the project was not directed or specified by the F. H. A. or any other Federal housing agency, it being contrary to the express policy and established practice of all such agencies to interfere in any way with local authorities in the location of any housing projects"; and (3) That the erection of the dwelling houses on lots not more than twenty-five (25) feet in width is in violation of the recorded "Declaration of Easements, Conditions and Restrictions" referable to the Miraloma Park District in that there "it is expressly provided that no lot * * * shall be re-subdivided in such a manner as to give any lot so re-subdivided an average width for the first one hundred (100) feet of depth of less than thirty (30) feet, together with a frontage of not less than fifteen (15) feet on any front street." The petition for rehearing concludes with the statement that "the foregoing points constitute newly discovered evidence * * * which could not with reasonable diligence have been discovered earlier and presented at the original hearing."

[13-16] Fairly construed, the application for rehearing presented by the real parties in interest must be deemed in substantial compliance with the board's aforementioned rule of procedure and, as such, a sufficient basis for its appropriate action. Bartholomae Oil Corporation v. Seager, 35 Cal.App.2d 77, 94 P.2d 614. It is true, as the petitioner notes, that the application, while conforming to the time limit for filing and the requirement as to the written specification of the grounds warranting reconsideration of the case, does fail to show "why the [alleged newly discovered] evidence was not produced at the original hearing." However, in considering the effect of such omitted matter, it must be remembered that the board, under authority of the municipal Charter and related ordinance provisions, is expressly empowered to grant rehearings without limitation as to the grounds thereof. Such broad power to reconsider should not be interpreted with too much refinement, nor should it be hedged about with subtle technicalities so as to hamper the just disposition of cases by the board. A rule of procedure, adopted for the guidance and convenience of both the administrative tribunal and the litigants and designed to facilitate the dispatch of business by such tribunal, must receive an interpretation commensurate with its purpose. Accordingly, a mere formal deficiency in a timely-filed application as is here concerned would not operate to deprive the board of its lawful power to rehear the proceeding upon its merits. The sufficiency of the application in the light of the board's appellate functions simply constituted another matter within its jurisdiction calling for the exercise of discretion, and in the absence of a showing of an abuse thereof, it will be presumed that the board did not act arbitrarily or contrary to its official duty. Code of Civil Procedure, sec. 1963, subd. 15; Vaughn v. Board of Police Com'rs, 59 Cal.App.2d 771, 777, 140 P.2d 130.

[17, 18] In support of the propriety of the board's determination to grant a rehearing in this case the real parties in interest herein recite the following circumstances as motivating factors. According to their claim, at the conclusion of the original hearing before the board's five members, three voted to deny and two voted to grant the permits, but that since section 39 of the San Francisco Charter, supra, requires the vote of four board members to overrule the action of the inferior administrative tribunal, the board affirmed the decision on appeal. Of the two members so voting to sustain the issuance of the permits, one allegedly was of the belief that the delay of the protesting property owners in taking their appeal allowed the petitioner to progress to such point in its construction program that it would be unfair to deny it the building permits as sought; and the other thought that the Federal authorities had selected the site in the Miraloma Park District for the project undertaken by the petitioner and would refuse further war housing in San Francisco if the permits for such construction were denied. Seeking a means to correct the misconception of the facts in these important particulars, the real parties in interest made said points the basis of their first two grounds for rehearing. Consistent with the scheme and purpose of its creation under the law, the board is bound to give due heed to all public considerations and private interests in passing upon the case. An application for rehearing before an administrative tribunal so constituted as the Board of Permit Appeals is not to be construed with the same strictness required for instance in a motion for a new trial before a court of law. The fact that the rehearing was granted by the board indicates its conclusion that a proper disposition of the matter would involve more mature reflection and careful reconsideration of vital evidentiary points. The pertinent municipal Charter and ordinance provisions above detailed give the board the power to so avail itself of the opportunity to undo and correct any error in judgment it deems it may have made as the result of a misconception of the merits of the appeal.

[19] Reviewing the record herein in connection with the three grounds for rehearing presented by the real parties in interest, the following matters deserve some men-

tion. As to the first ground relating to the operation of an estoppel against the protesting property owners in this case because of a lack of diligence in asserting their interests before the petitioner's completion of a considerable part of the construction work, it appears, according to the pertinent dates mentioned in the fore part of this opinion, that the appeal from the Central Permit Bureau's ruling in favor of the petitioner was taken well within the ten-day limitation allowed therefor by ordinance provision (San Francisco Municipal Code, 1939, part III, art. I, sec. 8)—in fact, but six days intervened between the granting of the 27 building permits first sought in this matter and the filing of the appeal. Moreover, each such permit contained the following qualification: "This permit issued subject to appeal within 10 days to Board of Permit appeals. *Incur no expense, under this permit, until right of appeal has lapsed.*" (Italics ours.) Consistent with this stipulation is the further ordinance provision that "Pending decision by the Board of Permit Appeals, the action of the department in granting, revoking, or authorizing the transfer of any permit shall be suspended." San Francisco Municipal Code, part III, art. I, sec. 8, supra. The petitioner claims that the local housing shortage motivated its commencement of the construction work promptly upon the granting of the 27 permits by the Central Permit Bureau and its consequent activity in "purchasing and moving materials onto the property and hiring and assembling workmen and laying foundations for [the] dwellings," procedure involving considerable expense but admittedly without sanction of the law, must be viewed in the light of the prevailing emergency conditions. While the petitioner's motives in so proceeding may well have been impeccable, its unauthorized action does not fortify its standing in the case upon any theory of equitable estoppel to deny the building permits, and the opposing considerations as to this feature of evidence presented a matter for the board, upon a full understanding of the facts, to determine in the exercise of its sound discretion.

[20] The second ground for rehearing relates to the policy of the Federal authorities towards the location of a war housing project in a vital defense area. The protesting property owners herein maintain that the selection of sites for such building program is wholly a matter for decision by the local authorities, and that further Federal war housing aid is not contingent upon the construction proceeding in any one particular section of the city. The petitioner does not dispute this proposition but simply adds the further, yet consistent, statement that "the Federal government has ruled that private houses during the war can be built only where streets are improved, utilities and sewers already installed, transportation facilities available, etc., so that no manpower or material will be called for in this regard; also, that this [Miraloma Park] area had been certified as acceptable for house building during the war." Moreover, all parties herein refer to the following telegram sent from a "Commissioner of the War Production Board, Federal Housing Authority, Washington, D. C." to the Board of Permit Appeals under date of September 28, 1943, a few days following the local board's decision of this case on rehearing, as expressive of the Federal government's attitude in the matter: "Am advised certain property owners have objected to the construction of war housing and that certain permits which have been issued have been revoked by your board. I recognize that the adoption of building standards and codes is purely a local matter. However, I call your attention to the fact that the War Production Board has adopted war housing construction standards which must be met in order for builders to secure preference ratings entitling them to build war housing. *In my opinion war housing can be built under these standards which will not create slum conditions or adversely affect neighborhood property values providing that such housing is properly located.* This location feature is a part of our analysis in approving mortgage insurance applications. If your code is amended in such a way that war housing cannot be built under the war housing construction standards of the W. P.B., our office will not be able to recommend approval of priority applications to the W.P.B. It would seem therefore *if such action is taken* that no war housing can be built in San Francisco." (Italics ours.) From these observations it appears that the Federal agencies are concerned simply with the construction of the needed number of dwelling units in acceptable sections of the municipality viewed as a whole —that is, areas certified as suitable from the standpoint of existing public improvements—rather than with the location of any part of the building program in any

one specified district. The importance of the board's complete understanding of this phase of the case in relation to the preservation of both public and private interests herein cannot be doubted, and in the exercise of its broad discretionary power under the law, the board's right to undertake the re-examination of the subject incident to a rehearing and the just disposition of the controversial issues involved must be recognized.

[21, 22] The third ground for rehearing concerns the charge that the petitioner's building is in violation of certain tract restrictions as recorded for the Miraloma Park District. Petitioner in its brief does not dispute this point of complaint. The materiality of digression from a settled section plan has been held a proper matter of consideration in connection with the enforcement of zoning regulations (Zahn v. Board of Public Works, 195 Cal. 497, 234 P. 388), and on a like basis such factor as so presented to the Board of Permit Appeals might have some bearing here in relation to the established building requirements. Moreover, on the same principle as affecting the petitioner's asserted *right* to the desired permits despite its admitted *nonconformity* with the district's standards both as to the aforenoted tract restriction as well as to certain other construction features, it is pertinent to note that the grant of such dispensation is a matter of grace, wholly within the scope of the discretionary power with which the authoritative board is vested. Rubin v. Board of Directors of City of Pasadena, 16 Cal.2d 119, 125, 104 P.2d 1041; Regan v. Council of City of San Mateo, 42 Cal.App.2d 801, 806, 110 P.2d 95; Otis v. City of Los Angeles, 52 Cal.App.2d 605, 613, 126 P.2d 954.

[23] In the present state of the record herein it is impossible to isolate the several factors which may have moved the Board of Permit Appeals to make its respective rulings. It was neither required by law, nor did it undertake, to set forth the reasons for its action either at the conclusion of the hearing or the rehearing in this matter. However, the proposition that said board, in making such investigation as it deemed the case warranted, was acting within its authority cannot be seriously challenged in view of the above-mentioned broad municipal regulations defining its appellate functions. Pertinent here is the observation in Bartholomae Oil Corporation v. Seager, 35 Cal.App.2d 77, 80, 94 P.2d 614, 616, relative to a city planning commission's recommendation upon an application for a variance permit: "In connection with the action of such a commission, composed usually of laymen, the fact that a certain action is taken raises the presumption that the existence of the necessary facts had been ascertained and found."

[24, 25] This holding as to the board's continuing jurisdiction in this matter does not impair the efficacy of the general principle that action by an administrative board, when the authoritative law intends it to be final, may not thereafter be revoked. The only question to be determined is when action becomes final. That is in every case a question dependent for its answer upon the scheme of the law by which power is conferred. Here it appears that finality is not reached while the Board of Permit Appeals, in the exercise of its discretion, has authority to grant a rehearing and arrive at a different conclusion as the result of a re-examination of the merits of the case. Confronted with conflicting considerations—on the one hand, the acute housing shortage in the Bay area, a situation which prompted the enactment of the aforementioned emergency ordinances for the city and county of San Francisco, permitting the waiver or relaxation of municipal building standards, as opposed, on the other hand, to the localization of the needed dwelling units in a manner consistent with the public health, safety, welfare and general prosperity of the municipality as a whole—the Board of Permit Appeals in its final ruling decided that the broad public interest required the denial of the building permits as sought by the petitioner for the Miraloma Park District, a determination based presumably on the premise that other available sections in the city would be more suitable for construction of the type here involved. In fact in this connection the petitioner does not dispute the point that in various parts of the city building under the war housing program is now proceeding in pursuance of duly issued permits. From this standpoint it cannot fairly be held on the present record that the situation herein was of such character as to preclude the board, in the exercise of a proper discretion, either from undertaking a further examination of the case in response to the appropriate application for rehearing or from reaching a different conclusion in consequence of such reconsideration. Accordingly, the propriety of the board's order rendered at the conclusion of its deliberations in connection with the consoli-

dated hearing and rehearing in this matter as above mentioned, and cancelling all 31 building permits previously issued to the petitioner, must be sustained.

The alternative writ is discharged and a peremptory writ is denied.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

23 Cal.2d 248

RISKIN et al. v. INDUSTRIAL ACCIDENT COMMISSION et al.

L. A. 18723.

Supreme Court of California.

Dec. 7, 1943.

1. Workmen's compensation 🔑308

An "independent contractor" is one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work and not the means whereby it is to be accomplished.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Contractor".

2. Workmen's compensation 🔑235

The relationship of "employer and employee" exists whenever the employer retains the right to control or direct how the work shall be done as well as the result to be accomplished.

See Words and Phrases, Permanent Edition, for all other definitions of "Employer and Employee".

3. Workmen's compensation 🔑235

One means of ascertaining whether the right to control exists, which is necessary to the relationship of employer and employee, is the determination of whether, if instructions were given, they would have to be obeyed.

4. Workmen's compensation 🔑235, 237

A strong factor tending to show the relationship of an employee is the employer's right to terminate the work at his pleasure, which involves the right of control, but neither the manner of payment nor the choosing by the employee of his own hours of work is conclusive of the relationship.

5. Workmen's compensation 🔑1437, 1705

Where there is shown no express agreement as to right of the claimed employer to control the manner of doing the work, the existence or nonexistence of the right must be determined by reasonable inferences drawn from the circumstances shown and is a question of mixed law and fact to be resolved initially by the commission.

6. Workmen's compensation 🔑1939

Where there is substantial evidence to support findings and order of the Industrial Accident Commission, the reviewing court will not substitute its views for those of the commission and annul the award.

7. Workmen's compensation 🔑1939

If the findings of the Industrial Accident Commission are supported by inferences which may fairly be drawn from evidence, even though the evidence is susceptible of opposing inferences, the reviewing court will not disturb the award.

8. Workmen's compensation 🔑1349

Alleged employers had burden to establish that claimant was an independent contractor, or employee of an independent contractor.

9. Workmen's compensation 🔑1455

Where claimant and another, as partners, were engaged by mine owners to do specified amount of tunnel work at a fixed rate and mine owners could have terminated the work at their pleasure, inference was authorized that mine owners had both the right to give special instructions and the power to require obedience thereto, and compensation award based on finding that claimant was an "employee" and not an "independent contractor" was supported by substantial evidence. St.1937, pp. 268, 299, §§ 3360, 5705(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Employee".

10. Workmen's compensation 🔑1939

Generally, it is a question of fact to be determined by the commission in each case whether the employee relationship exists and when the commission has found that the relationship does exist, the Supreme Court's inquiry upon review as to that point extends no further than to ascertain whether commission's finding is supported by substantial evidence.

In Banc.

Proceeding by R. W. Riskin and others against the Industrial Accident Commission and A. F. Miner to review an order of the respondent commission directing petitioners to pay compensation benefits to A. F. Miner.

Award affirmed.

Prior opinion, 135 P.2d 11.

Overton, Lyman & Plumb and L. K. Vermille, all of Los Angeles, for petitioners.

Everett A. Corten, Fred G. Goldsworthy, and Dan Murphy, Jr., all of San Francisco, for respondents.

SCHAUER, Justice.

Petitioners seek the annulment of an award made by the Industrial Accident Commission in favor of one A. F. Miner for injuries which he received on April 18, 1942, while engaged in constructing a tunnel on a mine known as the Ruby Quartz Claim near Shoshone, California. The sole question presented is the sufficiency of the evidence to justify the finding of the commission that Miner was an employee of petitioners at the time he was injured, rather than, as claimed by petitioners, either an independent contractor or the employee of a fellow workman also claimed by petitioners to have been an independent contractor. We have concluded that, upon the record, the award must be affirmed.

It appears from the return to the writ of review that in March and April, 1942, petitioners were jointly engaged in mining operations at the Ruby Quartz Claim. The evidence discloses a quite informal inception, and absence of detailed articulation, of the relationship between petitioners and the claimant. Petitioner Morris, on behalf of himself and the other petitioners, told Mr. Charles Brown, the proprietor of a general store at Shoshone, who sometimes acted as an intermediary or agent for mine owners, that petitioners wanted 40 feet of tunneling done on the mine and requested that if he, Brown, knew any one "who would take a contract to furnish everything and do the work at $7.00 a foot, to send him over to see" petitioner Riskin. Mr. Brown told Mr. Casey, an experienced miner, of Morris' request and instructed Casey that if he wanted to do the work he should go to Ibec (about 25 miles from Shoshone) and see either Morris or Riskin. Mr. Casey then informed Miner, the applicant for compensation herein, of the offered work or contract and "asked him if he wanted to go out there and go to work. He said we will go out there and look at it." Casey, Miner, and Riskin then went to the mining property, where Riskin gave general instructions as to the direction, length, and size of bore of the tunnel, telling the workmen, among other things, to "Keep it big enough to work in" and to "drive it a little bit to the left, to hit the incline shaft." The tunnel had previously been driven 50 to 60 feet and Riskin directed that the maximum length of the extension to be dug by Casey and Miner was to be 40 feet, but that they were to stop work if they struck ore at a shorter distance. As to any contractual obligation relative to earlier termination of the work, both Miner and Casey testified in effect that it was their understanding that they could quit whenever they wished, and that petitioners could direct discontinuance of the work any time they pleased. In the words of Casey, "They could stop us or we could quit if we wanted to." Morris also testified that Casey and Miner could have quit whenever they wished although he didn't think there was "any understanding to that effect," and that in such event they "could collect for what they had done" at the rate of $7 per foot. (The evidence shows that they did quit, after extending the tunnel 31 feet, and before striking ore, and that they were paid at the agreed rate.)

Casey and Miner commenced work on March 28, 1942, and continued until April 18, 1942, the date Miner was injured. At that time they had completed 31 feet of tunneling, for which they were thereafter paid, as parenthetically mentioned above, at the specified rate of $7 per foot by Brown, who divided the money equally between them pursuant to their instructions. The agreement between Miner and Casey was to "just go fifty fifty"; they both testified they were "partners" on the job. Money to pay for the whole 40 feet of tunneling had been deposited with Brown by Morris.

The two workmen had no mining tools or equipment, but were instructed by Riskin to use tools and equipment which were at the site of a neighboring mine and which belonged to another mining venture in which Riskin was a partner. In this connection, Miner testified that he did not understand that he and Casey were to furnish their own tools, although they were required to and did furnish their own transportation and haul in their own water. They also understood that they were required to, and they did, furnish the powder, fuse, and caps which they used in performing their work.

Apparently little, if any, supervision was exercised over the men at their work. Casey testified that Riskin visited the mine once while they were there, but that he said "nothing particular, only something about the work, probably; how the formation was and the ground, and how we ought to hit the ore in eight or ten feet, some remarks like that.

"Q. He said he thought you ought to get ore within eight or ten feet? A. Some remarks—a remark a man will make in a tunnel, around works like that.

"Q. Did he tell you how to drill the holes? A. No, sir.

"Q. Did he tell you how to do the work? A. Just give us the directions of the tunnel.

"Q. Then you did the rest. A. Did the rest. Just follow the course the tunnel was going and bear it off a little one way or the other, I think to the left, or right, I don't remember."

Miner testified that he was not present at any time Riskin was at the mine after work had commenced, but that Riskin told him that he, Riskin, had been over to the mine the "second Sunday" and had measured the work so far completed. Miner further testified that he and Casey "were all alone there at the mine doing the work," and that nobody told them how to use the tools on the property. Riskin denied visiting the mine at any time the men were working, but testified that on a Sunday during the period between March 28 and April 18 he "went up to my silver mine, which is the adjoining mine * * * and the boys weren't there." Riskin also denied knowing the rate at which the men were to be paid, although Casey testified that on the occasion when Riskin had taken him and Miner to the mine to direct them as to the work they were to do, Riskin had "told us the proposition, what it was * * * the exact words I couldn't tell you, but it was to be $7.00 a foot for driving this tunnel * * * we told him we would take it, at that price." The men worked such hours as they chose, but averaged seven to eight hours a day and took Sundays off.

It further appears that the method of payment and the amount of supervision customarily exercised over miners doing the type of work here involved vary. Miner testified that he had been engaged in mining "off and on since 1904"; that it is not customary for the foreman or the employer to constantly supervise the work; that "they give you general instructions and you go ahead with it. * * * I work week in and week out and never see bosses"; that on this job general directions were sufficient to enable him and Casey to do the tunneling. Both Miner and Casey testified that it was customary to pay for this type of work either by day or by foot, but usually the latter method was employed. Mr. Brown, who, it appears, was acquainted with mining customs in the vicinity, testified that "on large mines they let contracts, they generally guarantee on so much a foot—I mean guarantee on so much a day, or the work is very closely supervised on contracts. That is around little larger properties. There is no set rule that I can see." When questioned as to whether petitioners "would have a right" to "come out and supervise the work" of Casey and Miner, Brown stated, "Well, it was on their property. I imagine they could have a right to go and see whether the tunnel was a proper size or something like that, or running the right direction."

[1-5] The rules for determining whether one rendering service to an employer is an employee or an independent contractor may be summarized as follows: An independent contractor is one who renders service in the course of an independent employment or occupation, following his employer's desires only in the results of the work, and not the means whereby it is to be accomplished, whereas the relationship of employer and employee exists whenever the employer retains the right to control or direct how the work shall be done as well as the result to be accomplished. One means of ascertaining whether or not the right to control exists is the determination of whether, if instructions were given, they would have to be obeyed. A strong factor tending to show the relationship of an employee is the employer's right to terminate the work at his pleasure. Neither the manner of payment nor the choosing by the employee of his own hours of work is conclusive of the relationship. (See Burlingham v. Gray, (1943), 22 Cal.2d 87,

99-100, 137 P.2d 9.) The right to immediately discharge involves the right of control. (Hillen v. Industrial Acc. Comm. (1926), 199 Cal. 577, 582, 250 P. 570.) "Where there is shown no express agreement as to the right of the claimed employer to control the mode and manner of doing the work, the existence or nonexistence of the right must be determined by reasonable inferences drawn from the circumstances shown," and is a question of mixed law and fact to be resolved initially by the commission. (See Burlingham v. Gray, supra, 22 Cal.2d at pages 99-100, 137 P.2d at page 16; Hillen v. Industrial Acc. Comm., supra, 199 Cal. at page 580, 250 P. at page 571; Murray v. Industrial Acc. Comm. (1932), 216 Cal. 340, 345, 14 P.2d 301.) Relative to the right of a workman to discontinue his services it was stated in Los Flores S. Dist. v. Industrial Acc. Comm. (1936), 13 Cal.App.2d 180, 183, 56 P.2d 581, 583, that "An employee may quit, but an independent contractor is legally obligated to complete his contract."

[6-8] As to our approach to the factual questions on review the rule was recently stated as follows: "Where there is substantial evidence to support the findings and order of the commission, the reviewing court may not substitute its views for those of the commission and annul the award. [Citation.] If the findings of the Industrial Accident Commission are supported by inferences which may fairly be drawn from evidence, even though the evidence is susceptible of opposing inferences, the reviewing court will not disturb the award. [Citation.]" Pacific Lbr. Co. v. Industrial Acc. Comm. (1943), 22 Cal.2d 410, 422-423, 139 P.2d 892, 899. It is also to be observed that the burden of proof rested upon the petitioners to establish that the claimant was an independent contractor (or employee of an independent contractor) as distinguished from an employee of the petitioners. (Sec. 5705(a), Labor Code, St. 1937, p. 299; see also Murray v. Industrial Acc.Comm. (1932), supra, 216 Cal. 340, 345, 14 P.2d 301.)

[9] Applying the above-defined tests and rules to the evidence here, it is apparent that the commission could reasonably infer that petitioners had both the right to give special instructions to Miner and Casey, and the power to require obedience thereto, since, as is not disputed, petitioners could have terminated the work at their pleasure. Petitioners' contention that Miner, if not himself an independent contractor, was the employee of Casey rather than of petitioners, is defeated, under the circumstances shown, by section 3360 of the Labor Code, St.1937, p. 268, which provides that "Workmen associating themselves under a partnership agreement, the principal purpose of which is the performance of the labor on a particular piece of work are employees of the person having such work executed. * * *" We are of the view that the above epitomized evidence is not as a matter of law insufficient to support the findings and order of the commission, and hence that the award must be affirmed.

Petitioners, in support of their contention that upon the evidence here the commission was bound to find that Miner and Casey were independent contractors, have cited, among others, the following cases: Donlon Bros. v. Industrial Acc.Comm. (1916), 173 Cal. 250, 159 P. 715; Fidelity & Deposit Co. v. Brush (1917), 176 Cal. 448, 168 P. 890; and Parsons v. Industrial Acc.Comm. (1918), 178 Cal. 394, 173 P. 585.

[10] Generally speaking, it is a question of fact to be determined by the commission in each case, from the evidence therein adduced, whether the employee relationship exists. When the commission has found that the essential relationship does exist, our inquiry upon review, as to that point, extends no further than to ascertain, *in conformity with the rules hereinabove summarized,* whether the commission's finding is supported by substantial evidence. In the Donlon case, supra, the following factual statement appears (at page 252 of 173 Cal., 159 P. at page 715): "The deceased furnished his own working tools; he was a free agent as to his hours of labor, but *he could be discharged at any time.*" (Italics added.) Upon that factual situation the holding that the decedent was, as a matter of law, an independent contractor, is inconsistent with the rules we have hereinabove enunciated and it must be, and is, overruled. Likewise overruled are the similar holdings upon like factual statements in Fidelity & Deposit Co. v. Brush (1917), supra, 176 Cal. 448, 449, 168 P. 890, and in Parsons v. Industrial Acc.Comm. (1918), supra, 178 Cal. 394, 396, 173 P. 585.

The cases of Roberts v. Industrial Acc. Comm. (1921), 52 Cal.App. 31, 197 P. 978; Valente v. Industrial Acc.Comm. (1924), 68 Cal.App. 151, 228 P. 667; Provensano v. Division of Indus. Accidents (1930), 110 Cal.App. 239, 294 P. 71; Winther v. Industrial Acc.Comm. (1936), 16 Cal.App.2d 131, 60 P.2d 342, and State Comp. Ins. Fund v. Industrial Acc.Comm. (1941), 46 Cal.App.2d 526, 116 P.2d 173, are also cited by petitioners on the same proposition but all of them are distinguishable upon their respective facts to the extent that they cannot be said to be authoritative upon the precise point under discussion. In the Winther case [16 Cal.App.2d 131, 60 P.2d 343] there was a contract to pick "the entire crop of olives" and it does not appear that the employer had the right to terminate the agreement with the contractor short of its complete performance. The Valente case opinion makes no direct statement relative to the right of the employer to interrupt the work but as it is predicated solely on the Donlon Case, the Fidelity & Deposit Co. case, and the Parsons case, which are overruled herein, it can no longer be regarded as an authority. In none of the other cases of the group last above mentioned does it appear that the employer had the right to terminate the work at his pleasure.

The award is affirmed.

GIBSON, C.J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

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62 Cal.App.2d 99

LANDRES v. ROSASCO.

Civ. 12556.

District Court of Appeal, First District, Division 2, California.

Dec. 27, 1943.

Hearing Denied Feb. 24, 1944.

1. Husband and wife 🔑280

Where, shortly prior to an interlocutory divorce decree, a husband and wife living apart entered into a property settlement agreement which also provided for support of the wife and the custody and support of a child, any contract rights of the parties were concurrent with and supplementary to the rights accruing by reason of the decree, which confirmed the property settlement. Civ.Code, §§ 159, 175.

2. Appeal and error 🔑1008(3)

The construction which the trial court, after striking out extrinsic evidence, placed on a written property settlement agreement between a husband and wife, was not necessarily as equally reasonable as or more reasonable than the construction placed by the Court of Appeal on the liabilities arising therefrom.

3. Husband and wife 🔑279(1)

Payments for a wife's support, based on a property settlement agreement, though denominated therein as alimony, do not partake of the same characteristics as alimony awarded by the court. Civ.Code, § 159.

4. Husband and wife 🔑278(1)

A property settlement agreement, providing also for the custody and support of a child and monthly payments for three years for support of the wife, was valid and binding as a property settlement without approval by the divorce court, whose approval of the provision for payments to the wife was not necessary in order to give a contract right therefor. Civ.Code, §§ 159, 175.

5. Divorce 🔑254

A provision for payment to the wife of $70 a month for three years "for her proper support" was not merely a provision for "alimony" in the ordinary sense, but was an integral part of a property settlement agreement which also waived claims to further support or alimony, and, where a subsequent interlocutory decree of divorce confirmed the agreement and followed the language thereof in ordering the same monthly payments, liability therefor was not terminated by the wife's remarriage about a year later. Civ.Code, §§ 139, 159, 175.

See Words and Phrases, Permanent Edition, for all other definitions of "Alimony".

6. Divorce 🔑254

The statute qualifying in the event of remarriage the right of the divorce court to compel a husband to support the wife was not intended to apply to all property settlement agreements in the absence of an agreement to the contrary. Civ.Code, § 139.

◆

Appeal from Superior Court, Stanislaus County; B. C. Hawkins, Judge.

Action by Herman C. Landres against Joseph C. Rosasco on a property settlement agreement between a husband and wife subsequently divorced. From a judgment for defendant, plaintiff appeals.

Reversed.

Phillip Barnett, and Robert L. Dreyfus, both of San Francisco, for appellant.

Bush & Ackley, of Oakdale, for respondent.

NOURSE, Presiding Justice.

The plaintiff appeals from a judgment in favor of defendant in a suit based upon a property settlement agreement. The plaintiff is the assignee for collection of Thelma Taylor, who was formerly married to defendant.

On June 1, 1939, the then Thelma Rosasco and defendant entered into the property settlement agreement, the meaning of which is in controversy here. On June 7, 1939, Thelma Rosasco secured an interlocutory decree of divorce from defendant. On June 12, 1940, the final decree was entered and Thelma Rosasco remarried on or about August 1, 1940. Up until her remarriage the defendant paid the monthly sum provided for in the contract and also in the divorce decree to Thelma Rosasco, at which date he ceased the payments. The payments accruing between the date of remarriage and June 1, 1942, are the ones sought to be recovered here.

The sole question presented for decision concerns the effect of Thelma Rosasco's remarriage on defendant's obligation to pay the monthly sum provided for in the contract. The trial court found that the provision of the property settlement agreement relating to the payment of the monthly sum to Thelma Rosasco "was not a part of the settlement of property rights between the parties, nor did it have any reference to, nor was it based upon a division of community or other property between the parties, but such provision was an agreement by the husband to make certain payments as alimony or support to the wife." This finding was based on the property settlement agreement itself, and all papers in the divorce proceedings; all evidence relating to discussions, conversations or intentions of the parties was stricken from the record and that ruling is not attacked here.

The pertinent provisions of the agreement read as follows:

"Property Settlement Agreement

"Whereas, unhappy differences have arisen and do now exist between the parties, and the said parties are now living apart; and

"Whereas, it is the mutual wish and desire of said parties that a full and final settlement and adjustment of all their property rights, interests and claims be settled and determined by said parties in this agreement; and

"Whereas, the parties desire to make a tentative agreement relative to the custody, maintenance and support of their minor child, Nona Lee Rosasco;

"Now therefore, in consideration of the premises and the mutual relinquishments of property rights arising out of said marriage relations, and in consideration of the covenants herein mentioned, the parties hereto have entered into, and by these presents do hereby enter into, this agreement for the full, complete, permanent and final settlement and adjustment of all their respective property rights, interests and claims, present and future, arising out of, or dependent upon, or in any way connected with their marriage relations, and their mutual rights to support, maintenance and inheritance, as follows:

"1. The husband hereby agrees to pay to the wife upon the execution of this agreement the sum of $2000.00 in cash.

"2. The husband further agrees to pay certain bills which have been contracted by the wife since the separation of the parties, which bills are in amount somewhere between $500.00 and $600.00.

"3. *The husband further agrees to pay to the wife the sum of $70.00 on the first day of each and every month for a period of three years, commencing June 1, 1939, for her proper support and maintenance.*

"4. The said wife does hereby agree to grant and convey to the husband all her right, title and interest, community and otherwise, in and to the real property situated near LaGrange in Merced County, known as the "Rosasco Ranch" and more particularly described in a deed executed this day by the wife to the husband; and all her right, title and interest in and to any other real property, which said husband may own, or in which he may have any interest, including a tract of 280 acres, more or less, of mountain land in Tuolumne County, standing in the names of J. C. Rosasco and Louisa Rosasco. Said property is more particularly described in a deed executed this day by the wife to the husband.

"5. The said wife does hereby convey to the husband all her right, title and interest, community or otherwise, in and to the cattle, horses, farm implements and equipment, automobiles, moneys on hand or in bank, accounts receivable, and all other personal property whatsoever now owned by the husband or in which said husband may have any interest, including the furniture and furnishings of the home on the Rosasco Ranch above mentioned.

"6. It is understood and agreed that the payments herein specified and the transfers herein made by the respective parties hereto shall be in full for all claims that the said parties may have one against the other.

* * * * *

"9. It is further agreed that each of the parties hereto hereby expressly waives any and all claim to any further support, maintenance or alimony from the other party hereto, save as expressly provided herein, it being the intention of the respective parties that this agreement shall constitute a final, complete and permanent settlement of their respective property rights, and rights to support or maintenance by the other party.

* * * * *

"13. It is further agreed that this agreement is not an agreement for or in contemplation of divorce, and is not intended to affect and does not affect the right of either party to maintain an action for divorce against the other party or to assert any defense that he or she may have to a suit for divorce instituted by the other party. In the event any such action for divorce is commenced and prosecuted by either party against the other, then it is understood and agreed that in any such action neither party shall be entitled to any costs of suit, attorneys fees or expenses of litigation, or to any alimony, support or maintenance, or to any other sum or sums whatsoever from the other party, save as is expressly set forth herein.

* * * * *

"15. With respect to the custody, care, support and maintenance of Nona Lee, the minor child of the parties, now aged 3 years, or thereabouts, the parties understand that any agreement they may make is tentative only, and is subject to the approval of the proper Superior Court; and that no agreement hereby made is or shall be deemed to be final, even when approved by the Judge of the said Superior Court; but that said minor child will be under the jurisdiction of the Superior Court during her minority, and that either party, if he or she believes it for the best interest of the child may apply to the Court at any time to modify or change any agreement or decree which may be reached or made with respect to the custody, care, support or maintenance of their minor child.

"Subject to the above principles and understanding the parties hereby agree that for the present the wife shall have the custody of their minor child, Nona Lee; but that the husband shall have the right to see said child at all reasonable times, and shall have the right to take the child to his home to visit with him with reasonable frequency and for reasonable periods. The parties realize that it is almost impossible and probably not desirable to set arbitrary limits on this provision for visits to the father's home; but in this connection the wife promises that she will not be selfish about the child, and the husband promises that his requests will not be unreasonable, and the parties believe that in this spirit they can work this matter out agreeably between them.

"16. The husband agrees to pay to the wife the sum of $50.00 a month on the first day of each month, commencing June 1, 1939, and continuing over a period of three years, for the support and maintenance of Nona Lee. At the end of that time a new agreement will be made for the support and maintenance of said child, the husband hereby expressly recognizing his obligation to support his child during her minority."

In her complaint for divorce Thelma Rosasco prayed for $70 per month "for a period of three (3) years commencing on the 1st day of June, 1939, for her support and maintenance" pursuant to the agreement to pay such amount which contract right she alleged in paragraph VII of her complaint. The interlocutory decree of divorce ordered: "That the defendant, Joseph C. Rosasco, pay to the plaintiff, Thelma F. Rosasco, the sum of $70.00 a month on the first day of each and every month for a period of three years, commencing upon the first day of June, 1939, for her proper support and maintenance." And "That the property rights of the parties have been settled by agreement between them, and that said agreement as to the settlement of their property rights and the division of property between them be, and the same is hereby confirmed; and that neither parties shall henceforth have any claim against the other arising out of their marriage relations, save as is specifically set forth herein."

The final decree of divorce provided: "that the provisions of said interlocutory decree with regard to alimony and the custody and support of the minor child of the parties be and the same are hereby confirmed; that the provisions of said interlocutory decree relating to the property rights of the parties and the division of property between the parties be and they are hereby confirmed, and that neither party shall henceforth have any claim against the other, arising out of their marriage relation save as is specifically set forth in said interlocutory decree."

[1] It should be noted that this is a suit upon the contract which was denominated by the parties, "Property Settlement Agreement." We are not concerned with what possible effect Thelma Rosasco's remarriage might have upon the divorce decree by reason of sec. 139 of the Civil Code. Any contract rights the parties might have are concurrent with and supplementary to the rights accruing by reason of the interlocutory decree. Roberts v. Roberts, 83 Cal.App. 345, 256 P. 826, Civil Code sec. 159.

[2] The appellant contends that the finding of the trial court that the provision for monthly payments is not part of the property settlement agreement is not supported by the evidence before the trial court. With this contention we must agree. The trial court was deciding the construction to be placed upon a written contract without the aid of extrinsic evidence, and its construction of the contract is not equally reasonable or more reasonble than the construction we place upon the duties and liabilities arising from the Property Settlement Agreement. In re Estate of Wilson, 40 Cal.App.2d 229, 234, 104 P.2d 716; In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825; Trowbridge v. Love, 58 Cal.App.2d 746, 750, 137 P.2d 890.

[3] Looking at the contract as a whole, we note that it is titled "Property Settlement Agreement" and that the provision for payment of a sum monthly for three years is unqualified and appears within the above entitled document. Only the words "for her proper support and maintenance" indicate an intent that this particular provision is not part of the property settlement agreement and only a provision for alimony. Even though an agreement specifically denominates the payment alimony and not part of a property settlement agreement, they do not partake of the same characteristics as alimony awarded by the court when they are based upon a property settlement agreement. Rich v. Rich, 44 Cal.App.2d 526, 112 P.2d 780.

[4, 5] The terms of the agreement indicate that the only tentative question in the agreement concerned the rights with respect to the minor child. The court did not have to approve the provision for payments in order to give a contract right therefore. Roberts v. Roberts, supra. These payments for a fixed period of time were expressly part of the consideration for conveyances by the wife of certain property and relinquishment of her further right to support and maintenance. As between the parties upon the signing of the agreement their rights were fixed in the absence of an interest in the state which might be harmed. 14 So.Cal.L.Rev. 373; Civil Code sections 159, 175. This contract did not require the approval of the divorce court to make it valid and binding as a property settlement agreement. Hence it follows that the provision for support must have been part of a property settlement agreement and not only a provision for alimony in its ordinary sense.

[6] The next question to be decided is the effect of section 139 of the Civil Code as an implied term of an agreemen to support a wife. It should be noted tha this section concerns the right of a cour *upon divorce* to compel a husband to support his wife if he was at fault. This right to compel is qualified in the event of remarriage. We can not say that this policy of the legislature was intended to apply to all property settlement agreements

in the absence of an agreement to the contrary, which is the situation into which the respondent's position would lead us. This position is supported by Rich v. Rich, supra, in which the court sustained the denial of a motion to modify a divorce decree based upon a property settlement agreement even though there had been a remarriage. However, it should be noted, although the court did not lay great stress upon it, that the agreement expressly provided for the payment of the money after remarriage. Further in view of the conclusion we have reached with regard to the payments being an integral part of the property settlement agreement, we deem this case controlled by Wallace v. Wallace, 136 Cal.App. 488, 29 P.2d 314. Although in that case the property settlement agreement did not contain the words "for her proper support and maintenance," the facts are practically similar in that cash payments at the signing of the agreement and at intervals for a year thereafter were involved. The court in answer to the same contentions made here considers the following factors important (page 492 of 136 Cal.App., page 216 of 29 P.2d): "That a husband and wife may alter their legal relations as to property is well established (Civ.Code, § 159), and apparently with that in view the parties hereto attempted to mutually adjust their respective claims to certain property. Regardless of any allegation in the complaint using the word alimony, a reference to the property settlement agreement discloses they were attempting to effect a complete adjustment of their property and the benefits thereof were to be accepted in full satisfaction of support, maintenance, or alimony. With that clause in the agreement it hardly seems probable that the allowance in the decree would have been by way of alimony, but rather as part of a property adjustment. This is further emphasized by the fact that the prayer of the complaint does not ask for alimony but merely that the property settlement agreement be approved, and by the further fact that the order of the court did not in form designate it as alimony and followed the agreement as to amounts and time of payment." All these factors are presented here.

Atlass v. Atlass, 112 Cal.App. 514, 297 P. 53, upon which respondent relies and which is cited in Wallace v. Wallace, supra, 136 Cal.App. page 493, 29 P.2d page 316, involved a case where extrinsic evidence in the form of affidavits and counteraffidavits was before the lower court. Further, it should be noted that we have no way of determining, from the facts stated, the exact form of the property settlement agreement which was being interpreted.

For the reasons expressed the judgment is reversed.

STURTEVANT and SPENCE, JJ., concur.

Hearing denied; CARTER and SCHAUER, JJ., dissenting.

62 Cal.App.2d 1

COLE et ux. v. GILL.

Civ. 14042.

District Court of Appeal, Second District, Division 1, California.

Dec. 20, 1943.

As Modified on Denial of Rehearing

Jan. 17, 1944.

Hearing Denied Feb. 17, 1944.

1. Reformation of Instruments 🔑46

In action to reform note given for purchase price of realty and trust deed securing it, finding did not authorize conclusion of law that there was no agreement for cancellation of indebtedness on grantor's death.

2. Reformation of Instruments 🔑23

Where grantor of dwelling by her conduct led grantees to believe by her consent to insertion in deed of trust and purchase note of provision that on grantor's death balance due on note should be cancelled, and grantees acted thereon by taking possession and expending about $700 for repairs and improvements, grantor was estopped to deny that she voluntarily consented to the insertion of cancellation clause. Civ.Code, §§ 3516, 3517, 3519; Code Civ.Proc. § 1962, subd. 3.

3. Reformation of Instruments 🔑45(8)

In grantees' action to reform purchase-money note and deed of trust, a finding that clause providing for cancellation of indebtedness on grantor's death was not omitted from original note and trust deed through mistake, and that grantees knew of such omission when they executed and delivered instruments and that grantor never promised that instruments should contain cancellation clause, was not supported by evidence.

4. Mortgages ⚷211

Where grantor reserved life estate in one of three apartments of dwelling sold, and purchasers, after entering possession, expended about $700 in repairs and improvements on property on grantor's promise to cancel any unpaid balance remaining on grantor's death, there was sufficient "consideration" for grantor's agreement that promise as to cancellation should be inserted in deed of trust securing purchase price and for making of second note including such cancellation provision on scrivener's representation that he could not find original note. Civ.Code, §§ 1605, 1606.

See Words and Phrases, Permanent Edition, for all other definitions of "Consideration".

5. Trial ⚷396(2)

A finding wholly outside the issues framed by pleadings or raised by the evidence cannot be upheld.

6. Trial ⚷396(2)

In action to reform trust deed and note, a finding that grantees paid no consideration for insertion of clause for cancellation of indebtedness on grantor's death was not within the issues and could not be upheld. Civ.Code, §§ 1605, 1606.

7. Trial ⚷396(2)

A finding outside the issues in a case could not form an element in determining judgment to be rendered.

8. Trial ⚷396(1)

A finding may be made on an issue not formally raised by pleadings, but which arose during trial, and which was treated by parties as being properly before court on which trial was had without objection.

9. Reformation of Instruments ⚷45(8)

In grantees' action to reform trust deed and note by inserting therein provision for cancellation of any unpaid balance due on grantor's death, finding that grantor did not agree that note and trust deed should contain such cancellation provision was contrary to testimony.

10. Appeal and error ⚷1210(1)

Where judgment for defendant in grantor's action to reform trust deed and note by inserting therein provision for cancellation of any unpaid balance due on grantor's death was reversed because finding that grantor did not agree to cancellation provision was contrary to evidence, case was remanded for new trial.

YORK, P. J., dissenting.

Appeal from Superior Court, Los Angeles County; Clarence M. Hanson, Judge.

Action by Richard Cole and wife against Sadie L. Gill to reform a note and trust deed and to cancel another note, wherein defendant filed a cross-complaint for rescission of the entire transaction. From a portion of the judgment in favor of defendant, plaintiffs appeal.

Reversed and remanded for a new trial.

H. S. Shapiro, of Los Angeles, for appellants.

Snyder & Fletcher, and Louis T. Fletcher, all of So. Pasadena, for respondent.

WHITE, Justice.

This is an appeal from a portion of a judgment in favor of defendant, in an action brought to reform a promissory note and trust deed, and to cancel a promissory note.

The record discloses that on July 20, 1940, respondent Gill sold to appellants Cole a certain lot situate in South Pasadena which was improved with a large dwelling divided into three apartments, for an agreed price of $3,000. Of this amount $300 was paid in cash, and a trust deed was executed by appellants to secure the payment of a promissory note for the remaining $2,700, which was payable in monthly installments of $25 each.

The deed from respondent to appellants reserved to the former a life estate in one of the apartments in said dwelling, but through error said life estate was reserved to the "grantee" instead of the "grantor", and that portion of the judgment herein correcting such error is excepted from this appeal.

The complaint alleges that on the day the deed and trust deed were executed, it was agreed between the parties that in the event of the death of respondent Gill prior to the full payment of the trust deed, the balance remaining due thereunder should be cancelled and the appellants Cole should not be required to pay such balance; that through the mistake of the scrivener and by mutual mistake of the parties, the provision terminating the obligation of the appellants upon the demise of respondent was omitted from the trust deed and the note secured thereby, and the same were delivered to respondent and recorded without discovery by appellants of such omission.

Mrs. Cole's version of the transaction which took place on July 20, 1940, is to the effect that she, her husband and Mrs.

Gill met at the office of Mr. Victor Spaulding, a real estate broker, in South Pasadena, to consummate the sale of the property, and at that time Mrs. Gill suggested that the note representing the balance of the purchase price be cancelled upon her death. Mr. Spaulding replied that that was "a job for an attorney" and took the parties to the office of attorney Louis T. Fletcher, located nearby. Mrs. Gill then stated to Mr. Fletcher that she wanted a life estate reserved to her in the lower north apartment and wished the trust deed and note cancelled upon her death; that she was going to make a will but not that day. To this Mr. Fletcher replied: "If you are going to make a will, we won't put that (the two provisions) in the trust deed." Mrs. Cole testified that the note and trust deed were signed by her and her husband in blank, and because they were going on a trip and wanted something to show their agreement with Mrs. Gill, the latter at the suggestion of Mr. Fletcher executed an irrevocable will, the fourth paragraph of which provided: "I further direct that in the event said note is no longer my property at the time of my death, that my said executor pay out of my estate the remaining balance of principal and interest unpaid thereon. It is my intent that the said Richard Cole and Rose Marie Cole shall be relieved from the burden of paying the balance of said note after my death." This will was witnessed by Mr. Spaulding and Mr. Fletcher and handed to Mr. Cole. A short time thereafter, Mrs. Gill and Mrs. Cole called at Mr. Fletcher's office for the deed and trust deed, which had meantime been recorded. Mr. Fletcher turned the trust deed over to Mrs. Gill saying that he had mislaid the original note but would send it to her when it turned up. Mrs. Gill then handed the documents to Mrs. Cole to keep for her in the latter's safe deposit box. It was too late in the day to place the documents in the box and Mrs. Cole took them home with her. When the Coles read the trust deed that evening, they discovered that "the provision where she was to have the north lower apartment had been recorded and was in the trust deed, but the provision that the note would be canceled at her death was not in there." Thereupon appellants Cole and respondent Gill called at Mr. Fletcher's office, and, according to Mrs. Cole, "Mrs. Gill said 'Mr. Fletcher when we came in to make this agreement, I wanted it stipulated in here that the note would be canceled at my death. We don't find it in there. Will you put it in there for the Coles?' Mr. Fletcher said, 'It is not necessary but to satisfy the Coles I will put it in there.' Whether he copied it or the secretary I do not know, but it was put in there." A second note was drawn at this time containing the cancellation clause, and was signed by the Coles. Also, the cancellation provision which had been inserted in the trust deed was initialed by Mr. Fletcher and the Coles, but Mrs. Gill, although present, did not initial the change. The revised trust deed was left with Mr. Fletcher for re-recording, and sometime later Mrs. Gill and Mrs. Cole received the document from Mr. Fletcher and Mrs. Cole put it away in her safe deposit box. Early in the year 1942, when Mr. Cole, who was then engaged in the war effort, was leaving the country, Mrs. Gill asked him for her papers which were in the Cole safe deposit box. Mrs. Cole did not know which documents belonged to Mrs. Gill, so she took the joint tenancy deed to the property and the trust deed, not to Mr. Fletcher, but to another lawyer, who informed her that the trust deed belonged to Mrs. Gill, but that it looked to him as though the provision regarding cancellation had been added after the document was recorded. "And I said, 'Yes, we know that, but it has been re-recorded.' He said, 'Well, you go to the Hall of Records and find out if it has before you hand her the papers.' I went to the Hall of Records and the man looked it up in the books and I read that page where it was recorded and that provision that the note would be cancelled was not recorded, and I asked the man there if he wouldn't re-record it then. He said, 'No, I can't have that recorded, because Mrs. Gill has not initialed it the way you and Mr. Cole have.' He said, 'Have her initial it and then bring it down and I will have it recorded.' I thought, being Mr. Fletcher was the one that made that out, I went to him, and when I went in his office: 'Oh, yes,' he said, 'Mrs. Cole, I have been looking for you. Mrs. Gill has been in to see me', and I told him about the paper and he said, 'How about having Mrs. Gill initial it, being she didn't initial it at the time it was made?' And I said, 'I want to have it re-recorded, and I thought it had been recorded.' He said, 'That is a mere formality; she will initial that.' I said, 'When do you want to go to see Mrs. Gill?' And he said, 'Why don't you leave the paper with me, and I will take it to her and have her initial it?' I said, 'No', it had not been done right the first time, I wanted to be sure when she initialed it, and I wanted it done right this time, and I wanted to be the one to have it recorded. * * * I went to hire a lawyer for a few hours so he would come to Mrs. Gill's house and witness that initialing on there." At this meeting there were present Mrs. Gill, Mrs. Cole, the two attorneys, Fletcher and Cockerell, and Mrs. Cole's sister-in-law. "Mr. Fletcher went in to see Mrs. Gill by himself first, then he came into the other room and called us to come in to Mrs. Gill * * * and Mr. Cockerell showed Mr. Fletcher the trust deed and he said, 'All we want here is to have Mrs. Gill initial it, and Mrs. Cole would like to have it recorded.' He (Mr. Fletcher) said, 'Mrs. Gill you get the first note.' He handed the first note to me, he handed it to Mr. Cockerell. He said, 'This is the original deal', he said, 'that doesn't count.' Mr. Cockerell said, 'Being you made the second note here, why don't you just destroy the first note?' He said, 'No, no. I advised Mrs. Gill not to make such a deal, that the first note is the one that should count.' I asked Mrs. Gill if she didn't want the deal to stand that way. I said, 'Don't you want the deal to stand the way we made it?' She said, 'Yes, Marie, I want to do what is right.' Mr. Fletcher says, 'No, no, no. I advised you not to sign that, I won't talk to you further.' * * * So he put the trust deed and note in his pocket * * * He already had the note, but the trust deed Mr. Cockerell handed to him, and Mr. Cockerell said, 'Now, what will I have to prove that the deal was made that way? I don't have anything to prove the deal was made that way.' He (Mr. Fletcher) said, 'That is right; now you have nothing.'"

Mr. Victor Spaulding testified that the parties came to his office about July 20, 1940, and Mrs. Gill stated to him that "Mr. Cole had been a real friend to her and she wanted to do something for him if she could, and she wanted to have the note canceled at her death and the deed cleared to them for what they had paid in."

Mrs. Gill testified as follows: "I think the terms of the papers and the transaction were discussed between all of us * * * The first time it was discussed was when those papers were made out, and Mr. Fletcher, a stranger to me, lifted his head and looked askance at me when I allowed that, but I was in very poor health, and I felt Dick (Mr. Cole) was a good friend. I wanted to see him get a good home, I wanted to make it as easy as it possibly could be and upon writing the papers I said, 'Now, when you come to the part about the payments', understand, the payments were to be made, but I said I would just have that—when he was making the notes for the payments, I said, 'Let the payments be canceled after my death.'". The second note was read into evidence containing the clause "providing that upon the death of the said Sadie L. Gill, no further payments shall be made and this note shall terminate and any balance remaining unpaid thereupon shall be canceled." Whereupon, Mrs. Gill was asked: "Q. Now with the information before you, did you understand the meaning—do you understand the meaning of that provision in the note?" To which she replied: "A. I think I did. Q. And you understood it then? A. Didn't I make it? * * * Q. Was that portion incorporated in the copy of the note attached to the trust deed in your presence? A. That specific thing that you read was incorporated when the papers were made out in Mr. Fletcher's office." Mrs. Gill further testified: "It seems to me when that was originally made out it was specified, because this was a dear friend of mine, and I have in mind others, I would like when I passed away that this should be canceled in their favor. I remember that, Mr. Fletcher, but I can't recall just when you put it in, or how you put it in, or anything about it, only I remember I made the request."

Mr. Fletcher took the stand on behalf of the respondent Gill and testified in narrative form as follows: "On July 20th, Mr. Spaulding called me on the telephone and said he had some parties there who wanted to draw a note and wanted it to terminate on the death of the payee of the note, and wanted to know if it could be done. * * * I said, 'Yes, it can be done, but I don't recommend such a thing, as it would render the note non-negotiable.' * * * Mr. and Mrs. Cole were there and Mrs. Gill was there, and they told me—Then they brought up the question that the note was to be canceled upon Mrs. Gill's passing. * * * So I told them that I didn't recommend such a transaction because of the fact that it rendered the note practically non-negotiable, that it would not give Mrs. Gill the opportunity to meet a contingency in the event she might have to fall back upon the balance of that note by cashing it, and we talked at quite length, and the sum and substance of it was that I drew a trust deed and the note; that is the first note; and they were executed by Mr. and Mrs. Cole in my presence. * * * Mrs. Gill said this, 'I want them to have the property after I am gone. I have no one else to leave it to.' That Mr. Cole and her had been very close friends. Then I suggested that the best procedure would be to draw a will and to leave it to them by will. Some one spoke up and said that a will can be canceled. I said, 'Yes, a will can be canceled, but it can be made a part of the consideration, and it can be irrevocable.' So as a result, I drew up the will. * * * Mrs. Gill and Mrs. Cole and Mr. Cole, they came in and said they wanted the note to show in this transaction that it would be canceled upon Mrs. Gill's death. Now, that was some little time after July 20th. * * * I said, 'Now, Mrs. Gill, this is what you want?' She said, 'Yes, I want Dick to have everything, I have no one else to leave it to, and that is what I want.' So I said, 'Well, if that is what you want, all I can do is to do what you tell me to do', and * * * I wrote this new note, and probably said at that time, 'If this is what you want, we won't bother about the old note, we will just draw a new note and make it conform to that.' * * * At any rate, the new note was drawn which provided as is shown here for the cancelation, and I either typed in myself, or had the girl type in that part which is attached to Plaintiffs' exhibit 4, which is in original typing, and which calls for the cancelation of the note upon her death and I had Mr. and Mrs. Cole each initial it, and I initialed it also as a notary public. At that time the trust deed had been recorded. * * * Now, I will say this, that I did not * * * have Mr. and Mrs. Cole sign this note in blank. Under no circumstances do I do such a thing, and I didn't do it in this case. I do recall that Mrs. Cole came to my office and she presented the trust deed * * * and she said that the fact that she and her husband had initialed the addition to the trust deed and the fact that I had notarized it, was not sufficient evidence of Mrs. Gill's signature, and she wanted Mrs. Gill to initial it. I am quite certain that was after Mrs. Gill came to me in what I might say was an attorney and client relationship. I have not considered the first transaction when they all came in as being anything more than representing the group, and I think I did ask her for the note that day, but I didn't tell her that I would take and have it recorded. * * * I went over there and met Mr. Cockerell in the presence of Mr. and Mrs. Cole. He asked Mrs. Gill to initial this addition to the trust deed and also to initial the new note and she refused. It was Mr. Cockerell handed me the trust deed and I kept it." In answer to the following question asked upon cross-examination, "Q. Mr. Fletcher, did you advise Mrs. Gill to refuse to initial the trust deed or the note?", the witness replied:

"A. I don't recall whether I advised her then, or not, I will say this much, I don't think Mrs. Gill will object, I had advised her not to, when she came to me in an attorney and client relationship * * * I said, 'Just don't initial it.'

"Q. Now, when they had come back again, subsequent to the date of the recordation of the deed of trust * * * and called your attention to the fact that the trust deed and note did not contain that provision pertaining to the cancelation of the unpaid purchase price or balance at the time of Mrs. Gill's death, you then proceeded to make out the second note; is that right? A. Well, I think it was the second time, or maybe the third time, but when they came in and told me that they wanted the change made, I turned to Mrs. Gill and said, 'Do you want this?' She said, 'Yes.' As I said before, she had no one to leave it to, that is the way she wanted it. * * * In rebuttal, I want to say this, after I explained to Mrs. Gill the reasons why I thought she should not have the note canceled, she then said that was the way she wanted it, without the cancelation. * * * (In) Mr. Cole's and Mrs. Cole's presence * * * that is the day the note and trust deed was made out. Mr. Brody: This is the day you are advising not having it initialed? The witness: No, the first time, July 20th, when the complete transaction was discussed in our office. As I said before, Mrs. Gill at first wanted the note canceled on her death. When I explained my objections or reasons why I thought it should not be * * * and advised her it should not be, she seemed to comprehend it. She said, 'All right, we will have it the way you suggest', or something to that effect, so did Mrs. Cole and so did Mr. Cole."

[1] As a first ground of appeal it is urged by appellants that the court erred in making the following conclusion of law: "That no agreement was entered into between the plaintiffs and the said defendant Sadie L. Gill, either prior to July 20, 1940, or thereafter, agreeing that said note would be cancelled upon the death of said Sadie L. Gill or that no further payments would be required upon said obligation, or that said obligation would terminate at her death; and no agreement was entered into between plaintiffs and said defendant at any time agreeing that said note or trust deed should contain a provision for the cancellation thereof upon the death of said Sadie L. Gill."

We are in accord with appellants' contention in this regard because the court, upon substantial evidence, made the following findings:

"* * * that it is true that approximately ten (10) days after the execution of said trust deed and note the plaintiffs directed Louis T. Fletcher, as scrivener, to insert upon the copy of said note contained in the trust deed and upon a new trust deed note the following clause and provision now contained in said Exhibit 'A', to-wit: 'providing, however, that upon the death of the said Sadie L. Gill no further payments shall be made and this note shall terminate and any balance remaining unpaid shall thereupon be cancelled.' That it is true that the defendant Sadie L. Gill was present at the time plaintiffs directed said insertion upon said trust deed and note. That it is true that at the time said insertion was made said defendant was of the age of 80 years and was not represented by counsel."

"That it is true that at the time said insertion was made in the note portion of said trust deed that Louis T. Fletcher, as scrivener, informed plaintiffs that the original note described in said deed of trust had been mislaid, and it is true that at that time the said scrivener suggested that a new promissory note be made in lieu of the note that was mislaid."

"That it is true that at the time said insertion was made on said trust deed the plaintiffs did make and sign an additional note in the sum of twenty-seven hundred ($2700.00) dollars, dated July 20, 1940, in lieu of the aforesaid note that had been mislaid and it is true that there was added on said second note at the direction of the plaintiffs and in the presence of defendant Sadie L. Gill, the following provision: 'providing, however, that upon the death of the said Sadie L. Gill no further payments shall be made and this note shall terminate and any balance remaining unpaid shall thereupon be cancelled' and it is true that at said time there was also inserted upon the original trust deed the following provision: 'providing, however, that upon the death of the said Sadie L. Gill no further payments shall be made and this note shall terminate and any balance remaining unpaid shall thereupon be cancelled.' * * *"

[2] The foregoing factual findings lead inevitably to the legal conclusion that respondent is estopped to deny that she freely and voluntarily consented to the insertion of the clause which provided that the note would be cancelled upon her death and that appellants would not be required to make further payments thereafter. Having by her declarations, acts and conduct led appellants to believe by her consent to the aforesaid insertion that upon her death the note was to be cancelled and that the remaining unpaid balance thereon would be remitted, and appellants having acted upon the belief engendered by respondent's acts and conduct, she cannot subsequently be heard to repudiate or falsify her prior acts and declarations. Section 1962, subdivision 3, Code of Civil Procedure; sections 3519, 3516, 3517, Civil Code; Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88, 134 Am. St.Rep. 154; Carpy v. Dowdell, 115 Cal. 677, 47 P. 695. It is clearly demonstrated by the evidence that after appellants took possession of the property they expended in the neighborhood of $700 for repairs and improvements thereon, and that although respondent lived on the property she made no objections whatever to such expenditures.

[3] Appellants must be upheld in their claim that the evidence does not support the finding by the trial court that it was neither through a mistake of the scrivener nor through the mutual mistake of the parties that the cancellation clause was omitted from the original note and trust deed of July 20, 1940, but that the plaintiffs knew on said date when they executed and delivered the trust deed and note to defendant that said instruments did not contain

the cancellation clause and agreed with defendant that said provision should not be contained in said documents; that neither on July 20, 1940, nor at any other time, did defendant promise or agree that said instruments would contain a cancellation clause, but that on said date the parties agreed that no such provision should be contained in said trust deed and note. As we view the record it is barren of any evidence to support the foregoing findings of fact, but establishes the contrary thereof.

[4] Appellants must also be sustained in their contention that the court erred in making its finding of fact numbered nine reading: "That it is true that the plaintiffs paid no consideration to Sadie L. Gill nor did she receive any from any person whomsoever for the insertion of the aforesaid provision on said promissory note portion of said deed of trust, or for the making of said second promissory note, nor was any benefit conferred upon the said Sadie L. Gill by any other person, nor was any prejudice suffered or agreed to be suffered by any person for the making of said insertion."

[5, 6] First of all, the record clearly shows that appellants suffered prejudice by reason of the expenses incurred by them in making improvements upon the property on the promise of respondent to cancel the note and forgive any unpaid balance due upon her death. She received a benefit through the retention by her of a right to occupy a portion of the property during her lifetime. Under such circumstances a sufficient legal consideration was present. Sections 1605, 1606, Civil Code. Another reason exists why the finding last mentioned cannot be upheld. Such finding is wholly outside the issues framed by the pleadings or raised by the evidence. The complaint alleges that the provision in question was omitted from the original papers by mistake and that its insertion later into the trust deed and also into the new note which was made to replace the original one that had been mislaid, was for the purpose of correcting this error. By her answer respondent merely denied these allegations. At no time, by way of special defense or otherwise, did she contend that the insertion of said clause was a new agreement, separate from the original agreement, and that there was no consideration for said second agreement. No such claims appear in the cross-complaint by which respondent sought a rescission of the entire transaction.

[7, 8] There being no issue before the court authorizing it to make the finding in question, and therefore, being a finding outside the issues in the case, it could not form an element in determining the judgment to be rendered. Commissioners v. Barnard, 98 Cal. 199, 32 P. 982. We are not unmindful of the fact that the rule which we have enunciated is subject to the qualification that a finding may be made upon an issue not formally raised by the pleadings, but which arises during the trial; was treated by the parties as being properly before the court and where a trial upon such issue was had without objection. Such however is not the situation here. The record dictates the conclusion that no one except possibly the trial judge considered as being before the court the issue which gave rise to the questioned finding.

[9] Finally appellants attack as unsupported by the evidence finding numbered three which reads as follows: "That it is not true that the said defendant, on July 20, 1940, or at any other time, promised and agreed that said note and trust deed would contain a provision to the effect that upon the death of the defendant Sadie L. Gill no further payments should be made or required and that the obligation of said promissory note should terminate and any balance remaining unpaid at the time of the death of the defendant Sadie L. Gill should be cancelled, but it is true that on July 20, 1940, it was agreed between the plaintiffs and said defendant that no such provision should be contained in said trust deed and note."

[10] In order to sustain this finding it becomes necessary to disregard all of the testimony in the case, including that of respondent herself, save and except only the testimony of attorney Fletcher. And a reading of the latter's testimony generates the conclusion that while he was opposed to making the provisions in the trust deed and note, as referred to in the challenged finding, nevertheless, all of the interested parties to the transaction did so promise and agree, including his own client, respondent herein, who according to the attorney said: "I want them (the appellants) to have the property after I am gone. I have no one else to leave it to." In view of the fact that no findings were made on the issue of estoppel and because of the restrictions upon this court insofar as the credibility of wit-

nesses is concerned, we are of the opinion that while a reversal is required, the cause should be remanded to the trial court for further proceedings rather than with instructions to enter a judgment for plaintiff.

For the foregoing reasons the judgment is reversed and the cause remanded for a new trial.

DORAN, J., concurs.

YORK, P. J., dissents.

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62 Cal.App.2d 201

STEWART v. SANTA ROSA MINING CO. et al.

Civ. 3238.

District Court of Appeal, Fourth District, California.

Jan. 5, 1944.

Hearing Denied March 2, 1944.

1. Mines and minerals 🔑34

Evidence established ample consideration for note given as part of purchase price of mining claims.

2. Bills and notes 🔑63

Where all required papers had been placed in escrow so that according to agreement note should have been delivered to payee by escrow holder, but he was reluctant to do so without protection of court order and court took necessary steps in that regard, there was sufficient "delivery" of note to entitle payee to maintain action thereon against maker.

See Words and Phrases, Permanent Edition, for all other definitions of "Delivery".

Appeal from Superior Court, Inyo County; Pat R. Parker, Judge.

Action on a note by John Stewart against Santa Rosa Mining Company, Harold J. Goldman and others, wherein Harold J. Goldman filed a cross-complaint. From a judgment for plaintiff, the Santa Rosa Mining Company appeals.

Affirmed.

Fred W. Heath, of Los Angeles, for appellant.

Jess G. Sutliff, of Independence, for respondent.

BARNARD, Presiding Justice.

This is an action on a note for $5,000 given to the plaintiff by the Santa Rosa Mining Company, which will be referred to as the mining company.

In 1933, the plaintiff and one Duncan located four mining claims in Inyo County, known as the Empress Nos. 1 to 4. On June 23, 1938, the plaintiff and Duncan sold these claims to the mining company, of which J. R. LeCyr was president and manager, and the mining company as part of the consideration gave to the plaintiff two notes for $2,500 each, secured by a mortgage on the Empress claims. The mining company did not pay these notes and did not perform the annual assessment work on these claims for the year ending June 30, 1939.

On September 1, 1939, one Howell, who had been prospecting with the plaintiff, attempted to locate the same claims calling them the "Wide West Nos. 1 to 4", his notice of location stating that they were a relocation of the Empress claims. Later that same day J. R. LeCyr went to the property and found the Howell location notices, on each of which he wrote "This location is void and fraudulent." He then attempted to locate a claim called the "Ethel", which covered a portion of the other claims. Having learned of LeCyr's action, Stewart and Howell went to Los Angeles and contacted LeCyr on September 3, 1939. A heated argument ensued with mutual accusations of "claim jumping". LeCyr told the others that in locating the "Ethel" he was trying to protect the mining company as well as them. The parties then talked over an agreement with the idea of settling the dispute and avoiding litigation. Two days later a written agreement which had been prepared by LeCyr for this purpose, was executed.

This agreement, dated September 5, 1939, recited that it was between the mining company on the one hand and Stewart, Duncan and Howell on the other hand. It provided that the mining company was to purchase and the others to sell for the sum of $15,000 the Ethel claim located by LeCyr and the Wide West claims Nos. 1 to 4 located by Howell, that the company was to pay for said claims by executing and delivering a $5000 note to Stewart, another $5000 note to Howell, a $2500 note to Duncan, a $2500 note to Duncan's wife, and a mortgage on the property securing these notes. The agreement then provided that Harold J. Goldman should act as escrow holder; that the mining company should procure and deposit in this escrow a quitclaim deed from J. R. LeCyr conveying to it the Ethel claim; that Howell should deposit in the escrow a deed conveying to the mining company the Wide West claims; that Stewart and Duncan would deposit in the escrow promissory notes which had been given them by the mining company in connection with the purchase of the Empress claims in 1938, together with a satisfaction of the mortgage which had then been given to secure said notes; that all of these documents should be deposited in escrow in twenty days; that if this was not done any party thereto might cancel the agreement and receive back the documents which he had deposited in escrow; and that when all these documents were deposited in escrow the escrow holder should deliver the deeds to the mining company and the notes to the respective sellers with the mortgage given to secure the new notes. The agreement further provided that the mining company should have the option to apply 25% of the net smelter returns from ore produced or 20% of money received from the sale of securities to the payment of the notes, provided that it should keep at least 100 8-hour shifts per month working upon the property throughout the life of the mortgage. The agreement was signed by the mining company and by Howell.

All of these instruments were executed and deposited in escrow with Goldman, as provided in the agreement, although this was not completed within twenty days. However, none of the parties sought to cancel the agreement because of any delay in this regard. It is not contended that the mining company ever worked 100 8-hour shifts per month on the property or ever attempted to exercise its option to apply a portion of the smelter returns or a portion of the money received from the sale of securities to the payment of the note here in question.

The mining company failed to do the assessment work on these claims and made no payment on the $5,000 note to the plaintiff which had thus been placed in escrow. On July 21, 1940, J. R. LeCyr, his brother and another officer of the mining company attempted to relocate a portion of the ground covered by these other claims, naming this location the "Hillside". On September 26, 1941, the plaintiff filed an action on the notes aggregating $5,000 which had been given him by the mining company on the first purchase of the property in 1938. After that action was filed he wrote to the escrow holder telling him not to record any papers pertaining to his pending suit without his permission. Judgment in that action was in favor of the mining company, the court holding that these notes had been superseded by the $5,000 note executed under the agreement of September 5, 1939, and placed in escrow. The plaintiff then brought the present action on the latter note alleging that Goldman was holding this note for his use and benefit, and that since the mining company had failed to do the necessary work upon the property the security of the mortgage was lost and had become worthless.

In this action Goldman, the escrow holder, was named as a defendant. He answered, among other things, that he was holding said $5,000 note as an escrow and that he would deliver it either to the court or to either party if so instructed by the court. Before the trial the plaintiff moved, on due notice, to have the escrow holder required to produce the note and deposit it with the clerk. This motion was heard on affidavits of the respective parties and the court ordered the note produced and filed with the clerk. On the trial of the action the court found in all respects in favor of the plaintiff and entered judgment for him, from which the mining company has appealed.

[1] As admitted by the appellant in its reply brief, the only questions here involved are whether there was a consideration for this note and whether there was a sufficient delivery thereof. The appellant contends that there was no consideration for the note because Howell's location of the Wide West claims on September 1, 1939, was void for several reasons, and because the deed placed in escrow by Howell did not and could not convey a full and complete legal title since his original locations were void, and since he had not performed the necessary discovery work. LeCyr testified that he discovered the defects in the Howell notices of location, of which complaint is now made, when he visited the property later in the day on September 1, 1939, and before he made his attempted location on that day. He therefore knew of all of these defects

before the agreement of September 5, 1939, was entered into. While he also testified that when the parties began to discuss a settlement on September 3, 1939, he proposed that Howell should correct his location notices, should do the discovery work and should put himself in a position to convey a good title to the claim, there is much evidence to the contrary and the contract which was later signed, and which was prepared by LeCyr, is entirely different. Under that contract the mining company was purchasing the claims as they then were (it having already purchased the original Empress claims), and was to pay for the same by giving these notes through the escrow which was to be completed within twenty days and long before the discovery work was required to be done. Howell did not agree to do any work on the property and that duty was clearly assumed by the mining company under the terms of the contract. If the property was lost, as is now claimed, it was entirely the fault of the appellant in failing to do the necessary work. The mining company received exactly what it was to receive under the terms of the written agreement, and the respondent surrendered the original notes for $5,000 and gave a satisfaction of the mortgage which he had received upon the first sale of the property to the appellant in 1938. An ample consideration for the new notes appears.

[2] All of the required papers had been placed in escrow and in accordance with the terms of the agreement the note here sued upon should have been delivered to the respondent by the escrow holder. While he was reluctant to do so without the protection of a court order the court took the necessary steps in that regard and there was a sufficient delivery of the note for all the purposes of this action.

Other points raised by the appellant in its opening brief require no consideration. These are based upon a misconstruction of the agreement of September 5, 1939, or upon a portion of the testimony in complete disregard of other evidence which conflicts therewith. If there is anything that even tends to indicate that the respondent is not entitled to recover on this note, either morally or legally, we have been unable to find it in the record.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

62 Cal.App.2d 122

SMITH v. SAN MATEO COUNTY et al.

Civ. 12565.

District Court of Appeal, First District, Division 2, California.

Dec. 28, 1943.

Hearing Denied Feb. 24, 1944.

1. Counties 🔑143

Where plaintiff's minor son was killed when a tree fell across a cabin in which the minor was sleeping while a member of a summer camp conducted at a public park maintained by county and county forester and fire warden had observed that tree was spike-topped indicating that it was undernourished, dying, and dangerous, plaintiff was entitled to recover from the county for the death. Gen.Laws 1937, Act 5619, § 2.

2. Counties 🔑143

Where plaintiff's minor son was killed when a tree fell across the cabin in which minor was sleeping while a member of a summer camp conducted at a public park maintained by county and the dangerous condition of the tree, which should have been known and seen, had existed for many years, plaintiff was entitled to recover from the county for the death on ground that such officers and employees had constructive knowledge of the condition. Gen.Laws 1937, Act 5619, § 2.

3. Counties 🔑143

Under statute providing that county should be liable for injuries resulting from dangerous condition of parks where the governing and managing board of such county had knowledge of the condition, the "knowledge" may be either actual or constructive. Gen.Laws 1937, Act 5619, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Knowledge".

4. Counties 🔑143

"Constructive notice" of dangerous condition of park tree may render county liable for injuries caused thereby, long-continued neglect of conditions that should have been known being sufficient constructive notice. Gen.Laws 1937, Act 5619, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Constructive Notice".

5. Counties ⚷143

Under statute imposing liability upon counties for injuries resulting from dangerous condition of parks, where officers or employees having authority to remedy such conditions had knowledge or notice thereof and failed to remedy the condition within a reasonable time thereafter, liability is predicated solely upon knowledge, actual or constructive, of existence of a dangerous condition and failure to remedy such condition within a reasonable time. Gen.Laws 1937, Act 5619, § 2.

6. Counties ⚷143

The statute relating to liability of counties does not manifest an intention to make counties liable for all injuries resulting from natural conditions upon the public domain, but to impose liability upon a county maintaining for an unreasonable time a known dangerous but remedial condition in a park, regardless of whether such condition was attributable to natural or artificial causes. Gen.Laws 1937, Act 5619, § 2.

7. Counties ⚷143

Where plaintiff's minor son was killed when a tree fell across a cabin in which the minor was sleeping while a member of a summer camp conducted at a public park maintained by county, county was not relieved from liability for the death on ground that the injury was caused by a natural condition which is not a "defect". Gen.Laws 1937, Act 5619, § 2.

See Words and Phrases, Permanent Edition, for all other definitions of "Defect".

◆

Appeal from Superior Court, San Francisco County; Thomas M. Foley, Judge.

Death action by Peter L. Smith against the County of San Mateo and others. The action was dismissed as to defendants other than named defendant. From a judgment for plaintiff, named defendant appeals.

Affirmed.

George M. Naus, of San Francisco, and Gilbert D. Ferrell, Dist. Atty., San Mateo County, of Redwood City, for appellant.

James F. Brennan, Harrison W. Call, and Walter McGovern, all of San Francisco, for respondent.

SPENCE, Justice.

Plaintiff sued defendants to recover damages for the death of his minor son. The action was later dismissed as to defendants other than the County of San Mateo. The cause was tried by the court sitting without a jury. The trial court made findings upon all issues. The findings were in favor of plaintiff upon practically all issues but the trial court found and concluded that plaintiff's action was barred by the provisions of section 4078 of the Political Code. Plaintiff appealed from the judgment entered upon those findings of fact and conclusions of law and said judgment was reversed on appeal with directions to enter judgment in favor of plaintiff. Smith v. County of San Mateo, 57 Cal.App.2d 820, 135 P.2d 372. The present appeal is taken by the defendant county from the judgment thereafter entered by the trial court pursuant to said directions.

The main question presented on this appeal is whether the evidence was sufficient to support the findings of fact upon which the liability of the defendant county was based. Plaintiff sought to establish his case through the testimony of employees and former employees of the defendant county and there is practically no conflict in the material portions of that testimony.

Before setting forth the particular findings under attack and the evidence relating to said findings we will refer briefly to certain facts which are wholly undisputed. Plaintiff had a minor son who was ten years of age. The son was on a trip, arranged by the Young Men's Christian Association, into a public park which was owned and maintained by the defendant county. The park consisted of over three hundred acres and was located in the heavily wooded area in San Mateo County between La Honda and Pescadero. On the night of June 22, 1939, and while the son was sleeping in one of the cabins in a camp ground in said public park, a large redwood tree, without any disclosed external cause, fell across the cabin and caused the son's death.

The findings upon which the liability of the county was based were as follows:

"That at all times herein mentioned the defendant county of San Mateo owned and maintained in said county a public park and camping ground sometimes known as 'Loma Mar'; that said park was maintained by said defendant county for public use and was at all said times under the care and supervision of said defendant county; that on and before June 22, 1939, there were standing in said park numerous trees of a height of thirty feet or more, and that some of said trees were dead and partly rotted and were in constant danger of falling to the ground or of being blown down by ordinary winds prevailing in said park; that by reason of such condition of said trees said park and grounds were then and there in a dangerous and defective condition; that such dangerous and defective condition of said park and grounds had existed for many months prior to June 22, 1939, and that such condition was known to said defendant county and to its board of supervisors and county manager, which said officials, and all of them, had authority to remedy such dangerous and defective condition, for a period of many months prior to said last mentioned date; that notwithstanding such knowledge of such dangerous and defective condition of said grounds and said park, said defendant county negligently failed to remedy or remove such condition; that said defendant county, by and through its said officials, agents and employees was at all times herein mentioned aware of said condition of said trees and knew said trees were dangerous and likely to fall or topple at any time."

Defendant contends that the evidence was insufficient to show "knowledge or notice of the defective or dangerous condition" as required by the public liability statute. Stats.1923, p. 675; Deering's General Laws, Act 5619, sec. 2. In considering this contention, it is appropriate to set forth a description of the tree in question.

The tree was a large coast redwood tree, being about 125 feet in height and having a diameter at the base of about 7 to 10 feet. It was a second growth tree similar in most respects to the redwood trees quite generally found in coastal area of California. The tree was admittedly "a dangerous tree" as "all the heart of it had been burned out" at the base and the tree leaned a few feet in the direction in which it fell. Upon examination made after the fall of the tree, it appeared that there were only three "live spots" connecting with the roots at the base of the tree which spots measured approximately as follows: one about 5 inches by 14 inches; another about 8 inches in diameter; and another about 6 inches in diameter. As described by one of the witnesses, "The interior of the tree was all burned out and there was just above three live spots of woods on the exterior of the tree". Further details of description will be hereinafter mentioned in discussing the question of knowledge.

On the subject of knowledge, there was a great deal of testimony introduced relating to knowledge of the dangerous condition of the trees generally and other testimony relating to knowledge of the dangerous condition of the particular tree in question. In fact the subject of the dangerous condition of the trees appears to have been the subject of discussion among county officials and employees over a long period of time. Mr. Jensen was employed as superintendent of the park from 1935 to 1941. Mr. Werder was the county forester and fire warden for many years. These men were called by plaintiff and they testified at length. Mr. Jenson rendered his "Superintendent's Report No. 1" to Mr. Kellogg, the county executive, shortly after he assumed his duties as superintendent in 1935. Under the heading "Safety", he said in that report "under this comes the County's responsibility regarding safety of users of showers and dressing rooms and the three swimming pools in the Park; also the matter of the removal of such trees as are a menace to public safety." Mr. Werder was "put in there to clear the trees" as "there were a lot of dangerous and poor trees in the park". He had previously started some of this work in 1925 and he had been authorized by the board of supervisors in 1931 to establish a labor camp for this work, which camp had consisted of about fifty men. Mr. Werder testified that nevertheless "any number of trees fell" between 1932 and 1938. When he resumed the work after Mr. Jensen became superintendent in 1935, the two men apparently discussed the condition of the trees very frequently as the work progressed. Mr. Werder also discussed the situation on several occasions with Mr. Kellogg, and on at least one occasion with a majority of the members of the board of supervisors in a meeting in Mr. Kellogg's office. Mr. Werder testified, "I discussed the matter several times because I was criticized for taking out too many trees out of the park. But I deemed they were dangerous and should be removed, due to the fact that it was a public playground." We need recite no further testimony to demonstrate that numerous officials and employees of the defendant county, including the board of supervisors, the county executive, the superintendent of the park and the county forester and fire warden, had actual knowledge of the dangerous condition of the trees generally.

With respect to the condition of the tree which fell, no officer or employee admitted that he had actual knowledge of the dangerous condition prior to the fall. Those who were called as witnesses, however, were asked many questions for the purpose of showing that, prior to the fall, they did have knowledge of the dangerous condition of this particular tree. From their answers, it appears that this tree was a "spike-top" or "spike-topped" tree and had been such for more than forty years. Such a tree was described by Mr. Werder as follows: "A redwood tree which is in perfect condition has a perfect plumb top; a tree that is not in good condition and subject to rot has what we call 'a spike-top'. In other words, you will see a long dead spire sticking up through the top of the tree with dead limbs on it. That is what we call a spike-topped tree". Mr. Werder further testified that from his examination of the tree after it fell, he would say "it was a dangerous tree." He was asked by the court, "The top indicated that to a tree man?" and he replied, "Yes, a spike topped tree is an indication of a poor fed tree and a dying tree, undernourished tree." He stated that he "determined certain trees were dangerous from thirty years experience". He then gave the following answer to the questions propounded:

"Q. How do you determine whether they are dangerous or not? A. Trees that were badly rotted and had very little footing.

"Q. How did you determine they were badly rotted? A. By digging and making a survey of the tree. A redwood tree that is decayed or spike-topped, what we call a spike-topped tree, is generally a tree that is subject to heart rot or spot rot,—And if it is that way on top, there is something contributing to the decay of the tree and you will find it at the base of the tree, due to poor feeder roots."

He further testified that on this tree "the limb growth was not very good" and that there "was not good live healthy foliage". While the witnesses, including Mr. Werder, admitted that they had observed this spike-topped tree many times, it did not appear that any witness had actually examined the base of the tree to determine the condition there. In describing the condition which was found to exist at the base after the fall, the term "goose-pen" tree was used in the questions and answers. There is testimony that this tree was a "goose-pen" tree and there is testimony that it was not. That term is not clearly defined in the testimony but it appears probable that most of the witnesses believed that the term denoted a tree which was hollow at the base and had an opening to the outside through which a goose might enter and take shelter in the hollow. It is clear from the testimony that this tree was hollow at the base but it is not clear that there was any appreciable or plainly visible opening to the outside of the tree. The hollow portion at the base had been caused by rotting and burning but there had been no fire in that area for more than forty years. The testimony showed that the tree "had been badly underburned". This condition of the tree could have been determined merely "by removing a little of the leaf mold that had gathered there" and putting one's hand up into the hollow. While the extent of the live spots could not have been determined while the tree was standing without making some further examination, such examination could have been made merely by "digging down under tree". It does not appear, however, that any one ever removed any leaf mold or dug down under the tree to examine the condition of the base. Without having made any such examination, the employees of defendant testified that they had not considered that particular tree unsafe or dangerous prior to the fall.

[1-4] Defendant argues that there was no evidence to show that the board of supervisors or any person having authority to remedy the condition had knowledge of the dangerous condition of that particular tree and that therefore the above-mentioned findings relating to knowledge find no support in the evidence. Assuming that knowledge of the dangerous condition of that particular tree was necessary, we believe that there are two sufficient answers to this contention. The first answer is that the evidence showed that at least one employee of the defendant county, namely Mr. Werder, had observed that this was a spike-topped tree which indicated, according to his testimony, that it was an undernourished, dying and "dangerous" tree. This

evidence was sufficient to show actual knowledge of the dangerous condition on the part of at least one person who admittedly had authority to remedy such condition. The second answer is that the evidence showed that the dangerous condition of that particular tree, which should have been known and seen, had existed for many years and that the officers and employees who had authority to remedy the condition had wholly failed and neglected to do so. This evidence was sufficient to show at least constructive knowledge on the part of all such officers and employees. It is well settled that the knowledge specified in the statute may be either actual or constructive. As was said in Edwards v. City of San Diego, 126 Cal.App. 1, at page 3, 14 P.2d 119, "The first point raised is that actual knowledge of the condition of the tree was not brought home to the appellant and that constructive notice thereof is not sufficient under the statute. It has now been settled that constructive notice in such a case is sufficient and that this may be established by showing long continued neglect of conditions that should have been known and seen. (Citing cases)."

Defendant cites and relies upon Dineen v. San Francisco, 38 Cal.App.2d 486, 101 P.2d 736, in support of the claim that the statute did not impose upon defendant a duty of inspection. In view of the conclusions which we have reached we deem it unnecessary to discuss the claim that the statute imposes no general duty of inspection. We are not prepared to say, however, that the observations made by Mr. Werder and others did not place upon them a special duty to inspect the base of the tree in order to determine beyond question whether this leaning, undernourished and dying tree could be allowed to stand without serious danger to the occupants of the cabins in the near vicinity. Unlike the situation in the cited case, the evidence here showed that plainly visible indications of the dangerous condition of the tree had existed for a long period of time and had been observed by those having authority to remedy the condition; and the evidence further showed that a simple inspection of the base of the tree would have indisputably confirmed those plainly visible indications.

[5, 6] Defendant further contends that the evidence is insufficient "because it shows no more than an injury caused by a natural condition" and "because a natural condition is not a 'defect' within the meaning of the statute". In support of this contention, defendant cites certain authorities dealing with the scope of the common-law liability of private landowners and one authority dealing with the scope of the liability of a city under a Michigan statute. We find none of these cases in point. The title and body of our statute clearly show that the liability imposed thereby was intended to be quite broad in its scope. It imposes liability upon counties for injuries "resulting from the dangerous or defective condition" of certain public places including parks and play grounds "in all cases" where the officers or employees "having authority to remedy such condition, had knowledge or notice of the defective or dangerous condition" and had failed to remedy the condition within a reasonable time after acquiring such knowledge or notice. There is no indication in the statute that it was intended to be limited in the same manner as was the liability of a private landowner at common law and there is every indication to the contrary. The liability imposed is predicated solely upon (1) the existence of a dangerous or defective condition (2) the knowledge, actual or constructive, of the existence of such condition, and (3) the failure to remedy such condition within a reasonable time after acquiring such knowledge. While the statute does not evidence an intention on the part of the legislature to make public corporations liable for all injuries resulting from natural conditions upon the public domain, it seems entirely clear that the legislature intended to impose liability upon a public corporation which might maintain for an unreasonable time a known dangerous but remediable condition in a park or playground regardless of whether such dangerous condition was attributable to natural or artificial causes.

[7] The Michigan case upon which defendant relies (Miller v. City of Detroit, 156 Mich. 630, 121 N.W. 490, 132 Am.St. Rep. 537) involved a statute which was entirely different in substance from the one before us. The title of the act there was, "An Act to provide for the recovery of damages for injuries caused or sustained by reason of defective public highways, streets, bridges, sidewalks, cross-walks or culverts." Pub.Acts 1887, No. 264. Plaintiff in that case was injured by the fall of a dead limb from a tree. The court said on page 492 of 121 N.W., that the injury was not caused by "such a defect in

the highway as to be within the intention of the Legislature in its requirement to maintain and repair streets, bridges, sidewalks, cross-walks, and culverts * * *". The distinction between the two statutes is clear as the Michigan statute imposed liability solely for injuries caused by defective public works while our statute imposes liability for injuries resulting from either defective or dangerous conditions in either public works or public places. In our opinion, the liability imposed by our statute is not limited to conditions "artificially made by the hand of man" as argued by defendant.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

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62 Cal.App.2d 68

SWARTHOUT v. GENTRY.

Civ. 3242.

District Court of Appeal, Fourth District, California.

Dec. 22, 1943.

Rehearing Denied Jan. 14, 1944.

Hearing Denied Feb. 17, 1944.

1. Partnership 🔑67, 68(1)
Tenancy in common 🔑4

Evidence that the parties, having formed a partnership for that purpose, purchased a cattle business and contributed equal amounts in payment, showed that not only the cattle and other personalty, but also the realty, including certain desert water holes, was owned by the partnership and not by the parties as tenants in common.

2. Partnership 🔑22

A partnership may be formed by parol, though its sole purpose is to deal in realty.

3. Partnership 🔑68(1)

That realty dedicated to partnership use and used by the partnership for its sole benefit was acquired by one or more of the partners with their private funds, or was owned by them as tenants in common prior to formation of the partnership, will not necessarily defeat the partnership's claim of ownership, in the absence of an express agreement that it should remain property of the holders of the legal title, who, under such circumstances, will hold in trust for the partnership.

4. Trusts 🔑17(3)

Where title to realty stands in the name of a partner or third person, the statute of frauds does not prevent proof of a trust in favor of the partnership. Civ.Code, § 1624.

5. Partnership 🔑68(1)

Evidence that government land, used by a partnership in its cattle business, was purchased in his own name and with his own funds by one partner, who later conveyed a half-interest to the other partner, who paid his share of the price, and that the partnership continued to use the land and paid all taxes thereon, showed that it was partnership property.

6. Partnership 🔑68(1)

In the absence of an express contract, the conduct of the partners, one of whom purchases realty in his own name, is the best evidence of their intention concerning ownership of the property.

7. Partnership 🔑68(1)
Tenancy in common 🔑4

Where a partner and his wife, together with his unmarried partner, conveyed properties theretofore acquired by the partners to their attorney's secretary, who immediately reconveyed to the partners, without consideration, a mere indorsement on the secretary's deed that its purpose was to partition the partners' interests could be given little effect, and the conveyances did not affect the question of whether the properties were owned by the partnership or by the parties as tenants in common.

8. Trusts 🔑357(2)

A partner, holding the legal title to realty in trust for the partnership, could not convey his interest therein to a corporation without subjecting it to the same trust, where the corporation was owned by him and was therefore charged with his knowledge of the trust.

9. Partnership 🔑340

Generally, after taking an accounting on dissolution of a partnership, the court should require a sale of the partnership property and distribute the proceeds to the partners after payment of costs, expenses, and debts, but this rule is not inflexible. Code Civ.Proc. § 752.

10. Partnership ⚷340

On dissolution of a partnership, its property may be partitioned in kind only where it will not cause serious loss, and where there are no partnership debts due to anyone other than the partners. Code Civ.Proc. § 752.

11. Partnership ⚷340

On decreeing dissolution of a partnership which had conducted a cattle business, the court should not have decreed partition of realty without finding on conflicting evidence that partition could be made without serious loss, and a negative finding that it did not appear from the evidence that the property was so situated that partition could not be made without great prejudice was insufficient. Code Civ.Proc. § 752.

12. Fixtures ⚷7
Partnership ⚷68(1), 333

A substantial mountain cabin, which was constructed for his own use by a partner who invested $9,600 therein plus partnership timber and the labor of partnership employees probably worth not more than from $500 to $1,000, and which was built on a cement foundation imbedded in partnership land, was a "fixture" whose value must be deemed a contribution to the partnership, and, on dissolution thereof, the partner should receive credit for the increase thereby in the value of the partnership property, having regard to his use of the cabin for about 13 years, with consequent depreciation.

See Words and Phrases, Permanent Edition, for all other definitions of "Fixture".

13. Partnership ⚷83

Where a partnership formed to conduct a cattle business sold most of its cattle after about 16 years, a partner who for several years thereafter continued to supervise the partnership ranches, farming operations, etc., was entitled to his salary of $100 a month pursuant to the original agreement, never rescinded.

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action for a partition of property by Albert Swarthout against J. Dale Gentry, who filed a cross-complaint for a dissolution of the partnership between the parties, and for other relief. From an interlocutory judgment providing, among other things, for the appointment of referees to partition real property and striking a balance on an accounting between the partners, defendant appeals.

Reversed.

Duckworth, Mussell & King and Fred A. Wilson, all of San Bernardino, for appellant.

William Guthrie and Don W. Jordan, both of San Bernardino, for respondent.

MARKS, Justice.

This is an appeal from an interlocutory judgment providing for the appointment of referees to partition real property and striking a balance on an accounting between partners.

In his complaint plaintiff alleges that real estate in San Bernardino County and certain desert water holes were owned by himself and defendant as tenants in common and sought a partition of the property. Defendant denied that the property was held by the parties as tenants in common, alleging it was owned by a partnership composed of plaintiff and defendant operating under the name Gentry and Swarthout. By way of cross-complaint defendant asked for an accounting, a dissolution of the partnership, for the appointment of a receiver to take charge of and sell the partnership property and a distribution of the proceeds.

The trial court found that the real estate and water holes were owned by the parties as tenants in common and not as partners; that a partnership existed for the purpose of running, raising, buying and selling cattle; that the partnership assets consisted of some horses, seven head of cattle and some personal property; that on an accounting it appeared that plaintiff had contributed to the partnership capital $2,616.40 more than had defendant.

An interlocutory judgment was entered which provided for the appointment of three referees to divide and allot the real property (including the water holes) between the parties and to report to the court. It was further decreed that the partnership of Gentry and Swarthout be dissolved; that a receiver be appointed to take possession of its property and sell the same; that after the expenses of the receivership be paid the balance be applied on the partnership indebtedness to plaintiff; that if that debt be not so paid in full plaintiff have judgment against defendant for one-half of the unpaid balance. The evidence shows that all of the cattle owned by the partnership, except a few strays, had been sold before September 30, 1937, under an agreement of the parties.

The principal question involved is the sufficiency of the evidence to support the finding that the real property was owned by the parties as tenants in common and that it was not an asset of the partnership. Two secondary questions are argued: (1) Could a house built by Gentry, largely by use of his own funds, and for his own private use, on real property at Big Meadows in the San Bernardino Mountains be set aside to him with sufficient ground for its convenient enjoyment, and (2) could plaintiff demand and collect from the partnership $100 per month salary after the partnership had sold practically all of its cattle by September 30, 1937?

There is very little real conflict in the evidence. We have here a picture of two men, individualists, of honesty and integrity who had been partners and friends for sixteen years, each having absolute trust and confidence in the other, with one becoming offended over what seems to us to be a matter of minor importance, and now engaged in rather bitter litigation.

In and prior to 1907, two men, Garner and Marshall, were conducting a cattle business on the northerly or desert side of the San Bernardino Mountains with their headquarters at Cottonwood Springs. During that year plaintiff bought Garner's interest in the business which was continued by plaintiff and Marshall as copartners. Plaintiff filed a homestead on land surrounding Old Woman Springs and probably obtained a patent to it. Thereafter the winter headquarters of the business was located there, it being generally known as the Old Woman Springs Ranch. The summer headquarters were located on government land at Big Meadows in the San Bernardino Mountains. E. Scott Blair bought Marshall's interest in the partnership which was continued by plaintiff and Blair. Subsequently plaintiff sold his interest to Blair who conducted the business alone. Blair died in 1920 or 1921.

In 1921 plaintiff and defendant formed a partnership to purchase and conduct the cattle business formerly owned by Blair. Mrs. Blair died shortly after the death of her husband so at the time of the purchase there were two estates and two probate sales. However, for the purpose of this opinion it will not be necessary to differentiate between them. When we refer to the Blair estate or the probate sale it will be understood we are referring to either or both of them.

There was no written partnership agreement between plaintiff and defendant. The verbal agreement was described by defendant, without material contradiction from plaintiff, as follows: "The agreement was for the operation of a cattle ranch, to raise, buy and sell cattle, horses, or whatever stock that we might decide on, on holdings that we had purchased from the estate of E. Scott Blair and Leona Blair. The agreement entered into verbally was that we would be equal partners in everything, share and share alike. Mr. Swarthout was to manage the ranch and devote his full time to it on salary. I was to look after the business part of it outside of its operation, without any compensation. We were to operate a cattle ranch with all the necessary labor and efforts on both our parts to make it a success. That was about all the agreement was at that time, when we first started. Q. Well you mentioned the salary Mr. Swarthout was to draw. How much was he to draw? A. Mr. Swarthout was to have $100 a month, his board for himself and his family and living quarters."

Each party contributed $17,500 to the partnership. Gentry's contribution was in cash. Swarthout contributed $1,000 in cash and a claim against the estate of Blair, making his contribution equal to that of defendant.

The purchase from the Blair estate was completed by June 11, 1921. The consolidated descriptions in the deeds conveyed six parcels of real estate in fee to Albert R. Swarthout and J. Dale Gentry. They also conveyed all the right, title and interest of the estate in water rights and a number of water holes and all improvements at Big Meadows. There was also conveyed horses, cattle, saddles, bridles, windmills, pipe lines, farm machinery and other such personal property together with certificates for the purchase of State lands. The total of the considerations named in the deeds was $18,200. The balance of the $35,000, or $16,800, seems to have been used to acquire other cattle from the Blair estate. We fail to find in the record any conveyance of the title to these cattle.

Plaintiff, in his testimony, described the purchase as follows:

"Q. And then you and Mr. Gentry bought all the cattle and interest of Dr. Blair and his wife? A. We did.

"Q. Do you remember the amount of the purchase price? A. $35,000.

"Q. And of that Mr. Gentry paid half of it? A. He did, yes.

"Q. And you paid half? A. Yes."

The parties went into possession of the property purchased from the Blair estate and continued the business so acquired. The winter headquarters was on 260 acres of patented land composing Old Woman Springs Ranch acquired in the purchase from the Blair estate. The cattle ranged on the desert during the winter months and watered at the various springs, wells and water holes described in the deeds, one of which was about 22 miles easterly from Old Woman Springs Ranch. As soon as weather conditions permitted it was the custom to move the headquarters and the stock to the summer range in the San Bernardino Mountains, where they remained until they were moved back to the desert in the fall.

For the first years of the partnership the cattle on the summer range were grazed on government lands under grazing permits. Gentry, using his own private funds, bought nine sections of land in that locality from the Southern Pacific Company. He exchanged part of this land with the United States for approximately 1683 acres of government land at Big Meadows on which were located the improvements purchased from the Blair estate. The patent was issued to J. Dale Gentry and is dated July 18, 1929. He conveyed a one-half interest in this property to plaintiff for $10,000, paid out of plaintiff's private funds.

Plaintiff described the events leading up to these transactions as follows:

"Q. Then you and Mr. Gentry at some time or other discussed the possibility and the desirability of your acquiring title to some of this grazing land which you had previously been using under these permits? A. Yes.

"Q. When did that discussion first occur? When did you first begin to talk about getting some land up there that you would own rather than have the permit on? A. Not long after we were together. We would naturally want to get holdings there as soon as possible.

"Q. Was there some particular thing that brought about the acquisition of those lands? Was there some fact that entered into it? A. In this way; that a person in there owning property naturally would have a preference on the grazing in asking for a grazing permit.

"Q. If you owned it you would not need a permit, would you? A. I am speaking about the Forest Service grazing area. Certainly we would not need a permit to graze on our own land.

"Q. One of the facts which brought about the decision to go out there and buy some land was to assure yourselves of the opportunity of continuing to graze in the summer months in that area, wasn't it? A. Yes.

"Q. In other words what you were doing when you were buying this land was to secure your summer range? A. That is true, yes.

"Q. And in securing your summer range you negotiated with the Southern Pacific and then traded Southern Pacific land with the government and you finally got this patent for some 1683 acres of land which we have here in Exhibit 6. That is right, isn't it? A. Yes, I would say so.

"Q. Then after you had made this change and acquired this 1600 some acres in that area you continued still to get permits covering the parts that were not owned by you? A. Yes; there were quite a few restricted areas put in, but we had this permit above those restricted areas."

The parties continued to use this patented land as summer headquarters for the cattle business conducted by the partnership. All grazing permits seem to have been issued to Swarthout and Gentry with the charges paid from partnership funds.

They also acquired title to lands around some of the desert water holes, springs and wells by the use of script. As we have already observed, some script was obtained in the purchase from the estate of Blair. Whether this was used in making the purchases or whether new script was obtained is not clear from the record. The conveyance to some or all of this property was made by the State of California to J. Dale Gentry under date of May 25, 1927. Gentry conveyed a half interest in the property to plaintiff. After the acquisition of title the partnership used the property as before to water the stock ranging on the desert.

When the properties were acquired from the estate of Blair, there was a house on the Old Woman Springs Ranch which was used as the winter residence of plaintiff and also two small cabins at Big Meadows, one of which plaintiff used as his summer residence and the other was used by defendant. Plaintiff valued the improvement at Big Meadows, acquired from the Blair estate, at about $1,500. The house at the Old Woman Springs Ranch was rebuilt and enlarged at partnership expense. The cabin used by plaintiff at Big Meadows was torn down and a comfortable cabin for the use of plaintiff was built by the partnership together with a bunk house and a three-car garage which was used by both parties. Also a water supply was developed and some of the land was fenced.

Gentry desired a commodious mountain cabin for the use of himself and his guests. Plaintiff testified that Gentry "said he was going to build a house for himself there so he would feel free to entertain his friends"; that plaintiff told him, "well, to go ahead, it was all right with me"; that "I assumed he would pay for it"; that there was never any subsequent conversation about any accounting for the cost of the house. The old cabin used by Gentry was torn down and some of the lumber used for forms for the foundation of the new house. Some rock and timber from the patented land was used in the new house as was some labor furnished by employees of the partnership. The value of those contributions is very uncertain but it probably did not exceed $1,000, according to plaintiff, or $500, according to defendant. No account of their value was kept. Gentry invested $9,600 in the house and used it as his private property although the taxes on it probably were paid out of partnership funds as were the taxes on all of the real property we have mentioned.

The partnership business showed a profit to and including the year 1928, and the year 1935, and very small profits for 1932 and 1936, with losses for the years 1929, 1930, 1931, 1933 and 1934. This seems to have been due to adverse marketing conditions as well as constriction of the range obtainable under grazing permits so that the number of cattle on the range had to be reduced.

Defendant testified that plaintiff became dissatisfied with the partnership business in 1937; that plaintiff told him they could not get along; that he was through; that he did not know the reason for this dissatisfaction.

Plaintiff testified that they could not make any money in the cattle business so in 1937 he talked with Gentry about selling their herd and buying again when feeders were cheap; that "a friend of his, Mr. Parker, was buying cattle down in Mexico, and he told Mr. Gentry that he would have 165 head of what he thought were good quality steers, a good buy, and so Mr. Gentry thought it would be a good idea, and I did also, to take them, and Mr. Gentry said he would drop them off at Colton and send them on out to the ranch, and I said 'All right, that would be fine', and I goes out to the ranch and waits for the cattle, and I was there about 10 days, and I came in and wanted to know what was the matter, that no cattle had come, and he had sent them on up to Bakersfield or some place up north, and I was out on the desert waiting for them. I told him I didn't think we were going to get along." The decision to sell the partnership cattle followed immediately. All of the range cattle except a few strays were sold by September 30, 1937, and the parties did not resume the business of running cattle. This action was filed on December 11, 1941.

After the cattle were sold plaintiff remained at the ranches, lived in the houses he had been occupying and superintended the properties, looking after their care and upkeep. A caretaker was employed at each headquarters and some farming done at the Old Woman Springs Ranch. The buildings, fences and other improvements at both headquarters required and received plaintiff's care and attention. Also there were a few stray cattle taken up and sold. Plaintiff received the use of the two houses without charge and his grocery and other bills covering living expenses were paid for him by the partnership. Defendant does not question these items allowed in the accounting. The trial court also credited plaintiff with his salary of $100 per month for 56 months in the accounting.

Defendant seriously objects to this credit. He argues that the partnership went out of business in 1937 when it sold its cattle; that one partner is not entitled to more compensation than the other in the absence of an agreement providing for it (In re Estate of McConnell, 6 Cal.2d 493, 58 P.2d 639); that as defendant drew no salary and the partnership business was discontinued after September 30, 1937, plaintiff was entitled to none, there being no duties for him to perform for the partnership after the sale of the cattle as there was no partnership business for him to superintend.

The soundness of this argument depends to a considerable extent on the determination of the question of just what constituted the assets of the partnership. If those assets consisted solely of the cattle, horses, saddles, harness and such equipment, then there was little partnership business for plaintiff to superintend after the sale in 1937. Under his testimony plaintiff's principal activities after that time consisted of farming operations and care of the real estate and improvement on it. Thus if the real estate was not partnership property the chief value of his services went to the individual owners and not to the partnership. On the other hand, if the real property was a partnership asset, his care of the property was a benefit to the partnership instead of to the individuals. If the land and improvements belonged to the partnership, the work done by him differed from that performed before the sale of the cattle more in the amount done than in which group, the partnership or the tenants in common, benefitted by it.

The trial court found that all of the real estate and the water holes were owned by plaintiff and defendant as tenants in common. It was also found that the partnership of Gentry and Swarthout was formed in 1921; that the partnership owned all of the cattle, horses, saddles, harness, farming implements and other such personal property.

[1] We have summarized all of the evidence bearing on these questions. There is no material conflict in it. All of the purchase price of the property acquired from the Blair estate, including land, water holes, script to purchase State lands, cattle, horses and other personal property came out of the same fund, namely, the $35,000 subscribed by the partners and used to furnish capital for the partnership. How part of that property so purchased could become a partnership asset and the balance be owned by the partners as tenants in common is difficult to understand in the absence of an agreement to that effect. No such agreement was proved.

Plaintiff argues that the real property was conveyed to J. Dale Gentry and Albert Swarthout; that a presumption of tenancy in common arises from those conveyances; that to hold that property thus conveyed belonged to a partnership rather than to the grantees as tenants in common would violate the provisions of the statute of frauds by permitting the terms of a written instrument to be varied by parol.

We find little merit in this contention under the rules prevailing in this State and the facts presented.

[2, 3] It is well settled in California that a partnership may be formed by parol even though its sole purpose is to deal in real estate. If a partnership is formed and real property is dedicated to partnership use and is used by the partnership for its sole benefit, the fact that title was acquired by one or more of the partners with their private funds or was owned by them as tenants in common prior to the formation of the partnership will not necessarily defeat the claim of the partnership to ownership of the property in the absence of an express agreement that it should remain property of those in whose names title stood. Under such circumstances the owners of the legal title hold the property in trust for the partnership. Bastjan v. Bastjan, 215 Cal. 662, 12 P.2d 627. The rule is thus stated in Perelli-Minetti v. Lawson, 205 Cal. 642, 272 P. 573, 576:

"The partnership agreement was not in writing. 'A partnership in lands may be formed by an agreement in parol. Such parol agreement is valid and may be enforced between the parties.' Musick Cons. Oil Co. v. Chandler, 158 Cal. 7, 12, 109 P. 613, 614; Koyer v. Willmon, 150 Cal. 785, 787, 90 P. 135; Scott v. Jungquist, 179 Cal. 7, 9, 175 P. 412. The relations between the parties were confidential and each was a trustee for the other in all partnership transactions. Koyer v. Willmon, supra. 'If property owned by one of the partners before the organization of the firm has been used for partnership purposes, it must be determined from the partnership agreement and the conduct of the parties whether it has become a part of the firm property or remains the property of the one partner. Thus a lease of premises occupied by the firm business, procured by one partner before formation of the partnership may become firm property without formal assignment, if it is so understood and the partners regard it as such.' Rowley's Modern Law of Partnership, § 277. 'It is not necessary to show that the partnership property was purchased with partnership funds. Land standing in the name of an individual partner may have been contributed by him as his portion to the firm assets. The true method of determining, as between the partners themselves, whether land standing in the name of the individuals is or is not to be treated as partnership property is to ascertain from their conduct and course of dealing the understanding and intention of the partners themselves, which, when ascertained, should unquestionably control.' * * *

"'In the language of the trial court: "* * * Even though the ranch property in question may have originally come to the parties in the character of tenants in common, this character was destroyed by the parties having farmed and operated it upon joint account and as partnership property and by their acts thereby made it partnership assets."'"

See, also, McNab v. Mills, 199 Cal. 231, 248 P. 657; Chapman v. Hughes, 104 Cal. 302, 303, 37 P. 1048, 38 P. 109.

[4] Nor does the statute of frauds, Civ.Code, § 1624, prevent proof of the existence of a trust in favor of the partnership where title stands in the names of the partners or in that of a third person. In Bates v. Babcock, 95 Cal. 479, 30 P. 605, 16 L.R.A. 745, 29 Am.St.Rep. 133, it was held that under such circumstances the statute of frauds could not be invoked to commit a fraud on the partnership by depriving it of property belonging to it. Perelli-Minetti v. Lawson, supra, and Bastjan v. Bastjan, supra, are to the same effect.

Under these rules we cannot escape the conclusion that all of the real property involved here must be held to be partnership property and not owned by the parties as tenants in common. This also applies to water rights, springs, wells and water holes on the public domain to which the partnership may have retained possessory rights by use.

The trial court found that the cattle, horses and machinery and equipment purchased from the estate of Blair was partnership property while the Old Woman Springs Ranch, the water rights, springs, wells and water holes purchased with the same funds from the same estate, used for the same purposes and many of them conveyed to the partners by the same instruments, were owned by the partners as tenants in common. These findings seem to be inconsistent and irreconcilable. Other than the property at Big Meadows and such desert property as was acquired by script purchased after the formation of the partnership, if any there be, all the property was acquired with the $35,000 subscribed by the partners as the capital of the partnership. While the actual payments to the Blair estate may have been made by each partner individually, their total represented contributions to the capital of the partnership and the purchases must be considered to have been made by it. We cannot escape the conclusion that all of the property acquired from the estate of Blair must be held to be partnership property.

[5, 6] The circumstances of the purchase of the Big Meadows property were slightly different in that its cost price was advanced by one of the partners from his individual funds and the initial conveyance of title was made to him. Thereafter the other partner paid his part of the purchase price from his individual funds and a one-half interest was then deeded to him. However, the uncontradicted testimony of plaintiff, already quoted, shows that this property was acquired by the partners for the benefit of the partnership and for use by it and not for use by the individuals. Except for the cabin of defendant it was used exclusively by the partnership in the partnership business. In the absence of an express contract covering the subject the conduct of the parties is the best evidence of their intention. Kohl v. Lytle Creek, etc., Co., 24 Cal.App.2d 353, 75 P.2d 71. That conduct shows that the Big Meadows property was purchased and used for the partnership as partnership property. All the taxes on the real estate were paid by the partnership. A copy of a partnership income tax return is in the record showing that such taxes were deducted from the income of the partnership and that each partner could take a deduction in his individual income tax return for his propor-

tion of the partnership loss shown for that year, which loss was augmented by the payment of taxes on the real estate. Under all these circumstances we must conclude that the contribution each partner made to the funds used to acquire the Big Meadows property was a subscription of additional capital to the partnership; that all the property described in the findings and the judgment belonged to the partnership and not to the partners as tenants in common; that the individual partners held the real estate in trust for the partnership.

[7] Plaintiff points to two transfers of title of real property which he maintains support the finding that the real estate was owned by the partners as tenants in common and not by the partnership. The first is a deed dated June 10, 1921, from Veatrice A. Peck conveying to Albert R. Swarthout and J. Dale Gentry all of the property both real and personal except some of the cattle purchased from the estate of Blair. There is endorsed on this deed, after the statement that the consideration for it did not exceed $100, the following: "The purpose of this deed being to partition the interests of the grantees herein named." The second is a deed from J. Dale Gentry to Inter-State Note and Mortgage Company, dated March 2, 1934, conveying a half interest in the real estate, springs, wells and water holes in controversy here. The same property was reconveyed to Gentry by the corporation on or about May 31, 1941.

The Peck conveyance was made on the advice of the attorney who was then advising the parties. Veatrice A. Peck was his secretary. Gentry and Swarthout and his wife conveyed the property to her and she immediately reconveyed it to the parties here. There was no consideration paid by either of the parties to the other. The only explanation of these conveyances in the record is in the following testimony of defendant: "I can't explain the transaction there wherein the attorney, S. W. McNab, concentrated all the property into one deed, and it was deeded to his secretary, and then back to us again for a reason I don't know. It was not deeded out from our holdings, and I don't know why that transaction was made."

We cannot see how these conveyances can affect the question of the ownership of the property. There had been at least two conveyances from the estate to Swarthout and Gentry and the attorney evidently thought it advisable to consolidate them into one. The statement on the deed that its purpose was to partition the interests of the grantees can be given little effect. It was an endorsement on the deed and not a formal part of it. The deed did not and could not effect a partition of the property. It did not attempt to do so. It merely granted the property to "Albert R. Swarthout and J. Dale Gentry, (a single man)" thus leaving the title vested in the same parties who had been the record owners prior to their conveyance to Peck.

[8] His reasons for his conveyance to the Inter-State Note and Mortgage Company were explained by Gentry as follows:

"I told Mr. Swarthout what I was going to do and the reason for doing it. I was at that time operating as a corporation, closed corporation, for the reason that it was necessary to concentrate all the holdings in one in order to make the proper statement at the bank of the financial condition of the company, which was bad, and on the advice of my attorney I would do that for a time to be able to operate under more lenient laws on corporation tax than it would be as a single man or individual. Mr. Swarthout stated that it was all right with him.

"Q. Did you ever have a conversation with him after that time about the conveyance? A. No sir.

"Q. On or about May 31, 1941, the Inter-State Note and Mortgage Company conveyed the same property back to you? A. Yes sir.

"Q. Did you have a conversation with Mr. Swarthout about that conveyance? A. No sir."

Mr. Swarthout denied having had this conversation with Gentry prior to the conveyance of the property to the corporation, but admitted that he learned of the transfer of title as soon as he received the tax bills. He made no objection and after the transfer the property was used by the partnership as before.

If Gentry held the legal title to the property in trust for the partnership, he could only convey that legal title subject to the same trust as the corporation was owned and controlled by him and was charged with his knowledge of the trust. While the conveyance might have afforded Swarthout grounds for dissolution of the partnership, no such result followed and the partnership continued to use the property in its business and to pay taxes on it. We regard this transaction as the substitution of one trustee for another with the implied, if not the express consent of the beneficiary.

Defendant maintains that a holding that the real estate belonged to the partnership prevents any division of the property in kind between the partners; that the only available remedy is the appointment of a receiver, the sale of the partnership property, the payment of costs, expenses and partnership debts and the distribution of the balance to the partners. In support of this argument he cites Sec. 752, Code Civ. Proc.; 20 Cal.Juris. 845; Smith v. Cooley, 65 Cal. 46, 2 P. 880; Jameson v. Hayward, 106 Cal. 682, 39 P. 1078, 46 Am.St.Rep. 268; Murphy v. Superior Court, 138 Cal. 69, 70 P. 1070.

[9] As a general rule on dissolution of a partnership, the court, after taking an accounting, should require the partnership property to be sold and after the costs, expenses and partnership debts are paid should divide the balance between the partners. This rule is not inflexible and there is an exception to it which may or may not be applicable here. This rule is thus stated in 20 Cal.Juris. 845: "The general rule is that the decree should direct a sale of assets and division of proceeds, as that is regarded as the fairest course to be pursued. But where there are no debts necessitating a sale, and a division of assets in kind is fair to all parties, it may be ordered." The following cases support the text: Harper v. Lamping, 33 Cal. 641; Shuken v. Cohen, 179 Cal. 279, 176 P. 447; Vasiljevich v. Radanovich, 138 Cal.App. 97, 31 P.2d 802; and Watterson v. Knapp, 35 Cal.App.2d 283, 95 P.2d 154.

There is some conflict in the opinions of the parties about the practicability of the division of the land between them without causing a substantial loss. Gentry was of the opinion that this could not be done as the only use to which it could be put was for a cattle range and that all of it was necessary for that purpose. At one time Swarthout testified: "Mr. Swarthout, in your opinion, can this real property which you and Mr. Gentry own be divided without substantial loss to either party? A. No." At another time he testified that he could suggest a fair division and would be willing to give Gentry first choice of either part.

In the cross-complaint it is alleged that a physical division of the capital assets of the partnership could not be effected without injury and loss to both partners. The trial court found that "except as otherwise hereinabove specifically found, none of the allegations of the cross-complaint are true." Plaintiff argues that this is a specific finding that the property could be distributed in kind without loss to the partners; that this finding resolved the conflict in the evidence on this question in favor of plaintiff and is final and conclusive here. It was also found "that it does not appear from the evidence that the property, or any part of it, is so situated that partition cannot be made without great prejudice to the owners." This is a specific finding, though a vague one, on the question of partition with or without loss so the general finding does not come into play by its very terms.

[10, 11] As we understand the rule, partition of partnership property between the owners can only be made when there are no partnership debts to any persons other than to the partners. It was here established that there were no such debts. Further it must be established that such partition can be made without serious loss to the partners. The negative finding that it does not appear from the evidence that the property is so situated "that partition cannot be made without great prejudice to the owners" is a comment on the evidence rather than a finding that the conflicting evidence established certain facts as true. Thus the conflict in the evidence on the question of partition without loss was not settled by the trial court. Until that was done no partition of the property in kind should have been decreed.

[12] Defendant complains of that portion of the judgment which directs the setting apart to him of the house built on partnership land largely with his own money and for his own use, together with sufficient of the land for its convenient use and occupation. He also points out that no specific provision was made for a right of way over which to reach the building nor for any interest in the springs which furnish the domestic water.

The house was a substantial structure built on a cement foundation embedded in the soil. Thus as a fixture it became a part of the realty. It was built by Gentry with the knowledge and consent of Swarthout without any agreement other than that Gentry should have the use of it. Evidently the partnership paid the taxes on it as a part of the realty. As it was a fixture ownership was vested in the owner of the soil.

We must regard its value as a contribution to the assets of the partnership. Boskowitz v. Nickel, 97 Cal. 19, 31 P. 732; Ng Ye Yin v. Lee, 209 Cal. 379, 287 P. 341; Minikin v. Hendrix, 15 Cal.2d 338, 101 P.2d 473. This does not mean that Gentry should receive the full cost to him as a credit on the amount subscribed to the partnership capital. He has had the exclusive use of the house since it was built in 1927 or 1928. Like all mountain cabins, it must have been subject to depreciation during the years Gentry had used it. We believe it equitable to apply the rule used where one tenant in common has erected improvements on the common property to the effect that the cotenant making the improvements should receive credit for the amount which they enhanced the value of the common property. See, 1 A.L.R. 1202; 122 A.L.R. 241.

[13] There remains the question of the wages allowed plaintiff after the sale of the cattle in 1937. After that sale there remained the land and improvements besides some horses, a few cattle and some personal property belonging to the partnership. Plaintiff cared for this property and caught up some stray cattle which were sold, the proceeds being paid to the partnership. Gentry knew these services were being performed for the partnership and as a partner benefitted from them. He was a party to the original agreement under which plaintiff was to be furnished living quarters and living expenses and paid $100 per month. This agreement was never altered nor rescinded. When, after September, 1937, plaintiff delivered his annual statements of account to defendant, he called attention to the fact that he had not deducted his wages. These accounts showed cash received and cash expended which might explain why the unpaid wages were not charged against the partnership. Gentry made no comment when told about the unpaid wages and made no objection to the grocery bills of plaintiff, some of which were paid by checks drawn on the partnership bank account. He made no claim for rent of the living quarters occupied by plaintiff. Thus by mutual consent part of the contract for the compensation of plaintiff by the partnership was performed. Had Gentry desired to have the partnership relieved from the obligation to pay the salary he should not have remained silent until the trial of this case. The partnership received the benefit of plaintiff's services and because the amount of those services were less than before the sale of the cattle furnishes no sufficient ground for cancellation of part of the contract for compensation while leaving the remainder of it in full force and effect. Had the partners desired to change the obligations of the old contract, they should have negotiated a new one before accepting the benefits of plaintiff's services rendered under the old one.

The judgment is reversed.

BARNARD, P. J., and GRIFFIN, J., concur.

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62 Cal.App.2d 86

SCHULER-KNOX CO. v. SMITH et ux.

Civ. 6948.

District Court of Appeal, Third District, California.

Dec. 23, 1943.

Rehearing Denied Jan. 21, 1944.

Hearing Denied Feb. 21, 1944.

1. Justices of the peace 🔑135(6)

In suit to quiet title to realty, purchased by plaintiff at execution sale to satisfy default judgment for plaintiff against defendants in justice's court, plaintiff had burden of proving that such court acquired jurisdiction of subject matter and defendants' persons in suit wherein judgment was rendered.

2. Justices of the peace 🔑135(6)

In suit to quiet title to realty, purchased by plaintiff at execution sale to satisfy default judgment for plaintiff against defendants in justice's court, such judgment, certificate of sale and constable's deed to plaintiff were incompetent as evidence of plaintiff's title, in absence of proof by plaintiff that justice's court acquired jurisdiction of subject matter and defendants' persons in suit wherein judgment was rendered.

3. Justices of the peace 🔑59, 130

Since justice courts' functions are merely special and limited, nothing is presumed in favor of their jurisdiction, and party asserting a right under judgment rendered by such a court must show affirmatively every fact necessary to confer jurisdiction on court.

4. Justices of the peace 🔑44(1)

The amount of demand in complaint, not sum for which judgment in plaintiff's favor is ultimately rendered, determines justice court's pecuniary jurisdiction. Code Civ.Proc. § 112, subd. 2(a).

5. Justices of the peace 🔑58(5)

The body of complaint must be looked to in order to ascertain justice court's jurisdiction.

6. Justices of the peace 🔑40, 42

In justice's court suit, demand in complaint for sum not exceeding $300 and defendant's actual residence in township wherein court is situated are necessary jurisdictional requirements. Code Civ.Proc. § 112, subd. 2(a).

7. Judgment 🔑493

A defendant need not appear in inferior court and object to its jurisdiction as prerequisite to challenging such jurisdiction in suit brought after rendition of default judgment against him in such court.

8. Justices of the peace 🔑82(2)

In justice's court suit, officer's return, showing service of process on defendant in township wherein court is located, is prima facie evidence of defendant's residence therein.

9. Courts 🔑37(2)

A party to suit may challenge jurisdiction of court in which it is pending at any time or place.

10. Execution 🔑275(3)

The manner of sale of land on execution is merely procedural, and irregularity in selling land en masse, instead of in separate parcels, as required by statute, does not affect court's jurisdiction and may be waived by failure to object to such sale or move to set it aside on such ground within redemption period. Code Civ.Proc. § 694.

11. Justices of the peace 🔑135(6)

Mere inadequacy of purchase price of property sold at execution sale to satisfy inferior court's judgment is ordinarily insufficient ground for declaring sale invalid, but when gross inadequacy and palpable insufficiency of price clearly appear, together with material irregularities of sale, lack of evidence of court's jurisdiction to render judgment, or fraud, sale will be declared invalid.

12. Homestead 🔑47

Recitals in homestead declaration are mere ex parte statements which do not constitute competent evidence of facts recited. Civ.Code, § 1263.

13. Justices of the peace 🔑135(6)

An execution sale of lots to satisfy justice court's judgment will not be held void because of such apparent disparity between reasonable market value of lots, with improvements thereon, and sale price as to shock a chancellor's conscience, in absence of competent evidence of actual value of lots.

14. Homestead 🔑103, 107

A homestead, filed on land after rendition and recording of abstract of justice court's default judgment against owners, was subject to lien of judgment, unless it was void for lack of jurisdiction, and burden was on judgment creditor, in his subsequent suit to quiet title to land, to prove affirmatively that such court had jurisdiction of subject matter and parties in action wherein judgment was rendered. Code Civ.Proc. § 674; Civ.Code, § 1262.

15. Homestead 🔑43

A wife's homestead declaration, failing to state that her husband had not previously made such a declaration or that she was filing declaration for spouses' joint benefit, was fatally defective. Civ.Code, §§ 1262, 1263.

16. Homestead 🔑167

An absolute conveyance of land for valuable consideration by joint deed of husband and wife constituted abandonment of their homestead thereon. Civ.Code, § 1243.

◆

Appeal from Superior Court, Siskiyou County; C. A. Paulsen, Judge.

Suit by the Schuler-Knox Company, a corporation, against Frank C. Smith and wife to quiet title to and recover possession of ten lots. Judgment for plaintiff, and defendants appeal.

Reversed.

H. R. Whiting, Morgan V. Spicer, and W. W. Sanderson, all of San Francisco, for appellant.

Daniel S. Carlton and Oliver J. Carter, both of Redding, for respondent.

THOMPSON, Justice.

The defendants, Frank C. and Anna Clo Smith, husband and wife, have appealed from a judgment which was rendered in favor of plaintiff in this suit to quiet title and to recover possession of ten lots, together with the dwelling house and improvements thereon, situated in Siskiyou County. The plaintiff relied on title alleged to have been acquired by purchase of the property at an execution sale to satisfy a previous judgment by default in the sum of $131.50, which was recovered in a justice's court of Butte Township in that county.

The appellants assert that the justice's court judgment against them is void for lack of jurisdiction because they did not reside in the township in which that court is located and that the findings and judgment in this case are not supported by the evidence, since the plaintiff failed to sustain the burden of affirmatively proving that the justice's court had jurisdiction of the subject matter and of the persons of the defendants in the former trial, and that there is no presumption in favor of the jurisdiction of an inferior court.

The appellants Frank C. and Anna Clo Smith are husband and wife. They owned ten lots with the dwelling house and other improvements thereon near Dunsmuir, in Block B–5 of Collier Tract, in Section 36, Township 39 North, Range 4 West, M.D.M., in Siskiyou County. In July, 1930, suit was commenced by this plaintiff against Mr. and Mrs. Smith in the justice's court of Butte Township, Siskiyou County. The defendants were served with summons in Mott Township of that county. They failed to appear or answer in that action. Judgment by default was rendered against them July 30, 1931, for the sum of $131.50 and attorney's fees in the further sum of $25. August 3, 1931, Anna Clo Smith filed a declaration of homestead, declaring that the land was worth $5,000, but she failed to state that Frank C. Smith, her husband, had not previously selected a homestead, or that she claimed the homestead in behalf of herself and her husband. November 7, 1931, Mrs. Smith recorded a second homestead in which she properly stated all the facts required by Section 1263 of the Civil Code. Prior to the filing of the second declaration of homestead, the plaintiff recorded on October 28, 1931, an abstract of the judgment of the justice's court as required by Section 674 of the Code of Civil Procedure, thereby creating a lien on the property. September 16, 1933, Anna Clo Smith filed a petition in bankruptcy in the United States District Court, and was thereafter adjudged to be a bankrupt. Upon petition therefor, that court set the homestead apart to her as exempt. She was discharged in bankruptcy February 19, 1934. On September 28, 1933, the Constable of Butte Township, Siskiyou County, sold the ten lots, together with the dwelling house and improvements thereon, at execution sale en masse, and not in separate parcels, to the plaintiff Schuler-Knox Company, for the unpaid balance of the justice's court judgment, in the sum of $105.73. November 22, 1934, after the time for redemption had expired, the Constable conveyed the property by deed to the purchaser. The appellants remained in possession.

This suit to quiet title to the said property and to recover possession thereof was commenced July 29, 1937. For a valuable consideration Frank C. and Anna Clo Smith sold and conveyed the property to Nora Kathleen Trapp August 11, 1937. A general demurrer to the complaint was overruled. The defendants, Mr. and Mrs. Smith, answered the complaint, denying the material allegations thereof, and affirmatively alleging their homestead rights as previously stated and the adjudication of bankruptcy as a bar to the action. Nora Kathleen Trapp, who was made a party defendant, separately answered the complaint, denying the material allegations thereof, and also filed a cross complaint alleging the purchase and ownership of the property and the execution of the deed to her as previously stated. She also alleged the other affirmative defenses set up by Mr. and Mrs. Smith.

At the trial of this case the plaintiff, relying on his title as purchaser of the property at the execution sale, offered in evidence copies of the default judgment in the justice's court, the summons in that case with the attached affidavit of service thereof on Mr. and Mrs. Smith "in the Township of Mott, County of Siskiyou" on June 30, 1930, the Constable's Certificate of the execution sale of the property to the plaintiff "in one parcel," for $105.73, and his deed of conveyance executed and delivered to plaintiff November 22, 1934. To these instruments the defendants objected on the ground that they were incompetent because the justice's court judgment, upon which plaintiff relied for title, was void since that court was without jurisdiction. The objections were overruled, and they were received in evidence. No further evidence of the jurisdiction of the justice's court over either the subject matter or the persons of the defendants in that suit was adduced by the plaintiff. Neither the complaint nor the justice's docket was offered. None of the instruments received in evidence informs us of the nature of the justice's court action, the amount of the "demand" of the plaintiff or the township in which the defendants resided. On the contrary, the affidavit of service of the summons affirmatively avers that said defendants were served in Mott Township, and not in Butte Township, where the justice's court is located.

The court adopted findings favorable to the plaintiff in every respect and rendered judgment to the effect that plaintiff is the owner and entitled to possession of the real property in question, and that the defendants and neither of them have any right, title or interest therein. From that judgment Frank C. and Anna Clo Smith have appealed.

[1, 2] The chief issue on this appeal is whether the plaintiff sustained the burden imposed upon it by law to affirmatively prove that the justice's court had jurisdiction of either the subject matter or the persons of the defendants in the suit in which judgment by default was rendered in its favor, and upon which judgment it relies for evidence of title to the land, since there are no presumptions in favor of the jurisdiction of an inferior court. It is contended that it was the duty of the plaintiff to affirmatively establish that jurisdiction in the justice's court, or the judgment and subsequent execution sale, and deed would be deemed to be void. For that reason, among others, it is insisted the findings and judgment in this case are not supported by the evidence.

The plaintiff in this case had the burden of proving that the justice's court acquired jurisdiction of the subject matter and of the persons of the defendants in that former suit, since nothing is presumed in favor of the jurisdiction of an inferior court. The plaintiff failed to sustain that burden. There was no proof in this case that the demand of the complaint in the justice's court was for a sum not to exceed $300, or that the defendants resided in Butte Township in which that court was located. The affidavit of the constable who served the summons averred that he delivered it to the defendants in Mott Township. Neither the pleadings nor the docket was offered in evidence. The defendants did not stipulate in this case to the jurisdiction of the justice's court in the former action. The record is devoid of evidence that the justice's court had jurisdiction of either the subject matter or of the persons of the defendants in that case. At the trial of this case the defendants objected to the introduction of the certificate and to the constable's deed on the execution sale of the land to satisfy the judgment of the justice's court, on account of a lack of proof of its jurisdiction, which was overruled. For failure to prove the jurisdiction of that court, the judgment, certificate and deed were incompetent in this suit as evidence of plaintiff's title. The objection to those instruments should have been sustained.

[3] It is a uniform rule supported by numerous authorities that since the functions of a justice's court are merely special and limited, nothing is presumed in favor of their jurisdiction, and a party who asserts a right under a judgment rendered by that court *must show affirmatively every fact* necessary to confer jurisdiction. Newman v. Barnet, 165 Cal. 423, 132 P. 588; Heaton v. Justice's Court, 19 Cal. App.2d 118, 64 P.2d 1004; Gray v. Gieseke, 108 Cal.App. 271, 274, 291 P. 590, 292 P. 656; Rowley v. Howard, 23 Cal. 401; 15 Cal.Jur. 503, sec. 37.

[4, 5] It is the amount of the "demand" of a complaint which determines the jurisdiction, and not the sum for which judgment is ultimately rendered. Sec. 112, subd. 2 (a), Code Civ.Proc. We must look to the body of the complaint to as-

certain the jurisdiction. Dunne v. Hite, 59 Cal.App. 370, 374, 210 P. 839. It has been held that a judgment rendered in a justice's court upon a demand for a sum in excess of the jurisdictional limitation of that tribunal is void. De Jarnatt v. Marquez, 127 Cal. 558, 60 P. 45, 78 Am. St.Rep. 90. In the case last cited the complaint demanded payment of a promissory note for $250, which note also provided for reasonable attorney's fees. The plaintiff asked for and received judgment for the additional sum of $100 as attorney's fees. On appeal the Supreme Court said: "Plaintiff's demand, therefore, in his action in the justice's court, was for two hundred and fifty dollars, the principal sum of the promissory note, and the one hundred dollars pleaded by way of special damages as a reasonable attorney's fee. *The justice's court was, therefore, without jurisdiction, and its judgment void.*"

[6] We do not mean to infer that it affirmatively appears in this case that the suit in the justice's court was actually for a sum in excess of $300. We merely hold, in accordance with the preceding authorities on that subject, that the burden was on the plaintiff in this case to affirmatively prove that the justice's court had jurisdiction of both the subject matter and the persons of the defendants in that action, and that it failed to do so. It therefore follows that the findings and judgment in this case are not supported by the evidence. The record in this case is devoid of evidence of either the nature of the justice's court action, or the amount of the demand of the complaint therein. It does not appear that the demand of the complaint in the justice's court was not for a sum in excess of $300, or that the defendants actually resided in Butte Township where the court was situated. These are necessary jurisdictional requirements.

[7] The respondent contends that since the defendants did not appear in the justice's court and that judgment by default was rendered against them, they therefore waived their right to object at the trial of this case to the jurisdiction of that court. It has been definitely held that it is not necessary for a defendant to appear in an inferior court and object to its jurisdiction as a prerequisite to challenging that jurisdiction in a subsequent suit. Lowe v. Alexander, 15 Cal. 296; 15 Cal.Jur. 473, sec. 18. The last mentioned case has never been overruled or modified. It is the law of this state. The Lowe suit was instituted to recover possession of a mining claim in Sierra County. It involved a collateral attack upon the judgment of an inferior court upon which the defendant relied to support his claim of title. An objection to the jurisdiction of the justice's court was raised in the subsequent trial for possession of the property. For failure on the part of the plaintiff to prove that jurisdiction the objection was sustained. On appeal the judgment which was accordingly rendered was affirmed. In the present case the defendants raised the same question of the lack of proof of jurisdiction of the justice's court by objecting to the introduction of the summons, the return of the constable showing service thereof in a township other than the one in which the justice's court was located, the certificate of sale of land and the officer's deed. Those objections were erroneously overruled. The plaintiff failed to introduce proof of the jurisdiction of the justice's court over either the persons of the defendants or the subject matter. The record contains no evidence that Mr. or Mrs. Smith ever resided in Butte Township in which that court was located. In the Lowe case the court said: "The reasonable conclusion is that he (the defendant) was a resident of the township in which he was served, but independent of this, we think it was incumbent upon the parties seeking to avail themselves of the judgment, to show affirmatively, from the record itself, that the Justice had jurisdiction. It is well settled that no intendments can be indulged in favor of the jurisdiction of inferior courts, but that their jurisdiction must affirmatively appear, *or their judgments will be absolutely void.* 'The general distinction seems to be fully agreed, that power and authority shall be intended as to courts of general jurisdiction, but as to inferior or limited courts, those who claim any right or exemption under their proceedings, are bound to show affirmatively that they had jurisdiction.' * * * There is no doubt about the law on this subject, and the authorities are so numerous, and so familiar to the profession, that a citation to them is entirely unnecessary. As the record in this case does not show that the suit was brought in the proper township, we are forced to

hold that the proceedings were coram non judice and void. *It was not necessary for the defendant to appear and object to the jurisdiction.* He could have waived the objection by a voluntary appearance, but the jurisdiction is an affirmative matter, to be shown by the record, and the question is not whether the defendant appeared and objected, but whether this affirmative matter sufficiently appears upon the face of the record."

[8] It is true that the return of an officer showing service of process upon a defendant in the township in which the justice's court is located is prima facie evidence of his residence therein. Gregory v. Bovier, 77 Cal. 121, 19 P. 232; Fagg v. Clements, 16 Cal. 389. No such evidence appears in this case. On the contrary, the return of the officer in this case shows that the defendants were served with the summons only in a township other than the one in which the justice's court is located.

[9] The cases of Vance v. Superior Court, 48 Cal.App. 327, 191 P. 945, and Gulick v. Justice's Court, 101 Cal.App. 619, 281 P. 1031, upon which the respondent relies, are not in conflict with the Lowe case with respect to the necessity of affirmatively showing the jurisdiction of the justice's court by one who relies on a judgment rendered therein, even though the judgment is entered by default.

All that the Vance and Gulick cases hold in that regard is that a defendant who appears generally in a suit against him in a justice's court thereby waives his right to challenge the jurisdiction of that court in a subsequent action. This rule assumes that by a general appearance of a defendant, he is estopped from denying the jurisdiction of the court, even though he may actually reside in another township. It is said in those cases that if the defendant desires to challenge the jurisdiction under such circumstances he must appear specially for that purpose, if at all, or he waives his right. The Lowe case, however, determines that if a defendant does not appear in court and allows a judgment by default to be rendered against him, he does not thereby waive his right to challenge the jurisdiction of that court. It is a familiar and trite statement of the law that a party to a suit may challenge the jurisdiction of the court in which it is pending at any time or place. A question of the lack of jurisdiction may be raised in any court. 15 Cal.Jur. 52, sec. 141.

The appellants contend that the execution sale is invalid for the reasons that the lots were not sold in separate parcels as required by Section 694 of the Code of Civil Procedure, and because several lots, together with a substantial dwelling house and improvements, which were alleged in a declaration of homestead to be of the value of $5,000, were sold for the grossly inadequate sum of $105.73 to satisfy the unpaid portion of the justice's court judgment.

[10] It has been held a sale of real property under execution may not be collaterally attacked in a suit to quiet title after the statutory period of redemption has expired on the mere ground that the lots were not sold in separate parcels as required by Section 694 of the Code of Civil Procedure. Gregory v. Bovier, supra; Mitchell v. Alpha Hardware & Supply Co., 7 Cal.App.2d 52, 45 P.2d 442; Bechtel v. Wier, 152 Cal. 443, 93 P. 75, 15 L.R.A.,N.S., 549. The manner of the sale of land on execution is merely procedural in its nature. The irregularity of selling land en masse instead of in separate parcels does not affect the jurisdiction of the court and apparently may be waived by failure to object to such sale or to move within the period of redemption to set the sale aside on that ground. 11 Cal.Jur. 89, sec. 41.

[11] It is true that mere inadequacy of the purchase price of property secured at an execution sale is ordinarily insufficient ground for declaring the sale to be invalid. Haish v. Hall, 90 Cal.App. 547, 265 P. 1030; 11 Cal.Jur. 88, sec. 40. Nevertheless, when it clearly appears that the selling price is grossly inadequate and palpably insufficient, coupled with material irregularities of sale, lack of evidence of the jurisdiction of an inferior court to render the judgment, or fraud, a court will not hesitate to declare the sale invalid. Odell v. Cox, 151 Cal. 70, 90 P. 194; Rastelli v. Zaca Min. Corp., 52 Cal.App.2d 507, 511, 126 P.2d 368; Haish v. Hall, supra; 11 Cal.Jur. 88, sec. 40. In the Haish case, supra [90 Cal.App. 547, 265 P. 1031, 11 Cal.Jur. 88, sec. 40], quoting with approval from the Odel case, supra, it is said: "'In fact, according to very respectable authority, inadequacy of price may be so gross as in itself to furnish satisfac-

tory evidence of fraud or misconduct on the part of the officer or purchaser, and justify the vacating of the sale.' Mr. Freeman in his work on executions, in section 309, discussing this same question, said: *'Where the inadequacy is palpable, the purchaser can retain his advantage only by showing that the proceedings are free from fault or irregularity.'* "

[12, 13] In the present case, according to the certificate of sale, ten lots near Dunsmuir, Siskiyou County, in Block B-5 of Collier Tract, in Section 36, Township 39 North, Range 4 West, M.D.M., together with a dwelling house and other improvements, were sold "in one parcel," to satisfy the unpaid portion of the justice's court judgment in the sum of $105.73. The only evidence of the actual value of the property is found in the defendants' declaration of homestead, wherein it is stated to be worth $5,000. It is true that the recitals in a declaration of homestead are mere ex parte statements which do not constitute competent evidence of those facts. In re Estate of Delaney, 37 Cal. 176; Apprate v. Faure, 121 Cal. 466, 53 P. 917; 13 Cal.Jur. 560, sec. 132. In the absence of competent evidence of the actual value of the property, we are not inclined to hold that the sale was void on that account even though there is an apparent disparity between the reasonable market value of ten lots upon which there is a substantial dwelling house and other improvements, and the sum of $105.73 for which they were sold, which is so great as to shock the conscience of a chancellor. For the reason that it is unnecessary in this case to so hold we therefore refrain from determining that matter.

[14] The appellants claim that the execution sale of the property in question is void on account of a homestead which was filed thereon. We are of the opinion the judgment of the justice's court became a lien against the land as provided by Section 674 of the Code of Civil Procedure, before a valid homestead was filed, unless the judgment was void for lack of jurisdiction. The homestead was therefore subject to the judgment lien, except that in the subsequent suit to quiet title which was dependent on the validity of that judgment the burden was on the judgment creditor to affirmatively prove that the justice's court had jurisdiction of the subject matter and of the parties involved therein, which it failed to do in this action.

[15] The judgment of the justice's court was rendered July 15, 1930, but the abstract of judgment creating the lien was not recorded until October 28, 1931. In the meantime Anna Clo Smith declared a homestead on the property under Section 1262 of the Civil Code. That declaration failed to state that her husband Frank C. Smith had not previously made a declaration of homestead, or that she was filing the homestead for the "joint benefit" of herself and her husband. Those omissions rendered the declaration fatally defective. Hansen v. Union Sav. Bank, 148 Cal. 157, 82 P. 768; Cunha v. Hughes, 122 Cal. 111, 54 P. 535, 68 Am.St.Rep. 27; Booth v. Galt, 58 Cal. 254; Reid v. Englehart-Davidson Merc. Co., 126 Cal. 527, 58 P. 1063, 77 Am.St.Rep. 206; Feintech v. Weaver, 50 Cal.App.2d 181, 122 P.2d 606; 13 Cal. Jur. 470, sec. 43; 26 Cal.Law Rev. 247.

[16] That first declaration of homestead therefore did not have the effect of creating a homestead interest in the land superior to the judgment lien. November 7, 1931, ten days after the abstract of judgment had been recorded, which created a lien provided the judgment was valid, Anna Clo Smith filed another declaration of homestead, for the apparent purpose of, and which did, supply the fatal omissions in the first declaration. But in the meantime, if the justice's court had jurisdiction, the judgment lien became vested. November 2, 1934, the land was sold under execution. September 16, 1933, Anna Clo Smith filed in the United States District Court her petition in bankruptcy. She also filed in that proceeding a petition to assign to her as exempt the homestead, which was granted on January 26, 1934. This suit for possession of the property was commenced July 29, 1937. Mr. and Mrs. Smith were then in possession of the property. On August 11, 1937, Anna Clo Smith and her husband, for a valuable consideration, conveyed the property by deed to the defendant and cross-complainant in this suit, Nora Kathleen Trapp. That absolute conveyance of the land by the joint deed of both the husband and wife constituted an abandonment of the homestead. Sec. 1243, Civil Code; Oaks v. Oaks, 94 Cal. 66, 29 P. 330; First Trust & Sav.

Bank v. Warden, 18 Cal.App.2d 131, 63 P.2d 329; 13 Cal.Jur. 515, sec. 86; 26 Cal. Law Rev. 477.

Since a valid declaration of homestead was not recorded until after the abstract of the judgment in the justice's court had been recorded and that homestead was subsequently abandoned by the absolute transfer of title by deed of the spouses, we are of the opinion it is unnecessary to determine the effect of the claim of homestead right upon plaintiff's title or right of possession under the execution sale.

For the reason that plaintiff's title and right to the possession of the land in question depends on affirmative proof at the trial of this case that the justice's court had jurisdiction of both the subject matter and the parties defendant in the justice's court case, and that plaintiff failed to sustain that burden, it follows that the findings and judgment are not supported by the evidence.

The judgment is reversed.

ADAMS, P. J., and PEEK, J., concur.

Rehearing denied; ADAMS, P. J., dissenting.

Hearing denied; SCHAUER, J., dissenting; CARTER, J., not participating.

61 Cal.App.2d 417

JENNINGS v. AMERICAN PRESIDENT LINES, Limited.

Civ. No. 12482.

District Court of Appeal, First District, Division 2, California.

Dec. 22, 1943.

Hearing Denied Jan. 20, 1944.

1. Appeal and error ⇨1001(1)

Rulings on questions of fact will not be disturbed on appeal if supported by substantial evidence.

2. Appeal and error ⇨930(1)

On appeal the evidence most favorable to the jury's verdict must be accepted as true.

3. Appeal and error ⇨499(1)

Point that trial court should have construed certain writing was not presented by the record, where record showed affirmatively that the paper was admitted in evidence on joint stipulation of counsel, that trial court was not asked to construe it, and that trial court did not refuse to do so. Code Civ.Proc. §§§ 1858, 2102.

On petition for rehearing.

Petition denied.

Prior opinion 143 P.2d 349.

Treadwell & Laughlin, of San Francisco, for appellant.

John J. Taheny, of San Francisco, for respondent.

STURTEVANT, Acting Presiding Justice.

There is no merit to the petitioner's point that the parties did not plan to have a trial in the absence of Gonzales or his deposition. It should be noted that both parties took the risk that Gonzales' testimony would not be available and planned accordingly. At least the evidence before the trial court upon the motion for the continuance is susceptible of that inference, which inference must be accepted for the purposes of this appeal.

[1] Petitioner's contention that a material omission was made in the statement of facts in not stating that it repeatedly requested attorneys for plaintiff to give it the written cross-interrogatories is without merit. From the statement of facts the plaintiff took from April 6 to April 28 to prepare the cross-interrogatories. It also appears that on April 17, 1942, petitioner agreed to the setting of the cause for trial on May 25, 1942, before it had received the cross-interrogatories. The statement of facts in the opinion is, perhaps, favorable to the trial court's determination; but, as stated in the opinion, 143 P.2d 349, the issue before the court on diligence was a question of fact and on appeal such rulings are not disturbed if supported by substantial evidence. This substantial evidence is stated in the opinion clearly.

[2] On appeal the evidence most favorable to the jury's verdict must be accepted as true. Although there is no direct evidence that Gonzales did not trip or make an effort to keep the container from falling, Jennings testified that he was watching Gonzales and that he did not see him do any of these things from which it can be inferred that Gonzales did not do them.

Therefore the statement in the opinion is not erroneous.

[3] The question arises as to what effect is to be given the recital contained in the paper dated February 24, 1942: "My end of the container slipped from my hands. The container slipped from my hands. * * Jennings, as I let the container drop let his end go. * * * The surface of the container was slippery and I was using my bare hands. Jennings had more success with the ice hooks." The defendant calls attention to the fact that the evidence produced was a writing signed in New York by Gonzales on February 24, 1942. It argues that the trial court should have construed said writing, and it cites Code of Civil Procedure sections 1858 and 2102. But the record shows affirmatively that the paper was admitted in evidence on the joint stipulation of counsel. The trial court was not asked to construe it and the trial court did not refuse to do so. The point is not presented by the record.

The petition for a rehearing is denied.

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62 Cal.App.2d 112

GARCIA v. BERMAN et al.

Civ. 14177.

District Court of Appeal, Second District, Division 1, California.
Dec. 27, 1943.

1. Appeal and error 🔑1011(1)

It is not within province of District Court of Appeal to disturb trial court's fact finding on conflicting evidence.

2. Sales 🔑174

A cattle buyer, failing to send seller certified check for balance of purchase price, as required by contract, waived right to insist on seller's strict performance of contract terms favorable to buyer.

3. Appeal and error 🔑1050(1)

In action for breach of contract to purchase cattle by failure to deliver certified check to plaintiff for balance of purchase price, admission of plaintiff's testimony that if he had received certified, instead of personal, check from defendant before loading cattle, plaintiff would have sent telegram directing commission company to turn over cattle to defendant, was not prejudicial to defendant, in view of other evidence.

Appeal from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Action by Joe Garcia against B. Berman and another for breach of contract to purchase cattle. Judgment for plaintiff, and defendants appeal.

Affirmed.

Andrew Renetzky, of San Luis Obispo, for appellants.

A. H. Brazil, of San Luis Obispo, for respondent.

YORK, Presiding Justice.

This is an appeal by defendants from a judgment in favor of plaintiff in an action for damages for breach of contract.

The record discloses that on or about September 9, 1942, respondent Garcia and appellant B. Berman entered into an oral contract whereby respondent agreed to sell and appellants agreed to purchase for the sum of $3,040, thirty-eight head of cattle, the same to be delivered at Los Angeles. Appellants paid $100 on account, and, the complaint alleges, they further agreed to deliver forthwith to respondent a cashier's check for the balance of the purchase price. Appellants had a prospective purchaser for the cattle and desired delivery thereof at Los Angeles on the following Monday morning, September 14th. George Matts, appellants' agent or "spotter" at San Luis Obispo County, who was present when the contract was entered into, informed respondent that appellants' check was in the mail. Consequently, respondent shipped the cows on Sunday morning but, because he had not then received the certified check, he consigned the stock to California Commission Company at Los Angeles from himself rather than from appellants. Later that day, respondent received a personal check from appellants which he deposited for collection with an Atascadero bank on Monday, September 14th. Meanwhile, the cattle arrived at Los Angeles and appellants, being unable to secure them since they were consigned in respondent's name, stopped payment on the check.

Respondent testified that "if I had got a certified check before I loaded the cattle, if it had been a certified check instead of his (Berman's) personal check I would have sent a telegram down that night (Sunday)" to the California Commission Company. He further testified that he told appellant Berman on the day the contract was made that "I had to have my money before I shipped the cattle or before I turned the cattle over to him * * * I told him I wanted a certified check for the cattle" before they were shipped. The agent Matts testified that respondent stated he wanted a certified check and that appellant Berman said, "You don't have to worry about my check, my check is just as good, certified or not"; but that he would send a certified check. Appellant Berman testified that nothing was said about the check being certified, but that respondent "wanted the check sent to him. He demanded that."

The cattle were placed in a feeding yard and on September 29, 1942, respondent sold them to a third party. Before doing so, respondent's attorney sent the following telegram to appellants: "Up until now you have failed, refused and neglected to make good sale of purchase price on Garcia cattle although Garcia has indicated readiness and ability to transfer cattle to you final offer made and unless you wire immediately cashier check being sent, complaint will be filed against you."

The instant action was filed November 23, 1942, seeking the recovery by respondent Garcia of the sum of $1,003, to-wit: $167 for cost of hay, $100 freight charges and $736 loss in the amount received for the cows. The trial court found that respondent suffered damages in the sum of $799.98 and no more, and awarded judgment for that amount.

Appellants urge that respondent was the party who breached the contract and that he should respond in damages, because appellants specifically instructed respondent how to ship the cattle, i. e., to California Commission Company at Los Angeles in the name of appellants.

[1] Upon conflicting evidence the court found that the parties hereto "entered into an oral agreement wherein plaintiff agreed to sell to the defendants and the said defendants agreed to purchase from the plaintiff 38 head of mixed stock cows for the sum of $3,040, *to be delivered to defendants in Los Angeles,* but at the expense of said defendants, *upon the payment of the sum agreed upon by a certified check.*" (Emphasis added.)

Having so determined a question of fact upon conflicting evidence, it is not within the province of this court to disturb the trial court's ruling.

[2] Moreover, having failed to send a certified check which the court, in effect, found was a condition precedent to performance, appellants waived the right to insist upon strict performance by respondent of those terms of the contract which were favorable to themselves.

[3] Appellants object to the admission of testimony of custom and usage, as to how the cattle could have been released to appellants by telephone or telegraph, contending that it opened up an entirely new field not contemplated by the parties and permitted respondent to justify his departure from the terms of the contract.

While it is true, respondent was permitted to testify that "If this check had been a certified check, Sunday when I got it all I would have had to do would be to telegraph down that night * * * all I had to do was send a telegram down and have them (California Commission Company) turn (the cattle) over to him (Berman) if I had got a certified check before I loaded the cattle, if it had been a certified check instead of his personal check I would have sent a telegram down that night"—such evidence was not prejudicial to appellants' cause, for there is every reason to believe that if respondent had received the certified check on Sunday, September 13, 1942, said respondent could have effected a release of the cattle to the appellants on Monday morning, September 14th. Also, as hereinbefore pointed out, even as late as September 29, 1942, respondent offered to deliver the cattle to appellants upon receipt of payment of the purchase price agreed upon.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

62 Cal.App.2d 134

CAMBRIDGE CO. v. MOORE et al.

Civ. 14258.

District Court of Appeal, Second District,
Division 2, California.
Dec. 29, 1943.

1. Judgment 🔑743(2)

Where a corporation, being the grantee of land subject to a deed of trust, conveyed the land to its grantee, who deeded it to a subgrantee in connection with another's payment to the beneficiary of the amount due under the deed of trust, which was assigned to such subgrantee, who later procured the sale of the land, and the corporation brought an action to annul the deed of trust and to quiet title, a judgment therein adverse to the corporation was "res judicata" of an action against the same defendants by the corporation's assignee to annul the deed from the corporation's grantee to the subgrantee. Code Civ.Proc. §§ 1908, 1962.

See Words and Phrases, Permanent Edition, for all other definitions of "Res Judicata".

2. Deeds 🔑17(1)

Where an officer of a corporate grantee of land subject to a deed of trust procured an agreement by a stranger to prevent an impending sale by paying the beneficiary the amount due, the stranger's agreement to resell to such officer within 30 days at a substantial advance was a "good and valid consideration" for a deed from the corporation's grantee to the stranger's appointee. Civ.Code, § 1605.

See Words and Phrases, Permanent Edition, for all other definitions of "Good and Valid Consideration".

3. Deeds 🔑17(1)

Where an officer of a corporate grantee of land obtained a stranger's promise to discharge a deed of trust thereon, the promise was a sufficient consideration, as between the parties, for a deed from the corporation's grantee to the stranger's appointee. Civ.Code, §§ 1040, 1605.

4. Deeds 🔑15

A consideration is not necessary to support a deed of realty executed voluntarily and with knowledge of its contents and with intent to convey title to the grantee. Civ.Code, § 1040.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by the Cambridge Company against Julia Burke Moore and others to annul a deed from a third person to the named defendant, and to recover a certain sum of money. From an adverse judgment, plaintiff appeals.

Affirmed.

Henry O. Wackerbarth, of Los Angeles, for appellant.

Bautzer, Ryan, Ford & Silbert, of Hollywood, for respondents.

MOORE, Presiding Justice.

The question for decision is whether the findings and decision in a former action between plaintiff's assignor and defendants for nullifying foreclosure proceedings for the sale of a lot and for the recovery of damages by reason of such sale and for quieting title of the lot in plaintiff, is res judicata of the present action by plaintiff to annul the deed by which one of the defendants acquired title to the lot and for the sum received by her at the sale of the lot in excess of the amount she paid for the note and trust deed.

Prior to the events hereinafter mentioned, Orland Fitch and his wife were owners of lot 31, block 92, of Beverly Hills subject to their deed of trust in favor of Beverly Hills Investment Corporation as trustee for the benefit of Beverly Hills National Bank & Trust Company, hereinafter referred to as the Bank. On September 19, 1933, they conveyed the lot to Vitruvian Corporation hereinafter referred to as Vitruvian. On June 19, 1939, Vitruvian deeded the lot to defendant Dow, which deed was recorded on the 30th of the same month. On the very same day his deed was recorded, Dow executed a conveyance of the lot back to Vitruvian and it was never recorded. On September 1, 1939, the beneficiary of the deed of trust declared a default in the payment of the Fitch note secured thereby and demanded a sale of the lot in full. Pursuant to such declaration the trustee recorded the declaration and fixed the 8th of January as the day for the sale which was postponed from time to time until January 18, 1940. On the 17th of January Miss W. E. Stowell called upon defendant Russell, an utter stranger to her and to Vitruvian, and stated that she knew the owner of the lot, one Neal V. Dow, who was about to lose it by foreclosure of the trust deed; that she desired to acquire it for her sister, Mrs. Fitch; that she would procure an adequate conveyance to Russell if he would protect the lot from the pending foreclosure and resell it to her within 30 days at an advance of $1,500 over the amount due on the trust deed note, to wit: $5,058.64. Miss Stowell did not advise Russell of Vitruvian's connection with the matter or tell him that she was an officer of that corporation. But pursuant to his acceptance of her proposal he instructed her to fetch the executed deed from Dow in favor of defendant Moore to his office at 8 o'clock a. m. on the following day. In fulfillment of her appointment Miss Stowell delivered the deed (from Dow to Moore) at the time designated, whereupon Russell paid the Bank the $5,058.64 on behalf of Moore in consideration of the Bank's agreement (1) to assign the note and trust deed to Moore, (2) to rescind the declaration of default and demand for sale and (3) to cause the trustee to cancel the sale scheduled for that very day. After the bank performed according to its agreement, Russell and Miss Stowell opened an escrow at the Fairfax and Beverly office of the Citizens National Trust & Savings Bank under the terms of which Moore should sell the lot to Stowell within 30 days for the amount paid to the bank by Moore plus the sum of $1,500 or the total of $6,615.64 with interest at seven per cent from date of escrow plus escrow charges, cost of title and fire insurance, and recording fees. No payment on her proposed purchase price was ever made by Stowell within the 30 days or at all.

After Stowell's failure to make the purchase Moore proceeded to take the necessary and legal steps to perfect her title and to sell the lot by assigning the note and trust deed to defendant Fennell; by having the Beverly Hills Investment Corporation resign as trustee and by having defendant Stockman substituted as trustee by order of court. Such order was recorded in the official records on May 4, 1940. In orderly succession the customary, necessary, and legal acts were performed whereby to effect a valid sale by the substitute trustee. This was accomplished on September 3, 1940, at which time the obligation of the trust deed was in default. One T. C. Laubisch purchased the lot at the trustee's sale for the sum of $8,000. Just prior to the sale a paper was read by an agent of Vitruvian, advising the persons present that the trust deed of Fitch and wife had been satisfied and discharged on January 18, 1940, by the payment of $5,058.64, and that Vitruvian was the owner of the lot 31. By such act Vitruvian acquiesced in the substitution of Stockman as trustee. Following the sale Stockman delivered his trustee's deed to Laubisch, who recorded the instrument.

The deed of trust contained the usual provisions of such instruments which authorized all of the acts done by the bank and by Moore and her agents and trustees. It provided that the recitals in the trustee's deed are conclusive proof of their truth against all persons.

November 20, 1940, Vitruvian filed its complaint in the Superior Court against the identical defendants named herein to obtain the annulment of the deed of trust and for the sum of $14,719.04 as damages for their acts which divested Vitruvian of its title to the lot, to vacate the decree which appointed Stockman as substitute trustee, and to quiet its title to the lot described in the trust deed.

Although Vitruvian has been in possession of the lot since the trust deed was assigned to defendant Moore, it never made an offer to pay the $5,058.64; never paid taxes and delinquencies for three years prior to filing its action, which exceeded $800 at the time of the trial; never offered to any defendant to do equity in the premises.

In its action Vitruvian alleged that Stowell borrowed the money from Russell to discharge the sum due the bank; that she offered to have the lot conveyed to Russell as security for the loan; and that Russell charged $100 for his services. But the court found against these claims and also determined that Stowell did not employ Russell in connection with any matter mentioned in the findings.

Upon finding the facts as hereinabove recited the court decided and adjudged that Moore paid $5,058.64 for an assignment of the deed of trust and note; that the proceeding to substitute Stockman as trustee under the trust deed was regular and effective; that at the time of the sale to Laubisch the trust deed was a valid lien; that none of the defendants owned the lot after September 3, 1940; that the title of Laubisch be quieted against defendants and that Vitruvian take nothing.

Such findings and decision are sufficiently comprehensive to cover every justiciable claim that Vitruvian might make to the real property which it conveyed to defendant Moore. But after the judgment had been finally affirmed (Vitruvian Corp. v. Laubisch, 49 Cal.App.2d 360, 121 P.2d 784) Vitruvian conceived the theory that although the trust deed was valid and the sale to Laubisch conveyed a sufficient title to the lot, yet there was no consideration for the deed from Dow to Moore and it should therefore be set aside. Such event would reinstate Vitruvian as owner at the time of the foreclosure sale and entitle it to the surplus over and above the amount paid the Bank by Russell. Acting upon this new theory on August 5, 1942, Vitruvian (1) conveyed to plaintiff all of its interest in lot 31; (2) assigned to Cambridge its cause of action to set aside the deed from Dow to Moore; (3) assigned its claim against defendant Stockman in the sum of $2,393.62, the balance of the money received by the trustee from the sale of lot 31 after deducting the amount paid to the bank by Russell for the trust deed and note. Five days later Cambridge filed the instant action to annul the Dow deed and to recover from Stockman $2,393.62.

[1, 2] Clearly the judgment in the Vitruvian action is res judicata of the instant cause. Secs. 1908, 1962, Code Civ. Proc.; 15 Cal.Jur. 206, p. 162. In the former action it was determined that Vitruvian was not the owner of lot 31. It conveyed the lot to Dow and had him convey it to Moore. Two benefits accrued to Vitruvian by the contract of Russell and Stowell: (1) either Vitruvian or its grantor, Fitch, was protected against a deficiency at the scheduled trustee's sale on January 18, 1940, and (2) the corporation gained the privilege of repurchasing the lot by the payment of the sum agreed upon within the period stipulated. That agreement to sell the property to Stowell was a good and valid consideration. Sec. 1605, Civil Code. The failure of Stowell or Vitruvian to get possession of the moneys necessary for the repurchase was not the measure of Russell's promise to reconvey the lot within 30 days. Vitruvian's agent applied to Russell with a proposal of which the latter had no prior knowledge. Prompt action was required. The essential basis of the offer was the arrangement for Vitruvian's assistant secretary to regain the ownership of the lot freed from the trust deed for which she was willing to promise payment of a handsome profit.

[3, 4] But had the right to regain the title to the lot not been mentioned, the promise of Russell to discharge the trust deed was a sufficient consideration for the deed as between the grantor and the grantee. Mix v. Yoakum, 138 Cal.App. 290, 294, 31 P.2d 1071. The fact that Moore took advantage of the processes of the trust deed foreclosure in order to clear up all possible defects in the title that might have resulted from the numerous conveyances during Vitruvian's ownership does not diminish the value of Russell's agreement to protect Fitch, Stowell, Dow and Vitruvian from the Fitch note and to reconvey the lot for a designated price. Such agreement constituted the basis of the escrow which was opened at the behest of Stowell and to which she pledged the faith and adherence of Vitruvian. But if such advantages had not accrued still the deed would have been valid. A consideration is not necessary to support a deed of real property if it has been executed voluntarily and with knowledge of its contents and with intent to convey title to the grantee. Sec. 1040, Civil Code; Knudson v. Adams, 137 Cal.App. 261, 269, 30 P.2d 608; La Mar v. La Mar, 135 Cal.App. 693, 698, 28 P.2d 63; Huntoon v. Southern Trust & Commercial Bank, 107 Cal.App. 121, 127, 290 P. 86. Both Dow as nominal grantor and Stowell the negotiator acted on behalf of Vitruvian. Hence there was no superior interest except that of the beneficiary under the trust deed. There is no suspicion of fraud, menace or undue influence about the agreement of Stowell and Russell for the execution of the Dow deed. It was voluntarily and eagerly delivered. There was not even a breach of the agreement to resell by Russell or by Moore. The failure of Stowell to repurchase the lot left it on the hands of the grantee at a time when prices on realty were still depressed.

We have examined the pleadings as well as the findings of the Vitruvian action. The entire record reassures us that the rights of plaintiff and all claims of its assignor arising from the transaction consummated by Russell and Stowell were adjudicated in the Vitruvian action. There it was determined that Vitruvian had no interest in lot 31; here Vitruvian's assignee seeks a cancellation of the deed by which it alienated the lot. The authorities cited by appellant (Title Guarantee & Trust Co v. Monson, 11 Cal.2d 621, 81 P. 2d 944; Agnifili v. Lagna, 204 Cal. 262, 267 P. 705; Standard Livestock Co. v. Pentz, 204 Cal. 618, 269 P. 645, 62 A.L.R. 1239; Lang v. Lang, 182 Cal. 765, 190 P. 181) as disclosed by their facts fail to support its contention that the doctrine of res judicata does not apply.

Judgment affirmed.

W. J. WOOD and McCOMB, JJ., concur.

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62 Cal.App.2d 24

PEOPLE v. MEYERS.

Cr. No. 2262.

District Court of Appeal, First District, Division 1, California.

Dec. 21, 1943.

1. Kidnapping 🔑6
Rape 🔑57(5)

In prosecution for attempted rape and kidnapping of girl under 18 years of age, where accused's contradictory testimony merely raised a conflict with that given by prosecution's witnesses, it was for jury to decide who was telling the truth.

2. Criminal law 🔑1159(4)

In attempted rape prosecution, prosecutrix' testimony cannot be said to be inherently improbable merely because it contains contradictions or inconsistencies.

3. Criminal law 🔑1159(4)

To justify reversal of conviction because of incredibility of testimony on which it is based, improbability of such testimony must be so obvious as to leave court no recourse without self-stultification, except to reverse conviction.

4. Criminal law 🔑1159(4)

To justify reversal of conviction because of incredibility of testimony on which it is based, it is not sufficient that such testimony contains unusual circumstances.

5. Criminal law 🔑1160

On appeal from conviction for attempted rape, appellate court must accredit to trial judge's decision denying new trial a familiarity with the witnesses and their testimony and assume that trial judge acted with understanding and regard for jury's functions, though prosecutrix' testimony contains glaring inconsistencies and contradictions.

6. Criminal law 🔑1160

On appeal from conviction, appellate court will override jury's and trial court's conclusions because of incredibility of complaining witness' testimony only where such testimony is uncorroborated and is so obviously false that reasonable minds may not differ with respect to its character.

7. Criminal law 🔑1159(1)

Testimony which merely discloses unusual circumstances does not require reversal of conviction.

8. Criminal law 🔑1160

To warrant rejection of statements of witness who has been believed by trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions.

9. Criminal law 🔑1160

Conflicts in testimony which is subject to justifiable suspicion do not justify reversal of conviction, for it is the exclusive province of the trial judge or jury to determine credibility of witnesses and the truth of facts upon which conviction depends.

10. Rape 🔑53(5)

Evidence sustained conviction of attempted rape upon a girl under 18 years of age, as against contention that her testimony was inherently improbable.

11. Criminal law 🔑1160

The conclusions drawn from conflicting evidence by jury and trial judge were controlling on appeal.

12. Criminal law ⚷768(1), 1173(2)

In sex cases, accused is entitled to a cautionary instruction, but it is not necessarily prejudicial error for the trial court to refuse a cautionary instruction where prosecutrix' testimony is corroborated by direct or circumstantial evidence, and jury is instructed that accused is presumed to be innocent and that his guilt must be established beyond a reasonable doubt.

13. Criminal law ⚷768(1)

In prosecution for attempted rape of girl under 18 years of age and kidnapping, cautionary instructions definitely instructing that in sex cases prosecutrix' testimony should be examined with caution was sufficient in view of testimony corroborating prosecutrix.

14. Criminal law ⚷768(1)

In prosecution for attempted rape of a girl under 18 years of age and kidnapping, accused's proposed cautionary instructions that prosecutrix' testimony was wholly uncorroborated were properly refused.

15. Criminal law ⚷1023(8)

An order denying accused's motion for arrest of judgment was not appealable.

◆

Appeal from Superior Court, San Mateo County; A. R. Cotton, Judge.

Paul Meyers was convicted of attempted rape, and he appeals.

Affirmed in accordance with opinion.

Joseph J. Bullock, of Redwood City, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

KNIGHT, Justice.

The defendant was found guilty by a jury of an attempted rape committed upon a girl seventeen years of age, and was sentenced to imprisonment in the county jail for a term of six months. He was charged also, in the same information, with the crime of kidnaping, but was acquitted thereof. He prosecutes the present appeal from the conviction of attempted rape, and pending its determination was released on bail. The two points urged in support of the appeal are directed against the sufficiency of the evidence and the form of a cautionary instruction. There is no merit in either point.

The prosecutrix was a high school student, and lived in Millbrae with her father, two brothers and a sister. Her mother was dead. The defendant was residing temporarily in San Mateo. He was thirty-one years old, and followed horse racing for a living. At this particular time he had a horse entered in the race meet then being held at the Bay Meadows Race Track. He was married, but his wife was living in Los Angeles; and during the racing season at Bay Meadows he was lodging with a jockey at a house in San Mateo. He met the girl the night preceding the commission of the offense, at the conclusion of a dance which the girl had attended in San Mateo, in company with her brother and a girl friend, and the defendant made an appointment with the prosecutrix to call for her the next evening and escort her to a neighborhood "movie." He arrived at her home at the appointed time in his automobile, and they drove first to a dining place operated by a drug store in Burlingame for dinner, and then went to a Burlingame theatre. They left the theatre between 9:30 and 10 o'clock, and proceeded to drive back to the girl's home, located on Ludeman Lane, a narrow road running from El Camino Real westerly up to and beyond the Millbrae Country Club golf links. But instead of stopping at her home, the defendant drove on for about a quarter of a mile and stopped in the parking area of the golf links. The girl testified that while they were parked there the defendant, by means of force, attempted to have an act of sexual intercourse with her, following which he forcibly prevented her from leaving the car and started to drive back down Ludeman Lane toward her home, but refused to let her out there, and drove on, telling her he was going to take her to a police station. As they drove through Millbrae the girl screamed for help. Three persons heard her screams. Two of them were standing on the street and they testified that the defendant was driving through the town at a speed of 40 to 55 miles an hour. One of them was the chief of police, with whom the girl was acquainted, and hearing the girl's screams he got into his car and chased the defendant's car down the highway toward Burlingame for a distance of more than half a mile, at a speed of

55 or 60 miles an hour, before he overtook and stopped him. The girl jumped out and the officer asked her what had happened. She replied that the defendant had attacked her. He then said to the defendant, "What seems to be the trouble," and the defendant replied: "Ask the girl." The girl then repeated that the defendant had attacked her, and in response to further inquiry by the officer as to whether she would be willing to file a complaint against the defendant, she said she would. Thereupon the officer drove them to the sheriff's office in San Mateo, and after delivering the defendant into the custody of a deputy sheriff took the girl to a doctor for a physical examination. The officer further testified that when he stopped the defendant's car, the defendant and the girl "both looked like they had been in an awful fight"; that their hair "was all mussed up"; and that the girl was nervous and excited.

The defendant, testifying in his own behalf, admitted that he refused to let the girl get out of the automobile at her home after they left the golf links and that he told her he was taking her to a police station; but he denied having molested the girl in any manner, at any time, and specifically denied having attempted to commit an act of sexual intercourse with her. The record shows, however, in contradiction of his denial, that on the morning following his arrest he stated to the assistant district attorney, in the presence of the chief of police and a deputy sheriff, that he "was on top of the girl" and did attempt to have an act of sexual intercourse with her. Furthermore the medical testimony introduced corroborates the girl's testimony that such an act was attempted.

[1] The explanation offered by the defendant to the jury for having refused to let the girl out of the automobile at her home was in substance as follows: "I drove up to the golf course and parked. I must have been parked there about 10 minutes, and we were talking, she asked me about my business, what kind of business I was in, and I told her I was in the race horse business and my horse had just got through winning, and there was a kind of a lull in the conversation and she said 'You know I can get anything I want out of you.' It shocked me so I was kind of surprised, and I said, 'What do you mean?' And she said, 'All I have to do is holler "rape, rape." I am only 17 and they will put you in jail.' * * * I just was surprised. It stunned me so I just sat there for a minute, and then started up my car * * * I started back down the highway and when we got to her home she said, 'Here's where I live.' I said, 'I know it.' She said, 'What are you going to do?' I said, 'I am going to take you down to the police station.' She begged me not to." Continuing, he testified that she asked him why he was doing so and he told her he was going to protect himself, that she had told him she was going to get him in trouble and he wanted to make sure she would not; "In other words," so he stated, he was "going to file a complaint against her," and that he was on his way to the San Mateo police station when he was stopped by the chief of police in Millbrae. However, the girl positively denied ever having had any such conversation with the defendant at the golf links or elsewhere. The defendant also disputed the testimony given by the chief of police and the girl as to what was said when the officer stopped the automobile in Millbrae; and he denied having made the incriminating statements on the morning following his arrest. But the contradictory testimony given by him in this respect merely raised a conflict with that given by the prosecution's witnesses; consequently it was for the jury to decide who was telling the truth.

[2-6] Defendant argues that the testimony given by the girl as to what took place while they were in the parked car on the golf links is inherently improbable; but in this connection it should be noted that the girl was under the age of eighteen years, and that therefore the real question in the case was whether an act of sexual intercourse was attempted, rather than the extent of force that was used in attempting to commit the act; and in view of the medical testimony and the incriminating statement made by the defendant on the morning following his arrest, it cannot be held, on appeal, as a matter of law, that the girl's testimony that such attempt was made, is inherently improbable. The rule governing reviewing courts in dealing with such a question is stated in People v. Holquin, 48 Cal.App.2d 551, 120 P.2d 71, 72, as follows:

"It cannot be said that the testimony of a prosecutrix is inherently improbable merely because it contains contradictions or inconsistencies. To justify a reversal because of the incredibility of the testimony, its improbability must be so obvious as to leave the court no recourse, with self-stultification, except to reverse the judgment. People v. Becker, 140 Cal. App. 162, 35 P.2d 196; People v. Amadio, 25 Cal.App. 729, 145 P. 151.

"It is not sufficient that the testimony contains unusual circumstances. People v. Collier, 111 Cal.App. 215, 226, 295 P. 898. It is the peculiar and exclusive province of the jury to determine whether a witness has sworn falsely. Although the testimony of the prosecutrix contains contradictions and although her testimony be contradicted by other witnesses, it is still the duty of the jury to determine whether they will believe or disbelieve the prosecutrix. People v. Becker, supra.

"But, even though the testimony of the prosecutrix contains glaring inconsistencies and contradictions, the appellate court must accredit to the decision of the trial judge a familiarity with the witnesses and their testimony and [assume] that in denying a new trial he acted with understanding and with a regard for the function of the jury. Those instances in which the appellate courts have overridden the conclusions of the jury and the trial courts are where the testimony of the complaining witness is uncorroborated and it is so obviously and so inherently false and unbelievable that reasonable minds may not differ with respect to its character. People v. Jefferson, 31 Cal. App.2d 562, 566, 88 P.2d 238, 240."

[7-9] In other words, as said in People v. Huston, 21 Cal.2d 690, 134 P.2d 758, 759 "* * * testimony which merely discloses unusual circumstances does not come within that category. Kidroski v. Anderson, 39 Cal.App.2d 602, 605, 103 P.2d 1000. To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. Back v. Farnsworth, 25 Cal.App.2d 212, 219, 77 P.2d 295; Lufkin v. Patten-Blinn Lumber Co., 15 Cal. App.2d 259, 262, 59 P.2d 414; Agoure v. Spinks Realty Co., 5 Cal.App.2d 444, 451, 42 P.2d 660; Hughes v. Quackenbush, 1 Cal.App.2d 349, 354, 355, 37 P. 2d 99; Powell v. Powell, 40 Cal.App. 155, 158, 159, 180 P. 346. Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. Hicks v. Ocean Shore Railroad, Inc., 18 Cal. 2d 773, 781, 117 P.2d 850."

[10, 11] Applying the foregoing legal doctrines to the state of the evidence here presented, it is apparent that there could be no justification for holding as a matter of law, contrary to the finding of the jury and the conclusion reached by the trial court in passing on the motion for new trial, that the testimony of the prosecutrix is inherently improbable. The very most that can be said is that the evidence is conflicting; and that being so, the conclusions drawn therefrom by the jury and the trial judge are controlling on appeal.

[12-14] With respect to defendant's second point, it is doubtless the law that in sex cases the defendant should be afforded the benefit of a cautionary instruction. People v. Putnam, 20 Cal.2d 885, 129 P.2d 367; People v. Lucas, 16 Cal.2d 178, 105 P.2d 102, 130 A.L.R. 1485. But in dealing with such cases on appeal it has been held repeatedly that it is not necessarily prejudicial error for the court to refuse a cautionary instruction where the testimony of the prosecutrix is corroborated by direct or circumstantial evidence and the jury is instructed that the defendant is presumed to be innocent and that his guilt must be established beyond a reasonable doubt. People v. Mummert, 57 Cal.App.2d 849, 135 P.2d 665, citing People v. Agullana, 4 Cal.App.2d 34, 40 P.2d 848; People v. Williams, 55 Cal.App. 2d 696, 131 P.2d 851. See, also, People v. Fleming, 58 Cal.App.2d 37, 136 P.2d 88. Here the testimony of the prosecutrix was corroborated, and the jury was fully instructed upon the two doctrines last mentioned. Nevertheless the trial court gave the benefit of a cautionary instruction. It was as follows: "I instruct you that while it is true that the law does not require in this character of cases that the prosecuting witness be necessarily supported by another witness, or corroborating circumstances, still I charge you that the law does require in this class of cases that you examine her testimony with caution." While the instruction so given did

not embody all of the argumentative language used in some of the decisions in stating the reason why in sex cases a cautionary instruction should be given, it will be noted that thereby the jury was definitely and clearly instructed that in this class of cases the testimony of the prosecutrix should be examined with caution, which in view of the corroborative testimony here adduced, was legally sufficient to meet the legal requirement. The two cautionary instructions proposed by defendant were properly refused. The purport of both was that the testimony of the prosecutrix was wholly uncorroborated. It is apparent, therefore, that since the members of the jury are the sole judges of the weight to be given to the evidence and of the credibility of the witnesses, the giving of the instructions in the form proposed would have constituted an invasion of rights and powers to be exercised by the jury.

[15] The judgment of conviction and the order denying the motion for new trial are and each of them is affirmed. The appeal taken by defendant from the order denying his motion for an arrest of judgment is dismissed, since no appeal lies from such an order.

PETERS, P. J., and WARD, J., concur.

LEET v. UNION PAC. R. CO. (two cases).

Civ. 14170, 14171.

District Court of Appeal, Second District, Division 2, California.

Dec. 7, 1943.

Rehearing Denied Dec. 28, 1943.

Hearing Granted Feb. 3, 1944.

1. Death ⊂⇒31(3)

Under the Federal Employers' Liability Act, the administrator of a deceased employee, and not his widow, is the only "proper party" to sue for his death. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

See Words and Phrases, Permanent Edition, for all other definitions of "Proper Party".

2. Courts ⊂⇒480(1)

An Oregon court's injunction against the widows and other heirs of railroad employees who resided in Oregon and were killed there in a train collision, could not prevent their administratrix from suing the railroad in California under the Federal Employers' Liability Act, notwithstanding the railroad's claim that the transportation of witnesses would burden interstate commerce in wartime. Federal Employers' Liability Act §§ 1, 6, 45 U.S.C.A. §§ 51, 56; U.S.C.A.Const. art. 4, §§ 1, 2.

3. Constitutional law ⊂⇒207(3)

The right to a trial in the state court is conferred by the Federal Employers' Liability Act on the citizen of any state where the state court has general jurisdiction adequate to entertain the action, and the denial of such right violates the privileges and immunities clause. Federal Employers' Liability Act § 6, 45 U.S.C.A. § 56; U.S.C.A.Const. art. 4, § 2.

4. Courts ⊂⇒480(1)

A state court, merely because of inconvenience and expense, has no power to enjoin actions in a sister state under the Federal Employers' Liability Act on behalf of the heirs of an employee in interstate commerce. Federal Employers' Liability Act §§ 1, 6, 45 U.S.C.A. §§ 51, 56; U.S.C.A.Const. art. 4, § 2.

5. Courts ⊂⇒480(1)

The full faith and credit clause does not require the California courts to observe an Oregon court's injunction restraining railroad employees' widows from suing the railroad in California. Federal Employers' Liability Act §§ 1, 6, 45 U.S.C.A. §§ 51, 56; U.S.C.A.Const. art. 4, § 1.

6. Judgment ⊂⇒815

On motions to abate death actions brought under the Federal Employers' Liability Act, it is proper to exclude court records of a sister state which has enjoined the actions. Federal Employers' Liability Act §§ 1, 6, 45 U.S.C.A. §§ 51, 56; U.S.C.A.Const. art. 4, §§ 1, 2.

7. Master and servant ⊂⇒291(9)

In actions under the Federal Employers' Liability Act, an instruction that the happening of the accident raises an inference that the proximate cause was the railroad's negligence is proper. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

8. Appeal and error 🔑1064(1)

In actions under the Federal Employers' Liability Act, if the evidence clearly establishes that the railroad's negligence caused a derailment, giving an instruction whose function is to have the jury infer negligence is harmless to the railroad. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51; Const.Cal. art. 6, § 4½.

9. Master and servant 🔑291(3)

In actions under the Federal Employers' Liability Act, if the cause of a derailment was not proved, plaintiff, having alleged general negligence, was entitled to an instruction that the happening of the accident raises an inference of negligence. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

10. Master and servant 🔑291(3)

In actions under the Federal Employers' Liability Act, under an allegation of general negligence, evidence that the ballast was fine or river gravel and was inadequate, that angle irons and spikes were loose, that the track had pulled away from the ties, and that the nose of the guard rail was broken off, thus leaving the exact cause of a derailment in doubt, justified an instruction that the happening of the accident raised an inference of negligence. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

11. Negligence 🔑121(2)

Where an inference of negligence arises from the inherent nature of the act causing the injury, defendant must then adduce evidence to meet plaintiff's prima facie case.

12. Master and servant 🔑265(6)

In actions under the Federal Employers' Liability Act, plaintiff, having pleaded negligence generally, could not invoke the res ipsa loquitur doctrine if proving the specific negligence which caused a derailment, but if not clearly proving the cause of the accident, plaintiff did not waive the benefit of such doctrine. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

13. Master and servant 🔑265(6)

In actions under the Federal Employers' Liability Act, if plaintiff relies solely on the inference of negligence arising from the happening of the accident, such inference standing alone might be dispelled as a matter of law by competent proof, if uncontradicted and not open to doubt. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

14. Master and servant 🔑286(34)

In actions for the death of a brakeman and fireman on a train standing on a siding when it was struck by another train which had been derailed, whether the derailment was due to the railroad's want of ordinary care was for the jury. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

On Petition for Rehearing.

15. Abatement and revival 🔑2
Continuance 🔑22
War 🔑10(2)

In an administratrix' actions under the Federal Employers' Liability Act on behalf of the widows of nonresident employees killed in another state, it was not an abuse of discretion to deny motions for abatement and continuance, where the local courts were not overburdened, notwithstanding the necessity of transporting witnesses in wartime. Federal Employers' Liability Act § 1, 45 U.S.C.A. § 51.

Appeal from Superior Court, Los Angeles County; Ingall W. Bull, Judge.

Separate actions under the Federal Employers' Liability Act, § 1, 45 U.S.C.A. § 51, by Charlotte E. Leet, as administratrix of the estate of Alfred Martin Thatcher, deceased, and as administratrix of the estate of Harold Patrick Utterback, deceased, against the Union Pacific Railroad Company. The two cases were tried together, and after a judgment in both cases for plaintiff, defendant brings them up as one appeal.

Judgments affirmed.

E. E. Bennett, Edward C. Renwick, and Malcolm Davis, all of Los Angeles, for appellant.

Hilderbrand, Bills & McLeod, of Oakland, Martin & Downey, of Los Angeles, Louis H. Brownstone, of San Francisco, for respondent.

MOORE, Presiding Justice.

The two cases entitled above were tried together and are brought here as one appeal.

Each case presents two questions for decision, namely: (1) whether the superior court of California was required to abate the actions brought by the administratrix of the estates of the two decedents because of injunctions issued against the heirs at law by the courts of Oregon forbidding the prosecution of the California actions; (2) whether the instruction to the jury upon the doctrine of res ipsa loquitur was prejudicial error.

Martin Thatcher was the brakeman and Harold Utterback the fireman on the locomotive of eastbound train number "Extra 2521" as that train stood on a siding at Fir Station east of Portland, Oregon. It was alleged that "defendant carelessly and negligently maintained its tracks and right of way and thereby caused another train proceeding upon an adjacent track of defendant to become derailed and to collide with and strike the aforementioned locomotive * * *." As a result of the collision both employees were killed. On April 6, 1942, respondent was appointed administratrix of the estate of each of the decedents and sixteen days later filed her actions to recover on behalf of those entitled to compensation under the Federal Employers' Liability Act. (Section 51, 45 U.S.C.A.) On May 28, 1942, the answer was filed in each case. The employment of each decedent in interstate commerce was admitted, as well as was the accident, although negligence was denied.

Four months after the cases were at issue appellant filed an action in the circuit court of Multnomah county, Oregon, against Annabelle Utterback and her two children and against Lila B., widow of decedent Thatcher. By these actions in equity in the circuit court of Oregon it was alleged that the decedents were residents of the state of Oregon; that they came to their deaths in that state; that the widows had employed attorney Hildebrand of California, who is not licensed to practice in Oregon, to prosecute their claims against defendant; that he had brought a large number of cases in California to recover under the Federal Employers' Liability Act for death or injury occurring in other states. The bill alleges how such conduct "deprives the defendant railroad of all reasonable opportunity to defend itself on the factual issues"; how it prevents defendant from obtaining the attendance of witnesses before the court; how such practice prevents a view of the premises by the jury; how it encourages confusion, distortion and misrepresentation, and enables the plaintiff to take the defendant by surprise in making factual contentions which cannot be met because of inability to obtain witnesses. It alleges that such practice enables plaintiffs to exact from railroad companies a grossly excessive amount in settlements of exaggerated claims; that properly to defend these actions some twenty witnesses would be required to be transported 1150 miles to Los Angeles, which would burden interstate commerce during war time. Temporary injunctions were granted by Oregon's circuit court against the further prosecution of the California lawsuits by the widowed defendants.

Thereafter, basing its motions upon the orders of the Oregon court, on November 14, defendant undertook to abate the instant actions by motions presented in the superior court which were denied on November 23. Subsequent motions to continue the actions indefinitely were denied December 23, 1942.

[1] (1) Under the Federal Employers' Liability Act, sometimes hereinafter referred to as the Act, no right is conferred upon the widow of a railroad employee to sue directly on account of the death of her husband (45 U.S.C.A. § 51). The only proper party to such an action is the administrator of the estate of such deceased employee. Section 56 of the Act confers jurisdiction upon both federal and state courts, and no case filed in a state court of competent jurisdiction may be removed to a federal court; also the defendant may be sued where it is doing business at the time the action is commenced.

[2, 3] From the cited sections and from the holdings of the appellate courts the respondent was entitled to proceed with the trial of her actions in California without regard to the injunction issued by the circuit court of Oregon. The right to a trial in the state court is conferred by the Act upon the citizen of any state where the state court has general jurisdiction adequate to entertain the action. The denial of the right to prosecute such action by a state court is a violation of the privileges and immunities clause of the federal Constitution. Article 4, § 2. McKnett v. St. Louis & S. F. Railroad Co., 292 U.S. 230, 54 S.Ct. 690, 78 L.Ed. 1227. After the decision of the McKnett case the same subject came before the Supreme Court when the Baltimore and Ohio Railroad brought an action to enjoin the claimant who was

a resident of Ohio, where he was injured, from prosecuting his claim under the Act in the federal court of New York on the ground that such New York action was inequitable, vexatious, and harassing and was a burden on interstate commerce. The Supreme Court there held that while the power obtains in the Ohio court to enjoin a claimant under the Act from bringing his action in the district court of New York, yet the privilege of venue granted by the federal statute cannot be frustrated for reasons of convenience or expense; that as to such objections to the law the remedy is by the legislature. Baltimore & Ohio Railroad Co. v. Kepner, 314 U.S. 44, 62 S.Ct. 6, 86 L.Ed. 28, 136 A.L.R. 1222. Such venue is a privilege created by section 56, which is controlling.

Following the Kepner case the United States Supreme Court had occasion again to comment upon the power of the court of one state to enjoin the prosecution in the courts of a sister state of such an action as that now under consideration, in the case of Miles v. Illinois Central Railroad Co., 315 U.S. 698, 62 S.Ct. 827, 828, 86 L.Ed. 1129. Decedent was a resident of Tennessee and was killed in that state. His widow, having qualified as administratrix in her own state, filed action in Missouri under the Act to recover for the death of her husband. Thereupon the defendant railroad procured an injunction from the chancery court of Tennessee against Mrs. Miles' prosecution of the Missouri case. She dismissed her Missouri lawsuit, obtained her discharge as administratrix and procured the appointment of an administrator in Missouri. That official promptly instituted a new action in Missouri against the railroad upon the same cause alleged in the first lawsuit filed by Mrs. Miles. Not to be outdone, the railroad amended its pleadings in the chancery court of Tennessee whereby it sought "to forbid furthering the new suit in any manner or receiving the proceeds of any judgment" on the ground of inconvenience in that twenty employees would be withdrawn from their duties and defendant would be subjected to an expense of several hundred dollars per day and the burden on interstate commerce would be increased by the transportation of such employees to Missouri. A new temporary injunction was issued. After certiorari had been granted to the United States Supreme Court, 314 U.S. 602, 62 S.Ct. 177, 86 L.Ed. 484, it was there held that on the authority of the Kepner case the carrier must submit to inconvenience and expense if there is jurisdiction although interstate commerce is to be incidentally burdened. The Missouri court was required to entertain the action.

[4] The laws of the United States are controlling in the premises. A state court gains its venue from the Act. Hence, by virtue of the federal Constitution such court must remain open to litigants from other states or territories on the same basis as that on which litigants within its immediate jurisdiction are received. For it to deny venue to the personal representative of an employee in interstate commerce residing in a sister state would violate the privileges and immunities clause. (Art. IV, sec. 2, Constitution.) Such an action in a state court can be no more subject to the direction of the courts of a sister state than it would be if instituted in a federal court. It follows that under the Miles decision a state court has not the power to enjoin the prosecution of actions instituted on behalf of the heirs of an employee in interstate commerce in the courts of a sister state merely because of inconvenience and expense. Appellant contends that the Miles case is not applicable because the opinion specifically asserts that the "charge of burden on interstate commerce had been expressly abandoned." We do not deem that observation a sufficient differentiation of the holding to defeat its applicability. The Supreme Court held that the fact that "the carriers must bear the incidental burden" is a determination that "the state courts may not treat the normal expense and inconvenience of trial in permitted places * * * as inequitable and unconscionable."

That the nation is at war is not a ground for abating the actions. It is true that during the first world war Congress by statute conferred upon the President the power of controlling the enforcement of the liabilities of common carriers in interstate commerce. Alabama & Vicksburg Railway Co. v. Journey, 257 U.S. 111, 42 S.Ct. 6, 66 L.Ed. 154. There has been no such power conferred since the outbreak of the current war and therefore no similar executive order has been issued.

[5] The injunction granted by the Oregon court was ineffective. It profited neither the administratrix who is the plaintiff nor the court which appointed her. The judgment of the California court was not

affected by the injunction. 32 C.J. 84, 85, par. 71. There is no law requiring the courts of California to observe an injunction such as that issued by the circuit court of Oregon by virtue of the full faith and credit clause. The cases cited by appellant (Nations v. Johnson, 24 How. 195, 16 L.Ed. 628; Lynde v. Lynde, 162 N.Y. 405, 56 N.E. 979, 48 L.R.A. 679, 76 Am. St.Rep. 332; Id., 181 U.S. 183, 21 S.Ct. 555, 45 L.Ed. 810; Plant v. Plant, 171 Cal. 765, 154 P. 1058; Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, 132 A.L.R. 1357; Huntington v. Attrill, 146 U.S. 657, 13 S.Ct. 224, 36 L.Ed. 1123) in support of that proposition may be readily distinguished by their facts. Numerous attempts have been made to abate actions at law brought under the Act by injunction issued by the courts of another jurisdiction. In these cases it has been held that it is the duty of the court in the exercise of its ordinary jurisdiction to take cognizance of an action brought to enforce rights under the Act. Taylor v. Atchison, Topeka & Santa Fe Ry. Co., 292 Ill.App. 457, 11 N.E.2d 610. Certiorari was denied, 304 U.S. 560, 58 S.Ct. 942, 82 L.Ed. 1528.

[6] While the decisions upon this question are not uniform upon the question of admitting in evidence the records of other jurisdictions for the purpose of proving the issuance of injunction against the prosecution of pending actions, the better rule supports the action of the trial court in refusing to admit the court records of a sister state which had enjoined the prosecution of the action. Kepner v. Cleveland, C., C. & St. Louis Railway Co., 322 Mo. 299, 15 S.W.2d 825, 65 A.L.R. 599. In the case of Frye v. Chicago, Rock Island & Pacific Railway Company, 157 Minn. 52, 195 N.W. 629; Id., 263 U.S. 723, 44 S.Ct. 231, 68 L.Ed. 525, after Frye had brought his action in Minnesota he was enjoined by the courts of Iowa, which was his home and in which he had been injured. It was held by the Minnesota Supreme Court that the legislature cannot create a transitory cause of action and by statute confine its enforcement to its own courts. Objection to the exemplified copy of the injunction issued by the Iowa court was properly sustained. See State ex rel. Bossung v. District Court, 140 Minn. 494, 168 N.W. 589, 1 A.L.R. 145; Peterson v. Chicago, Burlington & Quincy Railway Company, 187 Minn. 228, 244 N.W. 823; Doyle v. Northern Pacific R. Co., D.C., 55 F.2d 708.

[7-14] (2) In applying the doctrine of res ipsa loquitur the court read the customary instruction (Baji 206-B) which in substance advised the jury that from the happening of the accident as proved there arises an inference that the proximate cause was the negligence of defendant. Such instruction is proper in actions under the Federal Employers' Liability Act. Hackley v. Southern Pacific Co., 6 Cal. App.2d 611, 45 P.2d 447; Sibert v. Litchfield & M. R. Co., Mo.Sup., 159 S.W.2d 612. The contention of appellant is that by their evidence plaintiffs proved that the exact cause of the derailment was the breaking of the rail which in turn was caused by the negligent maintenance of the road bed and therefore the res ipsa doctrine does not apply. Citing Connor v. Atchison, T. & S. F. R. Co., 189 Cal. 1, 207 P. 378, 26 A.L.R. 1462; Marovich v. Central Calif. Traction Co., 191 Cal. 295, 216 P. 595. The evidence bearing upon the question of negligence as contained in the appendix to appellant's brief does not prove the cause of the derailment. It merely showed a number of conditions such as the ballast was "fine gravel," or "river gravel," "not very much ballast," "the angle irons were loose," "the track had pulled away from the ties," "the spikes were loose," "the nose of the guard rail was broken off." Such testimony merely left the question of the exact cause of the derailment in doubt. If the evidence had clearly established that the negligence of defendant was the cause of the derailment, then no prejudice was suffered by the giving of the instruction since its function was to have the jury infer negligence. (Constitution, Art. VI, sec. 4½.) If the cause was not proved, then under all authorities plaintiff was entitled to the instruction because of the allegation of general negligence. Under such allegation while only circumstances were proved yet they "afford reasonable evidence of want of care in a respect for which the defendant is liable". Lejeune v. General Petroleum Corp., 128 Cal.App. 404, 18 P.2d 429, 433. Where an inference of negligence arises from the inherent nature and character of the act causing the injury, the defendant must then, if it would escape an adverse verdict, "adduce evidence to meet plaintiff's prima facie case." Hackley v.

Southern Pacific Co., 6 Cal.App.2d 611, 45 P.2d 447, 454. Having pleaded negligence generally, if plaintiffs had proved the specific negligent act which caused the derailment they could not have invoked the res ipsa doctrine; but if the evidence they introduced did not clearly prove the cause of the accident they did not thereby waive the benefit of the res ipsa rule. Williams v. St. Louis-San Francisco R. Co., 337 Mo. 667, 85 S.W.2d 624. In the Williams case, proof was received that the wreck occurred on a curve while the train was proceeding at a speed in excess of 40 miles per hour; that 75 per cent of the ties were in a rotten condition for a distance of more than 200 feet; that, commencing at a point near that at which the wheels first struck the ties, the rails of the track on the outside of the curve were joined with angle bars secured with only two bolts instead of four. The Missouri court held that such proof did not deprive the plaintiff of the res ipsa instruction. Had plaintiffs in the present actions introduced no direct evidence of the alleged negligence, and had they relied solely upon the inference referred to in the res ipsa instruction, then such inference standing alone might have been dispelled as a matter of law, by competent proof, if it had been uncontradicted and not open to doubt. Johnston v. Black Co., 33 Cal.App.2d 363, 369, 91 P.2d 921. But their evidence of the negligence in the many respects, without proving the exact cause of the accident, entitled them to the instruction. Manning v. Chicago Great Western R. Co., 135 Minn. 229, 160 N.W. 787. It is true that a derailment might have occurred without culpable negligence, but it was for the jury to determine under the instruction and the evidence whether this derailment was due to the defendant's want of ordinary care.

The authorities cited by appellant are distinguished on the facts. In the Connor case, 189 Cal. 1, 207 P. 378, 26 A.L.R. 1462, plaintiff was a fireman whose engine passed over the bridge in the morning and returned in the evening when the abutment gave way. The right of recovery was based upon the alleged negligence of defendants in failing to inspect the track after a cloudburst which had occurred in the afternoon. Where negligence is alleged with such meticulous care as was there done it is error to instruct on the res ipsa doctrine. In the Marovich case, 191 Cal. 295, 216 P. 595, the specific acts of negligence were enumerated. Under the rule to which we confess allegiance that unfortunate lady was not entitled to a res ipsa instruction.

Both judgments are affirmed.

W. J. WOOD and McCOMB, JJ., concur.

On Petition for Rehearing.

PER CURIAM.

[15] In its petition for rehearing appellant emphasizes the point that our opinion failed to determine whether the trial court exceeded its discretionary power in denying the motions to abate and to continue the trial. What we failed to say in words in reply to those inquiries is implied in the language used. There was no reason why the court should abate the actions. They presented justiciable causes by an officer of the same court, appointed for the very purpose of maintaining the actions on behalf of worthy claimants. Since the necessities that beset the widow of one who toils for wages are not abated by reason of a war, no reason is known to us why the adjudication of her claim for her alleged losses should be abated by a court. Inasmuch as there has been neither legislative enactment nor decision by the supreme court interdicting the maintenance in our courts of actions arising outside of California, the trial court was confronted with no such inhibition so long as the calendar of the superior court was in such state as to enable it to try the cases so arising without unduly burdening the court and without defeating California residents of their rights to the trials of their causes. No such situation obtained then or now in either the trial or appellate courts.

For the same reason the court was justified in having denied the motions for a continuance. To have continued the actions would have been tantamount to an abatement. We find nothing in the record to show an abuse of the court's discretion.

The petition is denied.

62 Cal.App.2d 130

PARKER v. LOS ANGELES COUNTY et al.

Civ. 14226.

District Court of Appeal, Second District, Division 2, California.

Dec. 28, 1943.

Hearing Denied Feb. 24, 1944.

1. Hospitals 🔑8

A complaint alleging that plaintiff was detained in psychopathic ward of county hospital and then committed to state hospital for insane was insufficient to state cause of action against either state or county, in absence of any allegation that plaintiff was not insane either at time of her detention at county hospital or while confined at state hospital, or that her commitment was wrongful, or that it was initiated by either state or county or by any of their agents.

2. Counties 🔑213

The presentation of a claim against county to board of supervisors is a prerequisite to maintenance of an action against the county, and the board of supervisors are powerless to waive such presentation. Pol.Code, § 4075.

3. Counties 🔑213

Plaintiff could not maintain action against county either on ground of negligence in treatment of plaintiff while a patient at county hospital or on ground of false imprisonment, where no claim was filed with board of supervisors as provided by statute. Pol.Code, § 4075.

4. Counties 🔑216

Even if plaintiff had filed her claim against county for negligence in treatment of plaintiff while a patient at county hospital or for false imprisonment with board of supervisors within one year after her injuries, plaintiff could not have sued county later than six months after rejection thereof. Pol.Code, §§ 4075, 4078; Code Civ. Proc. § 342.

5. Counties 🔑216

Illness will not toll statute requiring a suit against county to be brought within six months after rejection of claim by board of supervisors. Pol.Code, §§ 4075, 4078; Code Civ.Proc. § 342.

6. States 🔑197

Action against state for negligence in treatment of plaintiff while confined in state hospital for the insane could not be maintained, where statute authorizing negligence actions against state was not complied with. Pol.Code, §§ 667, 688; Const. art. 20, § 6.

Appeal from Superior Court, Los Angeles County; Alfred L. Bartlett, Judge.

Action by Cleotus Lucille Parker, in propria persona, against the County of Los Angeles, State of California, and State of California, for damages as result of plaintiff's confinement in the state hospital for the insane at Patton and in the Los Angeles County General Hospital. From judgments of dismissal, the plaintiff appeals.

Affirmed.

Cleotus Lucille Parker, in pro. per.

J. H. O'Connor, Co. Counsel, and W. B. McKesson, Deputy Co. Counsel, both of Los Angeles, for respondent County of Los Angeles.

Robert W. Kenny, Atty Gen., and Eugene M. Elson, Deputy Atty. Gen., for respondent State of California.

MOORE, Presiding Justice.

Plaintiff is a refined gentlewoman. Having been confined in the state hospital for the insane at Patton for seven weeks after a temporary detention in the Los Angeles County General Hospital, she deemed herself to have been aggrieved and brought this action against the county of her domicile and against the sovereign state of California. Inasmuch as she had no legal counsel to represent her or to steer her through the narrow straits of the law, we have sought to determine whether out of the wilderness of words and phrases there might have been combed such declarations as would create a justiciable issue. The general demurrers to her complaint were both sustained without leave to amend. From the two judgments of dismissal following such orders she brings this appeal.

The Facts Pleaded Are Not Sufficient

[1] Omitting all of the confusion and extraneous matters of the pleading the only language remaining which might bear upon a cause of action for damages is as follows: that plaintiff was detained for a week in the psychopathic ward of the General Hospital; that she did not there receive proper consideration and was denied

the privilege of a jury trial; that she was committed to the state hospital at Patton on May 15, 1936; that the hospital wrote to plaintiff's husband that "plaintiff was suffering from dementia praecox" and to her attorney that she "had epileptic seizures and was unquestionably paranoid"; that she underwent extreme mental suffering because of the incompetency and dishonesty of the employees of both institutions; that her health was injured; that while there she worried about her two children who were harmed in health and in character, and who endured mental suffering to her damage in the sum of $100,000 for each child; that she demands a half million dollars for herself and the possession of all records, pictures and recordings, and if these are not forthcoming, she should recover another half million dollars; that she had been unable to file suit within three years because she had been suffering a malaise induced by confinement in the state hospital and by her extreme worry and mental suffering.

Such allegations against the state or one of its subdivisions do not constitute a cause of action. There is no declaration that she was not insane either at the time of her detention at the General Hospital or while she was confined at Patton. It is not alleged that the proceeding was wrongful or that it was initiated or instigated by either of the defendants or by any of their agents or agencies. It follows that had there been no plea of the limitation of her action, and had it not been directed against the sovereignty, still she could not have recovered.

The Action Was Barred Within One Year

[2, 3] In order for such an action against a county to reach the stage of a trial, within one year after the occurrence of the injury the claimant must file with the board of supervisors a detailed statement in writing setting forth the time and place, when and where it arose, the county employees at fault, the nature, extent and amount of the injury, "and all other details necessary to a full consideration of the merit and legality of such claim shall be stated in writing signed by the claimant or someone authorized by him." Political Code, sec. 4075. The presentation of such claim is necessary to enable the board of supervisors fairly to hear and consider the demand made. It is the sine qua non to the maintenance of an action. The statute is not only valid but the board of supervisors were powerless to waive the provisions thereof. Spencer v. City of Calipatria, 9 Cal.App.2d 267, 49 P.2d 320; Norton v. City of Pomona, 5 Cal.2d 54, 53 P.2d 952; Walton v. Kern County, 39 Cal. App.2d 32, 102 P.2d 531. The cited authorities emphasize the principle that no action against a county can be maintained in the absence of a showing of compliance with the Code provisions. Since there is no constitutional inhibition against such statute it is a valid law, applying to all alike. No claim was filed with the supervisors as provided by section 4075. Nor was any filed with the state board of control as required of those who seek to recover damages from the state.

[4] The action sought to be alleged is one either for negligence in the treatment of a hospital patient or for the false imprisonment of the latter. In either event no suit may be maintained against the county thereon prior to the presentation of the claim within a year, and not later than six months after its rejection. Sec. 342, C.C.P.; sec. 4078, Pol.Code. It follows that even though plaintiff had filed her claim with the board of supervisors (sec. 4075, supra) within one year after her injuries, she could not have sued the county later than six months after the rejection thereof. Sec. 4078, supra. Appellant alleges that she was detained by the county on May 9, 1936, and that she was committed to the state hospital six days later. Her complaint was not filed until May 6, 1943. It follows that under no provision of the law, however liberally construed, could it be said that her action was not barred by the Code sections above mentioned.

[5] There is no appropriate allegation to toll the statute. Illness of any nature will not do so. See Kimball v. So. Pac. Gas & Electric Co., 220 Cal. 203, 210, 30 P.2d 39.

The State Cannot be Sued.

[6] In so far as the State of California is concerned, no action for negligence can be brought against the state except in compliance with sections 667 and 688 of the Political Code. Those sections were enacted in contemplation of section 6 of Article 20 of the Constitution which effectually forbids the prosecution of claims against the state unless brought in compliance with statutes providing therefor.

There is no attempt to comply with such statutes. See State v. Royal Consolidated Mining Co., 187 Cal. 343, 346, 202 P. 133.

The judgments are affirmed.

W. J. WOOD and McCOMB, JJ., concur.

62 Cal.App.2d 41

In re JOHANSON'S ESTATE.

WEINER et al. v. SMITH et al.

Civ. No. 14080.

District Court of Appeal, Second District, Division 3, California.

Dec. 21, 1943.

As Corrected Jan. 31, 1944.

1. Evidence 🔑334(4), 574

Where physician who treated testatrix testified that at time of execution of will testatrix was sane even under medical definition of "insanity" as a protracted departure of the individual in his acts, thinking and religion out of harmony with his education and cultural opportunity, certificate of death, signed by physician, which stated cause of death to be carcinoma of the brain with multiple cervical metastases could not be construed as an opinion by physician that functioning of brain had been impaired.

See Words and Phrases, Permanent Edition, for all other definitions of "Insanity".

2. Wills 🔑50

One has "testamentary capacity" if he is able to understand and carry in mind the nature and situation of his property and his relations to his relatives and those around him with clear remembrance as to those in whom, and those things in which, he has been mostly interested, and is capable of understanding the acts he is doing and the relation in which he stands to the objects of his bounty.

See Words and Phrases, Permanent Edition, for all other definitions of "Testamentary Capacity".

3. Evidence 🔑5(2)

It is common knowledge that the making of wills is often deferred until the testator is in contemplation of impending death, and as a consequence, many wills are validly made by those who no longer have ability to conduct their business affairs because of loss of mental vigor or partial loss of memory.

4. Wills 🔑50

Testatrix, suffering from physical rather than mental disorder, who had experienced no general loss of memory or of ability to concentrate and to reason, whose mental faculties were alert, if somewhat peculiar, who was able to understand and attend to her business affairs, who had ability to recall size and nature of her estate, and to exercise reasonable judgment as to plan of testamentary disposition in favor of those of her relatives and friends whom she considered to be most deserving, had "testamentary capacity."

5. Wills 🔑45

The fact that testatrix understood her serious physical condition and was greatly worried and depressed over it was not evidence of mental illness which would affect testamentary capacity.

6. Wills 🔑38(2)

Testamentary capacity is not destroyed by mere false beliefs nor departure from normal thought or action, nor even by insane delusions that do not bear directly upon and influence the terms of the will.

7. Wills 🔑55(3)

Where distress which testatrix felt prior to making will was not imaginary, statements by testatrix as to her condition which could be attributed to poor attempts to explain the nature of her feelings constituted insufficient evidence to authorize a finding that testatrix suffered from insane delusions.

8. Wills 🔑278

Proof that testatrix did not know or understand contents of will or that it was her will, because she was mentally incapable of understanding it at the exact time she executed it, was admissible under allegation that testatrix was of unsound mind.

9. Wills 🔑278

Where will contest alleged that testatrix was of unsound mind, an amendment alleging that testatrix did not know she was making her will or understand its contents was proper to admit proof that testatrix had no knowledge or understanding of contents of will, or that it was her will, even though she would have been able to understand it if it had been explained to her.

10. Wills ⇨324(2)

Where physician testified that on February 1, testatrix' mental condition was clear, and nurse testified that on February 4, on day on which will was signed, that testatrix was able to walk about, and attorney testified that testatrix was mentally alert and twice read will and asked explanation of a legal term before signing will, testimony that on February 6 the testatrix was in a stupor was insufficient to show that testatrix was unable to understand that she was executing her will or comprehend the contents thereof, so as to authorize submission of such issue to jury.

11. Wills ⇨302(3)

Where there was no evidence that testatrix did not know that document signed was her will, or that she signed it without reading it, or read it without understanding it, evidence did not sustain allegation, as a ground of contest, that testatrix did not know that document was a will or did not know its terms. Code Civ.Proc. § 1963, subds. 20, 28.

12. Wills ⇨109

A testatrix cannot make a valid will without having knowledge of what it contains.

13. Wills ⇨289

A will shown to have been signed by the testator and subscribing witnesses gives rise to a presumption that it has been duly executed and that testator had knowledge of its contents. Code Civ.Proc. § 1963, subds. 20, 28.

14. Wills ⇨289

In will contest after probate on ground that testatrix did not know that document was a will or did not know its terms, contestant had burden to produce affirmative evidence to sustain such allegations.

15. Wills ⇨302(3)

The fact that attorney was familiar with estate of testatrix and was in possession of other information which would have enabled him to draw will without specific directions from testatrix or the existence of a doubt as to the correctness of attorney's testimony in any respect would not constitute evidence that attorney drew will without directions from testatrix, or that will expressed attorney's desires rather than those of testatrix.

16. Wills ⇨288(1)

In a will contest after probate, contestant's case must be judged independently and must be found to have sufficient strength to justify a finding in contestant's favor before proponent is called upon to produce any proof.

17. Wills ⇨166(1)

Where evidence failed to disclose that nurse discussed proposed will with testatrix or that attorney made any request or suggestion as to terms of will, and attorney was named executor, but was not a beneficiary, and it was not shown that attorney would have profited in any way from the dispositions made in the will, allegations of undue influence by attorney and nurse upon testatrix were unsupported.

18. Wills ⇨326

Where evidence in support of will contest was insufficient to support a verdict for contestants, motion of nonsuit was properly granted.

19. Wills ⇨164(1)

Offer of proof in will contest in support of charge of undue influence that attorney who drew will and principal beneficiary were beneficiaries under will of testatrix' deceased husband was properly rejected as irrelevant.

20. Evidence ⇨219(3)

Offer of proof in will contest that a sister of testatrix had filed a contest upon grounds identical with those on trial and that it had been compromised was properly rejected.

21. Compromise and settlement ⇨2

Under rule that compromises are favored in law, a man is allowed to negotiate for the purchase of his peace without prejudice to his rights.

22. Evidence ⇨265(12)

A fact that one surrenders some of his rights under a will in order to avoid litigation does not sustain conclusion that he must have obtained such rights wrongfully.

23. Evidence ⚷553(1)

In will contest, where physician who was treating testatrix had made it clear that he had no definite opinion as to mental condition of testatrix on day will was signed because he had not seen her, objection to hypothetical question which called for physician's opinion as to the mental condition of testatrix on such date, and assumed facts wholly insufficient as a basis for opinion, was properly sustained.

BISHOP, Justice pro tem., dissenting.

Appeal from Superior Court, Los Angeles County; Ruben S. Schmidt, Judge.

Proceedings in the matter of the estate of Olivia Sofia Johanson, deceased, by Johan August Johanson Weiner and others against Helen Josephine Smith and others to contest, after probate, the will of decedent. Judgment of nonsuit, and contestants appeal.

Affirmed.

Walter G. Danielson, of Los Angeles, for appellants.

Birger Tinglof, of Los Angeles, for respondent Helen Josephine Smith.

Roscoe R. Hess, of Los Angeles, for respondent Oscar W. Houge.

SHINN, Justice.

This is an appeal from a judgment of nonsuit in a contest, after probate, of the will of Olivia Sofia Johanson. Contestants are the four brothers, two nephews and a niece of decedent. The original grounds of the contest were unsoundness of mind, undue influence, and that the will had not been duly subscribed and witnessed. At the close of contestants' case they were allowed to amend their petition by the addition of allegations that Mrs. Johanson did not know or understand the terms and provisions of the will or understand that it was her last will and testament, and the allegation that she was suffering from insane delusions.

It is insisted by the contestants that they made out a sufficient case to go to the jury as to all of the grounds of contest, except the one of non-execution, and there are also assignments of error in the exclusion of evidence. A consideration of the evidence in the light most favorable to contestants (In re Estate of Newhall, 1923, 190 Cal. 709, 719, 214 P. 231, 28 A.L.R. 778) has convinced us that contestants produced no evidence which would have justified a verdict in their favor upon any ground of contest.

The following summary states the substance of the evidence which tended to support the charges of unsoundness of mind, the allegations of lack of knowledge and understanding and of insane delusions, added by the amendment. Mrs. Johanson was a native of Sweden who had come to America in 1907 at the age of 22 with her twin sister Emma. She married in that year, some five years later she and her husband came west, and he died of cancer in December, 1939. She frequently corresponded and was on good terms with Emma and with her other relatives who lived in Sweden. She could read some English but usually corresponded in Swedish.

In January, 1939, decedent became a patient of Dr. John Doyle, an eminent specialist in nervous and mental diseases, who testified that he diagnosed her case as one of "depressive psychosis which is a form of insanity. (We shall refer later to what he meant by the term.) She was melancholy to a decree that was abnormal. Her power of concentration was materially diminished. She was unable to subtract 7 from 172. She knew the day of the week; stated the month was January. She stated the date was the 2nd, whereas it was the 9th. She stated the year was '32 where it was really '39. She had suicidal ideas, stating that she would 'like to go for my husband's sake.'" She was sent to a sanitarium for a few weeks under treatment by Dr. Doyle; he later gave her a treatment in June, 1939, and a final one in the following October, to relieve the depression in her melancholy state. Dr. Doyle examined her again in February, 1940, found her to be suffering from cancer of the breast and from an "obsession compulsion neurosis and anxiety" but no longer in a "depressive sickness." At that time pictures disclosed two fractures of the pelvic bones, due to the cancerous condition, and which would have occurred with relatively little pain. There was a healing process under way. Dr. Doyle saw her in March, August, September, October and November, 1940, and on January 2, 23, 25 and February 1, 8, and 12, 1941. In October she had obsessional ideas and she consistently complained of pain and tightening in the back of her neck. She was conscious of her heart beats through the blood vessels to the head and complained of that condition. She entered a sanitarium in September, 1940, and remained there until her death on February 15, 1941. Her nurse testified that in the latter part of January she had spells of vomiting but walked about her room, and on January 27th was outdoors in a wheel chair and walked in the hall; on January 28th she had a vomiting and coughing spell and appeared "very cyanotic, which is a bluish color that people get before they are about to die," but shortly thereafter took a walk in the hall and had visitors; thereafter she was out of bed in a wheel chair or walking about the room each day to and including February 4th, when she walked in the hall and her room in the morning and again at 4 o'clock in the afternoon. It was in the afternoon or evening of February 4th that she executed the will, with her nurse, Madlyn Smithson, and her attorney, Oscar W. Houge, as witnesses. On February 5th she had her lunch while sitting in a chair but ate very little and was crying and nervous. She conversed with her nurse, so the latter testified, until within three days of her death.

Dr. Doyle testified that he examined Mrs. Johanson on February 1, 1941, and that she was losing ground physically. He testified that on February 1st she understood what he was telling her, "the technical terms," and that their conversation "was of people in middle life, and discussing a difficult problem on her part," and he also testified as follows:

"Q. At that time when you examined her February 1st, 1941, what was her mental condition? A. Her mental condition was clear enough and she talked well.

"Q. That was true of all your prior examinations? A. Yes, sir.

"Q. Her memory was fair? A. Yes.

* * *

"Q. After October, 1939, it is true that she was sane even in your own medical definition? A. That is right."

He testified that by February 8th a state of stupor or blunting of her mental faculties had arisen since February 1st, and expressed the opinion that on February 8th she did not have sufficient mental capacity to understand the nature and situation of her property or her relations to the persons who might have claims upon her bounty and that this was due to the condition of stupor. He also testified that he could not say with any degree of certainty when that degree of stupor had first manifested itself.

Witnesses who had been close to Mrs. Johanson testified to her conduct and statements in 1938 and thereafter, which we summarize as follows: In the latter part of 1938 she for the first time lost interest in her personal appearance, began to smoke cigarettes incessantly and to drink beer, one witness testifying that on one occasion she smoked five packages of cigarettes between dinner and bedtime, and another that she smoked five or six packages a day and drank seven or eight bottles of beer a day. She left cigarette stubs on the floor, and would bite the heads off matches and chew the match stems or place them in patterns around a coffee table. On one occasion she ate all the cube sugar in a bowl and when it was refilled ate what had been added. Sometimes on a street car she would make a face at someone, putting her fingers in her mouth and stretching it wide; she would take out her dental plate and handle it and appear in her back yard in her pajamas and bathrobe, pull flowers off the bushes and cut up the petals. She complained that her head felt as if it had wheels grinding in it, and in 1940, after her husband's death stated, "I am nervous—I killed him, I killed him. Everyone is sorry for him but no one is sorry for me." She talked to herself, tore up small pieces of paper and threw them at a woman who was working for her, would have breakfast in bed because she said she was too ill to get up, but would arise after breakfast. She talked constantly of her troubles; she received an electric treatment by a physician and afterwards stated that the machine had broken all of her bones and dried up all the blood in her bones. She stated that she was going crazy and that she could hear voices. She always refused to listen to the radio because it annoyed her. She at times avoided her neighbors and at least one witness testified that her eyes appeared glassy. Most of the foregoing testimony related to the years 1939 and 1940. Upon one occasion in 1940 she stated to her attorney that she had been unfriendly with her sister Emma and had not corresponded with her at one time for about 20 years. The attorney who drew the will testified that Mrs. Johanson had discussed with him on several occasions the matter of making a will; that on February 4, 1941, he went to the sanitarium at her request about 9:30 a. m., received instructions as to the terms of the will, prepared it during the day and returned with it the same afternoon; that he handed it to her while she was seated almost erect in bed, that she put on her glasses, looked at the will page by page, asked a question as to the meaning of a legal term in the will, stated that she had finished reading it, and in answer to an inquiry said she wished the nurse and the attorney to act as witnesses. The attorney, according to his testimony, asked her to read the will a second time, she again looked at it page by page, and finally said, "I have read the will again" and stated it was the way she wanted it, whereupon it was subscribed by her and the witnesses. The original will, at Mrs. Johanson's suggestion, was kept by the attorney and a copy was placed in an envelope, which, at Mrs. Johanson's request, was put in a wardrobe by the nurse. The will was not read to Mrs. Johanson nor did she read it aloud or discuss any of its particular provisions.

[1] There was no expert testimony and no opinion evidence of acquaintances that Mrs. Johanson was of unsound mind on or prior to the date of the will. The eminent specialist who had examined and treated her at various times over a period of two years, and who was in a better position than anyone else to express an informed opinion as to her mental faculties, testified to no mental disorder other than a condition of "depressive sickness" which passed away considerably more than a year prior to the date of the will. The only condition indicative of loss of memory or the power of concentration was the one which he found when he first treated her and from which she recovered. The testimony of the physician as a whole was contrary to the contention that she was at any time of unsound mind, except as to a single occasion four days after the will was executed, when she was found to be in a debilitated physical and mental condition. He explained the use of the word "insanity" in connection with his diagnosis in 1939 as describing "a protracted departure of the individual in his acts, thinking and religion out of harmony with his education and cultural opportunity," and, as already noted, expressed the opinion that after October, 1939, at the times of his several examinations Mrs. Johanson was sane even according to his medical definition. In view of his testimony, the certificate of death which had been signed by him and which stated the cause of death to be "carcinoma of the brain with multiple cervical metastases" cannot be distorted into an opinion that the functioning of the brain had been impaired.

[2, 3] We should first determine whether the mental powers of Mrs. Johanson had failed to such an extent that she could not make a valid will. The test, which is not a difficult one to meet, is that one has testamentary capacity "if he is able to understand and carry in mind the nature and situation of his property, and his relations to his relatives and those around him, with clear remembrance as to those in whom, and those things in which, he has been mostly interested, capable of understanding the act he is doing, and the relation in which he stands to the objects of his bounty." In re Estate of Motz, 1902, 136 Cal. 558, 562, 69 P. 294, 295; 26 Cal.Jur. 639. A more rigid test would invalidate many wills, for it is of common knowledge that the making of wills is often deferred until the testator is in contemplation of impending death through old age or sickness. As a consequence many wills are made, and validly made, by those who no longer have ability to conduct their business affairs because of loss of mental vigor or partial loss of memory. Extreme care should be exercised in applying the settled rules to the facts of a given case, as a decision at variance with those rules would set an unfortunate precedent. We have therefore considered it necessary to indulge in a somewhat detailed statement and analysis of the evidence.

[4, 5] We are satisfied that Mrs. Johanson was shown to have had testamentary capacity. She was suffering from physical rather than mental disorders. She was only 54 years of age at the time of her death and she had experienced no general loss of memory or of ability to concentrate and to reason. Her mental faculties were alert, if somewhat peculiar. There was no general debility either physical or mental which was indicative of senility. There was no evidence that at any time preceding the execution of her will she was unable to understand and attend to her business affairs, although it is apparent that she must have had some responsibility in that connection. The undisputed testimony was that she examined her bills and wrote checks until a few days before her death. If the disease which had affected various parts of her body had also attacked her brain, there was no evidence of any accompanying change in her mental

condition. There was no evidence of progressive mental failing. She understood her condition and was greatly worried and depressed over it, but her worry was only natural and was not an evidence of mental illness. There was no evidence of general mental weakness from which it could be reasonably inferred that at any time she was without ability to recall the size and nature of her estate, which does not appear to have been extensive, or the ability to exercise reasonable judgment as to a simple plan of testamentary disposition that would favor those of her relatives and friends whom she considered to be most deserving.

[6, 7] The unusual statements and beliefs of Mrs. Johanson hereinbefore enumerated are relied upon by appellants as manifestations of insane delusions. But if given their greatest significance the eccentricities were not inconsistent with the existence of testamentary capacity. Peculiar and unusual conduct and the possession of false beliefs frequently accompany physical afflictions, but something more than that is required to render one incapable of making a valid will. The right to dispose of one's estate by will is not confined to those whose mental powers are unimpaired and whose conduct and beliefs are normal and, from a medical viewpoint, sane. Testamentary capacity is not destroyed by mere false beliefs or departure from normal thought or action, nor even by insane delusions or hallucinations that do not bear directly upon and influence the terms of the will. In re Estate of McDonough, 1926, 200 Cal. 57, 61, 251 P 916; In re Estate of Wright, 1936, 7 Cal.2d 348, 60 P.2d 43; In re Estate of Nolan, 1938, 25 Cal.App.2d 738, 78 P.2d 456; American Trust Co. v. Dixon, 1938, 26 Cal.App.2d 426, 78 P.2d 449. Mrs. Johanson suffered pain which she said gave her the feeling of wheels grinding in her head. She stated that her bones had been broken and her blood dried up by the electric treatment she had received. Perhaps these were poor attempts to explain the nature of her feelings, but her pelvic bones had been broken and the distress which she felt, while perhaps not lucidly described, was not imaginary. Her turning to excessive smoking and acquiring a fondness for beer did not bring her into a state of insanity nor to the verge of it, any more than did the breaking and chewing of match stems and placing them in patterns around a coffee table. These were expressions of a nervous condition, the causes of which were to be found in the state of her physical health. It did not appear in the testimony that anyone had endeavored to reason her out of her ideas nor was there any evidence tending to show that she possessed false, much less insane, delusions which bore any relation whatever to the existence of testamentary capacity or which would in any manner have influenced the terms of her will. It is true that the attorney testified that Mrs. Johanson had said that for one period of 20 years she had not been on good terms with her twin sister and had not corresponded with her. It is also true that there was evidence that the facts were to the contrary. There was testimony to the effect that late in the fall of 1940, while she was in the sanitarium, she complained to her attorney that her sister and brother-in-law had come from New York to live with her; that they were staying at her house, she was paying all of the bills, had to buy everything, that they paid her no rent, and that she had to leave home because she could not get along with them. But there was no evidence that she and her sister were not on good terms at the time the will was made; according to the testimony of her attorney she said at that time that her sister had helped her and that she wanted to leave her $100 and no more. There was no evidence that at that time she entertained any false beliefs as to her sister's conduct or held any ill will toward her. The argument that she held some unreasonable and false belief concerning her past relations with her sister would have had considerably more plausibility if the four brothers had been given more than the sister. The will referred to Helen Josephine Smith as a trusted friend and faithful employee of her deceased husband and herself in their business enterprises and as one who had been of great assistance both as an employee and as a friend, and these were the reasons she gave for making Miss Smith the principal beneficiary of her will. There was no evidence that the facts were not as stated. Reference was made in the will to the four brothers who resided in Sweden, with whom she was on good terms. Two of them received nothing and the other two received Mrs. Johanson's clothing and wearing apparel, except a seal skin coat. Her silverware was left to a friend, Mrs. Charlotta Roseland of Los Angeles. The

will was not an unnatural one. In re Estate of Nolan, supra, 25 Cal.App.2d 738, 78 P.2d 456. A finding that she suffered from insane delusions would have been unjustified.

[8, 9] We have left for separate discussion the allegations added by amendment to the contest, that Mrs. Johanson did not know she was making her will or understand its contents. It appears to have been the theory of the contestants that the amendment alleged a ground of invalidity distinct from that of unsoundness of mind. If it had been intended to charge that Mrs. Johanson did not know or understand the contents of the will, or that it was her will, because she was mentally incapable of understanding it at the exact time she executed it, proof of that fact would have been admissible under the allegation that she was of unsound mind. If, upon the other hand, it was intended to allege that she had no knowledge or understanding of the contents of the will or that it was her will, even though she would have been able to understand it if it had been explained to her, the amendment was perhaps necessary to admit proof of such facts. In order to fully dispose of the contentions of appellants it is necessary to discuss separately the evidence relating to Mrs. Johanson's condition immediately before, at the time of, and after the execution of the will, to see whether there was any substantial evidence of want of testamentary capacity; also the circumstances in evidence as to the execution of the will, to see whether there was any evidence that she did not know she was making a will or did not understand its contents.

[10] We have already stated the testimony of Dr. Doyle as to Mrs. Johanson's mental and physical condition on February 1st. No other witness, except her nurse, testified to her condition on that day and as the evidence was all one way we think it must have been accepted as a fact that her mind was clear then and that she would have been able to understand the terms of her will. No witness testified to any failing of her mental faculties between that time and the execution of the will. We have already alluded to the testimony that she was out of bed and walking about and conversing with her nurse each day. The testimony of the attorney was that he had two conversations with her on February 4th. On February 6th she was visited by her sister Emma and the latter's husband. They testified that at first she did not recognize them but then said softly, "Sister here, sister here," and that she could not say anything else. Her sister stayed with her for some time during the morning and returned in the afternoon. She testified that Mrs. Johanson did not recognize her in the afternoon, that her eyes were glary, and that she did not respond to the touch of her hand. A Mr. and Mrs. Roseland testified that they visited Mrs. Johanson on February 6th, found her lying motionless, and that they did not believe she recognized them, although she endeavored to speak. They remained only 10 or 15 minutes. It is to be recalled that Dr. Doyle testified that her mental condition on February 8th was due to stupor, which had come on since February 1st, and that he was unable to express an opinion as to when she had fallen into that condition. There was no evidence that she was in a condition of stupor or that she was not mentally alert on February 4th. If it be contended that between February 1st and February 4th she became incapacitated through the onset of extreme stupor or coma, the proof failed to establish that fact. A finding by a court or jury that that condition existed earlier than February 6th would be wholly unsupported by the evidence. If there had been testimony that she had been in a state of coma on February 4th before the will was executed or on a previous day, there would have been some reason to believe that that condition had persisted. Of course it can be said that the testimony of Dr. Doyle, the attorney and the nurse need not have been accepted in its entirety but contestants cannot make out an affirmative case by throwing out the evidence which was unfavorable to them. There was no substantial evidence that Mrs. Johanson was unable, because of her physical or mental weakness, to understand that she was executing her will or to comprehend the contents thereof.

The theory which prompted the amendment, and which must not be confused with the one just discussed, suggests something different from want of testamentary capacity, namely, that Mrs. Johanson did not know that the document was a will or did not know its terms.

[11-16] The attorney who drew the will had known Mr. and Mrs. Johanson for some 20 years. He was called under sec-

tion 2055 of the Code of Civil Procedure as executor of the will and an adverse party. There was no evidence that the will had not been duly executed by Mrs. Johanson and subscribed by the witnesses. And if the testimony of the attorney should be entirely disregarded there would be no evidence that Mrs. Johanson did not know that the document was her will or that she signed it without reading it or read it without understanding it. It may be granted that she could not have made a valid will without having knowledge of what it contained (see cases 68 C.J. 606, § 226) but it was to be presumed from the fact that she signed it that she had read it and knew its contents (see cases 68 C.J. 984, § 751). In the ordinary course of business people acquaint themselves with the contents of their wills before executing them, and it is to be presumed that Mrs. Johanson did so. Code of Civ.Proc. sec. 1963, subds. 20 and 28. A will shown to have been signed by the testator and subscribing witnesses gives rise to a presumption that it has been duly executed (In re Estate of Braue, 1941, 45 Cal.App.2d 502, 114 P.2d 386) and it would seem that the presumption of due execution should be extended under the same rule to include knowledge of the contents. The burden of proof upon the issue raised by the amendment was upon the contestants. They were required to produce affirmative evidence that the testatrix did not know or understand the contents of the will, and there was no such evidence. It did not appear that she had intentions which were not expressed in the will or that she was suffering from any mistake as to its contents. The fact that the attorney was familiar with Mrs. Johanson's estate, and was in possession of other information which would have enabled him to draw the will without specific directions from her, which appellants emphasize, or a doubt as to the correctness of his testimony in any respect would not be evidence that he did draw it without her directions or that it expressed his desires and not hers. Mere weakness in the proof that a will is valid does not constitute affirmative evidence that it is invalid. A contestant's case must be judged independently, and must be found to have sufficient strength to justify a finding in his favor before the proponent is called upon to produce any proof. In re Estate of Stone, 1943, 59 Cal.App.2d 263, 138 P.2d 710; In re Estate of Latour, 1903, 140 Cal. 414, 420, 73 P. 1070, 74 P. 441; In re Estate of Relph, 1923, 192 Cal. 451, 458, 221 P. 361. This separate ground of contest was wholly unsustained.

[17] The charge of undue influence was that the attorney, Oscar W. Houge, and Helen Josephine Smith conspired to and did subject Mrs. Johanson to their own wills and that the testamentary document was signed solely under the influence, domination and dictates of said Houge and Smith. So far as shown, Miss Smith did not discuss the proposed will with Mrs. Johanson or Houge. There was no evidence whatever that Houge made any request or suggestion as to the terms of the will. He was named as executor but was not a beneficiary and it was not shown that he would have profited in any way from the share of the estate taken by Miss Smith. There was no evidence, direct or circumstantial, to support the allegations of undue influence.

[18] In view of the insufficiency of the evidence to support a verdict for contestants, it would have been error to submit the case to the jury.

[19] Contestants offered to prove in support of the charge of undue influence that Mr. Houge and Miss Smith were beneficiaries under the will of Mrs. Johanson's deceased husband. The evidence was objected to and was refused admission. It was not relevant to the question of the use of undue influence in the making of Mrs. Johanson's will and the ruling was not erroneous.

[20-22] Contestants also offered to prove that testatrix' sister, Emma Nystrom, had filed a contest upon grounds identical with those on trial and that it had been compromised. An objection was sustained and the ruling is assigned as error. In the writing which evidenced the settlement it was stated that neither Miss Smith nor Mrs. Nystrom made any admission as to the soundness or unsoundness of mind of Mrs. Johanson, and the agreement was to be effective only if the validity of the will should be established. It is now contended that the settlement, to which the executor was a nominal party, would have furnished support for an inference that respondents Houge and Miss Smith were guilty of the charges made against them. The objection was properly sustained. An offer of compromise is not an admission that anything is due (Code of Civ.Proc., sec. 2078) and evidence that a compromise has been offered

is not admissible as proof of liability. Compromises are favored in law and a man is allowed to negotiate for the purchase of his peace without prejudice to his rights. Probate contests have a special appeal to the spirit of compromise for the preservation of family ties and the adjustment of equities which the courts are powerless to arrange. The argument that one who surrenders some of his rights under a will in order to avoid litigation must have obtained them wrongfully would be an appeal to prejudice which could not be sanctioned. The agreement of compromise offered in evidence would have tended to prove no material fact in the case but would have confused the minds of the jury in the decision of the issues of mental capacity and undue influence. Had it been admitted without objection it would not have strengthened the case of the contestants.

[23] The court properly sustained an objection to a question which called for Dr. Doyle's opinion as to the mental condition of testatrix on February 4th. The witness had already made it clear, in answering a question of the court, that he had no definite opinion as to her condition on that day because he had not seen her. The facts assumed in the question were wholly insufficient as a basis for an opinion.

The judgment is affirmed.

DESMOND, P. J., concurs.

BISHOP, Justice pro tem. (dissenting).

I dissent. There was a crucial question in this case which, in my judgment, the jury should have been permitted to answer. The question was not in the case when the trial began. Interestingly enough, the allegations concerning it were added "to conform to proof," yet a nonsuit was granted on the ground that they had not been proved. The question was this: Did Mrs. Johanson know the contents of the document which was probated as her will? The contention that she did not, constituted a valid ground of contest. Section 371 of the Probate Code, which follows closely the last half of former section 1312 of the Code of Civil Procedure, which it supplanted, serves to give us the grounds upon which a will may be contested. In re Estate of Latour, 1903, 140 Cal. 414, 419, 73 P. 1070, 74 P. 441. In addition to the more familiar grounds (incompetency, undue influence, and lack of due execution) we find that there may be raised: "Any other question substantially affecting the validity of the will." Such a question is presented by the allegations of the amendment to conform to proof. As this conclusion has not been questioned by the respondents, has been "granted" for the purposes of the majority opinion, and seems to me to be both sound and soundly established, although barely touched upon in California, I content myself with these citations in its support: In re Estate of Eklund, 1932, 186 Minn. 129, 242 N.W. 467, 468; In re Reilly's Will, 1931, 139 Misc. 732, 249 N.Y.S. 152, 158; Hogan v. Whittemore, 1932, 278 Mass. 573, 180 N.E. 526, 527; In re Bose's Estate, 1939, 136 Neb. 156, 285 N.W. 319, 330; and see review of evidence in Re Estate of Relph, 1923, 192 Cal. 451, 461, 221 P. 361.

I agree with the explicit premise of the majority opinion, that the contestants had the burden of proof; they had to show, affirmatively, that the contents of the will were not known to Mrs. Johanson; that it was not enough to impeach the nurse and the attorney, the two subscribing witnesses and the only persons who testified to seeing Mrs. Johanson on the day the will was executed. There is, however, a premise implicit in the majority opinion, with which I do not agree. It is that an affirmative showing must be made by direct evidence; that it may not be done by indirect evidence. If this were the law no contest could be successful where the execution of the will was not witnessed by some one other than the subscribing witnesses. Moreover, it would make meaningless the well-recognized rule that in examining the evidence upon the review of an order granting a nonsuit, every reasonable inference in favor of the contestant which the evidence permits must be accepted, and all contradictory inferences and contrary direct evidence must be rejected. In re Estate of Burre, 1940, 38 Cal.App.2d 518, 520, 101 P.2d 549; and see many quotations in Re Estate of Ivey, 1928, 94 Cal.App. 576, 271 P. 559. At this point it should be further observed that as a jury may credit some statements of a witness whose declarations concerning other matters they disbelieve (People v. Smith, 1940, 15 Cal.2d 640, 648, 104 P.2d 510), so on the review of an order granting a nonsuit the portions of a witness' story which favor the contestants should be accepted, and the unfavorable portions rejected.

Applying these firmly established principles there appears to me to be evidence of sufficient substantiality to have warranted the submission of the case to the jury on the ground of contest that Mrs. Johanson did not know the contents of the probated will. The jury would have been fully justified, had they been given the chance, to have concluded that the stupor in which the doctor found Mrs. Johanson at 9:30 a. m. on February 8, was fairly descriptive of her condition during February 6. In the morning of that day both Mr. and Mrs. Roseland, good friends of Mrs. Johanson, were with her for fifteen minutes. They testified that they were of the opinion that she did not recognize them, and that her larynx moved but she was too weak to talk, nor did she move her hands or arms or turn her head. In the morning of the same day Mrs. Johanson's twin sister and the latter's husband called upon her, and found her in the condition described by the Roselands, except that, after ten minutes, in spite of Mrs. Johanson's inability to speak, her sister heard the words: "Sister, here, sister, here." Calling again in the afternoon, the sister was not recognized.

The picture before the jury was not that of a woman suddenly stricken. The doctor who found her in a stupor on February 8 at first thought that it might be due to the effect of a bromide, but "Her subsequent progress" led him to the conclusion "that she was actually suffering from multiple metastases in the brain." Cancer spreading throughout her system over a period of months was bringing about a steady deterioration in her condition. Knowing how far gone she was on February 8, and on February 6, twelve jurors, bringing their combined experiences to bear upon the problem before them, might with reason have concluded that on February 4, Mrs. Johanson, though not then advanced to the stuporous stage where she neither moved nor spoke nor recognized her friends, nevertheless was so weak and near the stuporous stage that she could not and so did not arouse herself to read or comprehend the two pages of a document she had never seen before, written in English, a language which she could read "a little."

If the testimony of the attorney who drew the will had to be accepted by the jury, then Mrs. Johanson's inability to read it over and learn its terms would not necessarily be fatal to its validity. According to his testimony, he had called in the morning of February 4 at 9:30, although possibly rather than probably earlier, and learned what its terms were to be, so that, when he returned with the typewritten document in the afternoon, she could be said, in the absence of some evidence to the contrary, to have known its contents. But the jury could, with reason, have concluded that the facts were not just as he related them. In the first place, remembering the statement in his deposition that on two previous occasions Mrs. Johanson had told him that she was going to leave everything to Helen Smith, whom he knew well, they may have doubted more than just his uncertainty as to who the Helen was to whom she referred, that morning of February 4, as, in a half hour's conversation about her health and other matters, she told him, according to his story, how she wished her will drawn. They may have believed the nurse's testimony, rather than his, concerning the half hour of events about 9:30 a. m. of February 4, she having testified, from her chart, that "At 9:30 she had some water. She was vomiting and her emesis was a yellow froth."

The nurse, whose only patient was Mrs. Johanson, refreshing her recollection from the chart, made no mention of the visit of the attorney who testified to the drawing of the will unless it is included in her statement: "At 7 [p. m.] she was sleeping and had a visitor." From the chart and the nurse's testimony the jury could with reason infer that there was but one caller upon Mrs. Johanson on February 4, and that he was the attorney who came with a prepared will, early in the evening, and that he had not been there before that day. According to his own testimony he did not read the document to her nor engage in any exposition of its terms. Whatever knowledge of its contents she had she acquired herself. The jurors, given the opportunity, would not have shocked reason had they determined that under all the circumstances Mrs. Johanson never did learn the terms of the document which became her witnessed will. The issue should have been submitted to the jury; it was error to grant the nonsuit as to the ground of contest which was added to conform to proof.

62 Cal.App.2d 107

SOUSA et al. v. SINSHEIMER et al.

Civ. 14038.

District Court of Appeal, Second District, Division 1, California.

Dec. 27, 1943.

Partition ⚷114(2)

In partition action involving several parcels of land, a decree directing sale of one parcel, in which one of the parties had no interest, and division in kind of remaining parcels among several owners, and directing that fees and expenses be a charge upon proceeds of sale and property involved, should further apportion the expenses and charges among the various cotenants in proportion to the respective interests. Code Civ.Proc. §§ 768, 774, 796.

Appeals from Superior Court, San Luis Obispo County; Ray B. Lyon, Judge.

Partition action by George Sousa and others against L. F. Sinsheimer and others. From a decree directing sale of one parcel of realty and the division in kind of others and fixing the amount of the fees and expenses, the defendants L. F. Sinsheimer and Sinsheimer Brothers appeal.

Reversed and remanded.

Nelson & Castro, and C. P. Kaetzel, all of San Luis Obispo, for appellants.

Schauer, Ryon & McMahon, George A. Cavalletto, Robert W. McIntyre, and Alfred D. Haines, all of Santa Barbara, for respondents.

YORK, Presiding Justice.

This is an action in partition with respect to four parcels of real property situate in the County of San Luis Obispo, to-wit:

1. A group of eight lots in the Town of Morro;
2. A 1,204-acre tract, called the "Mountain Ranch";
3. A 193-acre tract, known as "Lot 23";
4. A 755-acre tract, referred to as the "Home Ranch".

Defendant L. F. Sinsheimer had no interest in Parcel 1, but owned an undivided 6/44th part of parcels 2, 3 and 4; and defendant Sinsheimer Bros. owned an undivided 4/44ths interest in parcels 1, 2, 3 and 4.

The trial court appointed three referees to sell parcel 1 and to partition the remaining three parcels in kind among the plaintiffs and defendants. Parcel 1 was sold for an aggregate sum of $2,880. The two defendants, L. F. Sinsheimer and Sinsheimer Bros., a corporation, stipulated that any property partitioned to them be set apart to them jointly as tenants in common in the proportion of 3/5ths to L. F. Sinsheimer and 2/5ths to the corporation.

After making its findings of fact, the trial court concluded that the proceeds of the sale of Parcel 1 "should be paid by said referees to the clerk of this court to be held subject to the further order of this court."

The interlocutory decree in partition sets out the respective interest of each party in the four parcels of land, and then decrees as follows:

"II. That there are no valid liens or encumbrances against said property, except taxes" against parcels 2, 3 and 4, which, including penalties, amounted to the sum of $1888.67.

"III. That the services of Messrs. Schauer, Ryan & McMahon, as counsel for plaintiffs, and of C. P. Kaetzel, Esq., as counsel for defendant Sinsheimer Bros., a corporation, and of Albert Nelson, Esq., as counsel for the defendant, L. F. Sinsheimer, together with the plaintiffs' expense of title of the Security Title Insurance and Guarantee Company, costs of partition, compensation of the Referee * * and costs of the suit of the respective parties are all for the mutual benefit of the owners of said property, and the compensation and costs thereof are by this court adjudged as a lien against said property and the proceeds of sale thereof; that pursuant to stipulation between counsel for plaintiffs and defendants, the court reserves the right to receive proof and make its order in reference to said compensation, costs and expense. * * *

"VII. That said referees are hereby directed to sell said parcel One at public auction to the highest bidder for cash upon notice given in the manner required by law for the sale of real property on execution, and after making said sale said referees are hereby directed to report to the court * * * and that the proceeds of said sale are hereby directed to be paid by said referees to the clerk of this court to be held subject to the further order of this court."

The final judgment of partition makes no order distributing the proceeds of the sale of said parcel 1, but it does (1) confirm the sale thereof for an aggregate sum of $2,880, and (2) partitions parcels 2, 3 and 4 by allotting to the plaintiffs Sousa parcel 2 (the Mountain Ranch), and requires them to pay certain owelties to the other cotenants in order to equalize the partition; allots to defendants Sinsheimer parcel 3 (Lot 23) and 154 acres of parcel 4 (the Home Ranch), and awards to the other plaintiffs the balance of parcel 4, each allotment being made "subject to all liability for delinquent and/or current property taxes thereon and liens therefor", without segregating or stating the specific amount of said taxes accruing against the various allotments. Said judgment also allows referees' fees and expenses totaling $1,096.58, surveyor's fees in the sum of $602.69; fixes the fees of plaintiffs' counsel at $3,230 and the fees of defendants' counsel jointly at $1,000; *adjudges all of said fees and expenses a charge against the "real property described in the complaint and the proceeds thereof,* and *that the same be paid* by the parties hereto receiving partition of said real property, *in the proportion that the partitioned share of each bears to the whole thereof*"; and finally awards costs in specified amounts to the parties to the action. (Emphasis added.)

Both defendants, L. F. Sinsheimer and Sinsheimer Bros., a corporation, appeal separately from said final judgment of partition, and by stipulation made for that purpose, said appeals are presented upon one Clerk's and one Reporter's transcript.

Among the contentions made by appellants, respondents concede that the following three points are well taken and consent to a modification of the judgment with respect thereto, to-wit:

1. That the final judgment should provide for allotment of appellants' respective proportionate interests in the land allocated to them in accordance with their stipulation, i. e., ⅗ths to L. F. Sinsheimer and ⅖ths to Sinsheimer Bros., a corporation.

2. That counsel fees should not have been awarded to the respective attorneys but to the parties to the action for such fees as had been incurred by them, citing section 796 of the Code of Civil Procedure, and Chavez v. Scully, 62 Cal.App. 6, 216 P. 46.

3. That it was error to award attorneys' fees to appellants' counsel jointly, because appellants were represented by different attorneys and their liability for such fees was separate and should have been segregated.

In addition to the above points, the corporate appellant claims that when proceeds from the sale of real property in a partition are paid into court, the trial court must adjudge and determine the respective claims of the parties thereto (Sec. 774, Code of Civ.Proc.); and that since it was entitled to a portion of such proceeds, it "is injured if its portion thereof is confiscated by the judgment to pay expenses of litigation charged to L. F. Sinsheimer, who had no interest in the land sold."

In the same vein, appellant L. F. Sinsheimer urges that the court erred in making all of counsel fees and costs, and referees' fees and expenses a charge upon his property, thereby burdening him with the fees and expenses incurred for the benefit of parcel 1 in which he had no interest, and that these fees and expenses should have been determined separately and apportioned among the various cotenants (Sec. 768, Code of Civ.Proc.), in proportion to their respective interests (Sec. 796, Code of Civ.Proc.).

Both appellants also claim, in effect, that the court erred in failing to ascertain and adjudge the amount of taxes due as against each separate allotment.

Section 774, Code of Civ.Proc., provides: "When the proceeds of the sale of any share or parcel belonging to persons who are parties to the action * * * are paid into courts, the action may be continued as between such parties, for the determination of their respective claims thereto, *which must be ascertained and adjudged by the court.* Further testimony may be taken in court, or by a referee, at the discretion of the court, and the court may, if necessary, require such parties to present the facts or law in controversy, by pleadings, as in an original action." (Emphasis added.)

As heretofore noted, the final judgment subjects the proceeds of the sale of parcel 1 to the lien for fees and expenses incurred in the instant suit, and directs that such expenses be paid by the parties hereto "in the proportion that the partitioned share of each bears to the whole." Therefore, since appellant L. F. Sinsheimer had no interest in parcel 1, it would appear only just and equitable that the proceeds derived from the sale thereof should be apportioned among the persons entitled thereto, in order that each may ascertain to what extent the lien against his partitioned share of the land is released by such apportionment of said proceeds.

"The expenses of the referees, including those of a surveyor and his assistants, when employed, must be ascertained and allowed by the court, and the amount thereof, together with the fees allowed by the court, in its discretion, to the referees, *must be apportioned among the different parties to the action, equitably.*" Sec. 768, Code of Civ.Proc. (Emphasis added.)

"The costs of partition, including reasonable counsel fees, expended by the plaintiff or either of the defendants, for the common benefit, fees of referees, and other disbursements, must be paid by the parties respectively entitled to share in the lands divided, *in proportion to their respective interests therein, and may be included and specified in the judgment.* In that case, they shall be a lien on the several shares, and the judgment may be enforced by execution against such shares, and against other property held by the respective parties. * * *" Sec. 796, Code of Civ. Proc. (Emphasis added.)

In accordance with the terms of said code sections, it became the duty of the court to apportion the expenses and charges incurred in, and incident to, this action, among the various cotenants of the partitioned realty in proportion to their respective interests.

In the case of Capuccio v. Caire, 207 Cal. 200, 208, 277 P. 475, 478, it is stated: "Assuming that the action for partition was properly brought and that the trial court shall have so determined upon the issues as framed in said action and having so determined shall proceed to distribute said property or the proceeds thereof among the several persons so found to be the owners as cotenants of hitherto undivided interests therein, we are of the opinion that the more just and equitable rule to be applied to such cases would require a proper division of the expenditures entailed in the maintenance of such actions for the common benefit among those who shall have been found to be entitled to their respective shares and interests in said property by the ultimate judgment of the court * * *."

The same rule should be applied to the question of delinquent taxes and the amount thereof accruing as against each separate allotment should be ascertained and apportioned.

It may well be that these various items were not called to the attention of the trial court, because it is obvious from the record herein that the several amounts could easily have been ascertained and apportioned at the time the final judgment was rendered.

For the foregoing reasons, the judgment is reversed and the cause remanded for further proceedings in accordance with the views herein expressed.

DORAN and WHITE, JJ., concur.

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61 Cal.App.2d 800

CLARK v. STATE PERSONNEL BOARD et al.

Civ. 6917

District Court of Appeal, Third District, California.

Dec. 17, 1943.

1. Officers ⇨103

Where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the court will act.

2. Mandamus ⇨13

Where petitioner's application for reclassification was denied by the State Personnel Board, and time in which to petition for rehearing had expired, the Superior Court was without jurisdiction to entertain petition for writ of mandate. St.1937, p. 2106, § 173(c).

3. Officers ⇨103

The enforcement of the rule requiring exhaustion of administrative remedies before resort to the courts is not a matter of judicial discretion but is a fundamental rule of procedure.

4. Officers ⇨103

Where an act provides for a rehearing by administrative board and makes no provision for specific redress in the courts, the rule of the adoption of administrative remedies supplies such omission by requiring a rehearing as a condition precedent to an appeal to the courts. St.1937, p. 2106, § 173(c).

◆

Appeal from Superior Court, Sacramento County; Peter J. Shields, Judge.

Proceeding by Mrs. May Clark against the State Personnel Board of the State of California and others for a writ of mandate to compel the board to enter petitioner's name on the roster of the Board as a senior account clerk, and for judgment for the accumulated difference in salary. From a judgment denying petition for mandate, petitioner appeals.

Judgment set aside and trial court directed to dismiss the petition.

Fontaine Johnson and McGilvray & McGilvray, all of Sacramento, for appellant.

Robt. W. Kenny, Atty. Gen., and Wilmer W. Morse, Deputy Atty. Gen., for respondents.

PEEK, Justice.

This is an appeal by petitioner from a judgment denying her petition for a writ of mandate.

The only facts pertinent to a disposition of this appeal are that on October 27, 1939, petitioner filed with the State Personnel Board a petition for correction of her civil service classification which she alleged to be erroneous; that such petition was denied on February 6, 1940; that on March 28, 1940, she filed with the Superior Court of Sacramento County a petition for a writ of mandate to compel the Board to enter her name on the roster of said Board as a Senior Account Clerk as of June 25, 1931, and for judgment for the accumulated difference in salary during such period; that not until November 17, 1941, after the entry of judgment denying her petition for a writ of mandate in the Superior Court and approximately twenty-one months after the Board had denied her petition for correction of her classification, did she request a rehearing of said petition. The Board thereupon adopted a resolution that her position be reclassified as Senior Account Clerk as of May 25, 1931, conditioned upon her filing a waiver of back salary and wages to the date of said resolution.

Sections 1 and 2 of Rule 23 of the Rules and Regulations of the State Personnel Board provide in effect that decisions by the Board shall become final after ten days from the time of service of such decision upon the person or persons affected thereby, and that an application for a rehearing after such decision by the Board may be granted if an application in writing is made thereafter any time within ten days after said service of notice; while Section 173(c) of the Civil Service Act, Stats.1937, pp. 2085, 2106, Deering's General Laws 1937, Act 1404, provides that within thirty days from and after receipt of a copy of the decision by the Board either the employee or the appointing power may apply for a rehearing by filing a written petition therefor.

If under the procedure set forth in said act and the rules of said Board the rule of the exhaustion of administrative remedies before resort may be had to the courts applies, the failure of petitioner to request a rehearing in accordance with the provisions mentioned before filing her petition for a writ of mandate is fatal.

In the case of Alexander et al. v. State Personnel Board et al., 22 Cal.2d 198, 137 P.2d 433, 434, the identical question was at issue. A complaint against petitioners therein was filed with the Board on July 12, 1938; a copy of the Board's findings, conclusion and decision was mailed to their counsel on April 8, 1939, and was received two days later; a petition for a writ of mandate was filed on July 5, 1939. No petition for rehearing was filed with the Board until September 11, 1939, more than thirty days after service of a copy of the decision.

[1] The Supreme Court applied the rule that administrative remedies must be exhausted before redress may be had in the courts and held that the time within which the petitioners could have applied for a rehearing expired before the petition for a writ of mandate was filed with the Superior Court, and "the belated application for a rehearing * * * was ineffective," to give jurisdiction, citing Abelleira v. District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942, 949, 132 A.L.R. 715. In the latter case this court was prohibited from issuing a writ of mandate directed against the California Unemployment Commission. The Supreme Court, after carefully examining the entire question of the exhaustion of administrative remedies, held that this court was without jurisdiction to issue the writ prior to the completion of the ad-

ministrative proceedings, and stated the general rule to be that "where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act."

[2-4] Here, as in the Alexander case, an opportunity for a rehearing was available to the petitioner, and in order to give the Board a chance to correct its mistake, if such it was, resort should first have been had to such agency. However, petitioner did not apply to the Board for a rehearing until many months after service upon her of the order denying her original petition, and the Superior Court was without jurisdiction to entertain her petition for writ of mandate. The enforcement of the rule requiring exhaustion of administrative remedies before resort to the courts is not a matter of judicial discretion but is a fundamental rule of procedure. The Civil Service Act does not expressly require that an application for rehearing be made a condition precedent to redress in the courts, neither does the act expressly designate a remedy in the courts. When, as here, the act provides for a rehearing and makes no provision for specific redress in the courts, the rule of the exhaustion of administrative remedies supplies such omission by requiring a rehearing as a condition precedent to an appeal to the courts. Alexander et al. v. State Personnel Board, supra.

The above case leaves no room for doubt that the exhaustion of the administrative remedy is prerequisite to a resort to the courts, even though, as in the present case, the provisions for rehearing is permissive and not mandatory. Stated in another fashion this means that the courts recognize the obvious necessity of keeping such matters with the agency charged with the administration of the particular act in question and permitting that body to initially decide its myriad problems unhindered; for if it were otherwise, the complex and technical problems which should be solved by such government agencies might so burden the courts as seriously to impair the orderly disposition of their normal work. Abelleira v. District Court of Appeal, supra.

In view of these recent expressions of opinion by the Supreme Court of this state upon the question directly at issue herein the trial court was without jurisdiction to entertain a hearing on the merits of plaintiff's petition for a writ of mandate prior to a rehearing or denial thereof by the State Personnel Board.

The judgment is set aside and the trial court is directed to dismiss the petition for the writ of mandate.

ADAMS, P. J., and THOMPSON, J., concur.

THOMSON et al. v. BAYLESS et al.

Civ. No. 14204.

District Court of Appeal, Second District, Division 1, California.

Dec. 22, 1943.

Rehearing Denied Jan. 10, 1944.

Hearing Granted Feb. 17, 1944.

1. Automobiles 🔑173(4)

Truck driver's action in parking truck 12 inches from right curb of four-lane highway, right lane of which was over 14 feet wide, for purpose of going to sleep in cab of truck at night, with lights on, was not unlawful or negligence which would authorize recovery for injuries to occupants of automobile colliding with rear of truck. Vehicle Code, § 586, St. 1935, p. 191.

2. Automobiles 🔑173(3)

If truck driver's stopping and parking truck on four-lane highway at nighttime with lights on was lawful, fact that he did it for purpose of taking nap in truck was immaterial, and would not render parking unlawful. Vehicle Code, § 586, St.1935, p. 191.

Appeal from Superior Court, Los Angeles County; Samuel R. Blake, Judge.

Action by Culver E. Thomson and another against John R. Bayless and others, for damages resulting from an automobile accident. Judgment for plaintiff, and defendants appeal.

Reversed.

Reginald I. Bauder, of Los Angeles, for appellants.

Arthur C. Miller, of San Francisco, and Lee A. Solomon, of Los Angeles, for respondents.

DORAN, Justice.

Defendants appeal from the judgment following a jury verdict in an action for damages resulting from an automobile accident.

The record reveals that the action arose out of an accident on San Fernando Road about five miles from San Fernando, when the automobile in which plaintiff Culver E. Thomson was riding as a guest collided with the rear of defendants' truck and trailer, which was parked twelve inches from the right hand curb of the highway. The driver of the truck testified in substance that he had dinner in Burbank and that it was his custom to take a nap before continuing over the ridge route to Bakersfield; that he stopped his truck, got out and checked the tires and lights; that all of the lights were lighted and that he then returned to the cab and went to sleep; that at the point where the accident occurred the highway is divided by white lines with a double line in the center; that there is an 8 inch curb along the right side of the highway; that the lane next to the curb is 14 feet 8 inches wide, the next lane 10 feet 4 inches wide; that the lane next to the double line on the opposite side is also 10 feet 4 inches wide and that the outside lane on the opposite side is 19 feet wide with a 10 foot gravel shoulder adjacent; that the truck and trailer were 8 feet wide. The evidence reveals that the accident occurred January 13th about 10 P.M. and that the weather was clear.

It is appellants' contention that, as a matter of law, defendants were not shown to have been guilty of any negligence in the management and operation of the truck and trailer and that the negligence of the driver of the car in which plaintiff was riding was the sole proximate cause of the accident.

Respondents, on the other hand, contend that defendant driver was "so heedless and negligent that he failed to even consider driving his equipment off, to the left shoulder of the highway, but contrary to section 586 of the Vehicle Code [St.1935, p. 191] chose a place, dangerous to travelers lawfully upon the highway." Also, quoting from respondents' brief: "The defendant driver had established personal habits that made it individually desirable that he park his truck at a certain spot on the main traveled highway so that he might sleep. His act was done with knowledge and deliberation and he does not even offer as an excuse that he was overcome by unusual fatigue. He expected to seek repose at a given time and place where certainly a reasonable, ordinary, prudent person would not have deliberately parked, if not for the safety of the general public having an equal right to use the highway, certainly out of consideration for his own safety. That such act was negligence as a matter of law proximately contributing to the occurrence of the accident is well settled by many authorities. * * * The defendant driver was therefore either so heedless and negligent that he failed to even consider driving his equipment off, to the left shoulder of the highway, but contrary to section 586 of the Vehicle Code chose a place, dangerous to travelers lawfully upon the highway."

In support of the above-quoted contention as to the law, respondents cite three California decisions, viz: Inai v. Ede, 42 Cal.App.2d 521, 109 P.2d 400; Scoville v. Keglor, 27 Cal.App.2d 17, at page 31, 80 P.2d 162, and Hunton v. California Portland Cement Co., 50 Cal.App.2d 684, at page 695, 123 P.2d 947. They fall far short of sustaining respondents' contention. A reading of the above-mentioned decisions reveals the facts and circumstances in each to be so different from the facts herein that the language employed in such decisions with regard to the facts there considered, does not apply, nor may it properly be applied to the evidence in the within action.

[1] There is no material conflict in the evidence. In the circumstances revealed by the record the action of the truck driver in parking the truck along the curb at the point where the accident occurred was lawful; such act violated no provision of the California Vehicle Code. Nor does the evidence show any other act or omission amounting to negligence. And no negligence having been proved, the evidence is insufficient to support the judgment.

[2] Respondents, in emphasizing the fact that the truck driver stopped and parked the truck to take a nap, overlook the logical proposition that if parking the truck, in the circumstances, was lawful, then the motive becomes immaterial and

the argument based on such incident is beside the issue.

For the foregoing reasons, the judgment is reversed.

YORK, P. J., and WHITE, J., concur.

62 Cal.App.2d 60

In re HARKLEROAD'S ESTATE.

HUSSEY v. HARKLEROAD.

Civ. 2874.

District Court of Appeal, Fourth District, California.

Dec. 21, 1943.

1. Wills 🔑163(2)

Where one who unduly profits by a will sustains a confidential relationship to the testator and actively participates in procuring execution thereof, burden is upon him to show that the will was not induced by his undue influence.

2. Wills 🔑163(2)

Where testatrix, who was survived by a husband and children, held title to real property to which her mother would have had no right of inheritance in absence of a will, and will leaving such property to mother was executed in hospital two hours before death of testatrix, and mother aided testatrix in signing will, presumption of undue influence applied.

3. Wills 🔑166(1)

Evidence supported finding of undue influence and authorized denial of probate of that portion of will containing gift to mother of testatrix.

Appeal from Superior Court, San Diego County; Arthur L. Mundo, Judge.

Proceedings in the matter of the estate of Lois Hussey Harkleroad, formerly known as Lois H. Hussey, deceased, on petition of Gladys H. Hussey, special administratrix, to admit decedent's will to probate, contested by Carl H. Harkleroad, widower of decedent. From that portion of order admitting will to probate which denied probate to provisions of will in favor of petitioner, petitioner appeals.

Affirmed.

Philip Storer Thacher and Lester J. Penry, both of San Diego, for appellant.

Dempster McKee, of San Diego, for respondent.

BARNARD, Presiding Justice.

This is an appeal from a portion of an order admitting a will to probate.

Mrs. Harkleroad died on December 18, 1940. In a will, executed two hours before her death, she appointed her mother, Gladys H. Hussey, as executrix, gave certain real property to her mother together with all personal property located thereon, gave all the rest of her property to her mother in trust for the benefit of her three minor children, and provided that her husband should receive nothing. The mother filed a petition for the probate of this will. The husband of the deceased filed a contest before probate. At the hearing, by mutual consent, the court proceeded to hear the petition for the probate of the will, allowing the attorney for the contestant to examine the witnesses (see Estate of Relph, 192 Cal. 451, 221 P. 361), and no evidence was offered by the contestant who later filed a dismissal of his contest.

In its order the court found that the portion of the will which purported to give certain real and personal property to the mother was made under the undue influence of Mrs. Hussey; that at the time of the making of the will the deceased was on her deathbed, extremely weak and unable to speak; that Mrs. Hussey was the mother of the deceased, was active in the preparation of the will and unduly profited thereby; and that the remainder of the will was the free and voluntary act and will of the deceased and should be admitted to probate. It was then ordered that probate be denied to that part of the will which purported to give the real property and the personal property located thereon to the mother, and that the remainder of the will should be admitted to probate. This appeal was taken by Mrs. Hussey, who had been appointed special administratrix, from those portions of the order which found to the effect that undue influence had been used by her, and which denied probate to that part of the will which left certain real and personal property to her.

The sole question presented is whether the court's action in this regard is sustained by the evidence, in which there is no conflict and all of which appears in the testimony of witnesses offered by the appellant. The testatrix was in a hospital, her mother was with her and it was known that she could not live. During the night of December 17–18, two nurses had called on her very frequently and she had been able to answer yes or no when they asked her if she wanted various things. About 6:00 o'clock on the morning of December 18, a nurse overheard the testatrix and her mother "talking" about some matters that needed legal attention, and reported this to the head nurse. The head nurse then told the mother that if she needed an attorney she better call him at once. The mother asked if it would not be "soon enough to call him by office hours." The nurse replied that she was afraid this would be too late. A lawyer, who had previously acted for both the mother and the testatrix, was called and arrived at the hospital about 7 o'clock.

The testatrix was then unable to speak a word. She was extremely weak, her breathing was labored, she had been given a heart stimulant, and during all times material here oxygen was being continuously administered to her through her nose. All information concerning what should be put into the will was furnished to the lawyer by the mother. He then asked the mother to leave the room, which she did for four or five minutes. During that interval he asked the testatrix if she wanted this real estate to go to her mother, if she wanted the rest of her property to go to her children equally, if she wanted her mother to look after the property for the children and if she would like to waive bond for her mother as executrix. To each of these questions the testatrix nodded her head. He then asked her if she wished her husband to have anything and if she would rather have her husband look after the property which the children would get. In reply to each of these questions she shook her head. He then went to the office of the hospital and typed the will.

When he returned to the room he read the will to the testatrix and he testified that she seemed to understand. He asked her if each provision was as she desired and she nodded in the affirmative. The mother and the head nurse raised the testatrix while she signed the will and the mother held her arm up "at about the elbow." The nurse testified that while the will was being signed it was necessary for the mother to arouse the testatrix more than once in order to get her to go on with the transaction; that the testatrix "would sort of sink back"; that the mother would then say "Lois, do you hear what I say"; that the testatrix would nod her head yes; and that "then she would go on again to—oh, it just seemed sort of too weakened, hard put to arouse her to the importance of what was going on." The lawyer testified that the actual writing of the signature took a considerable length of time, that the testatrix "made the first part" and that after a slight pause in which both he and the mother asked if she could complete the signature she "made what is the second half of the signature." In this signature the first part, "Lois H. Ha", can be made out although a large number of marks following the letter "L" indicate that the writer did not know what she was doing when she made them. The remainder of the signature is entirely illegible and consists of two sets of meaningless marks. It might well be questioned whether any of the will should be admitted to probate, but we are here concerned only with the portion of the order appealed from. After the will was thus signed the lawyer asked the testatrix if this was her will and if she desired him and the nurse to sign as witnesses thereto. She nodded her head and they signed as witnesses there in the room. The testatrix died two hours later.

There is also evidence that the real property mentioned in that part of the will to which probate was refused was purchased by Mrs. Hussey with her own funds, that she and the testatrix lived on the property for some years while both were working, and that some of the earnings of the daughter may have gone into improvements on the place. We find no evidence as to who paid for the personal property mentioned in that part of the will. In any event, some years before the will was executed the property was placed in the name of Mrs. Hussey and the testatrix as joint tenants. Sometime later, the testatrix was sued in connection with an automobile accident and at her request her mother conveyed the entire property to her to enable her to file a homestead thereon. That litigation terminated in favor of the testatrix. Some months, but not more than a year, before the will was executed the lawyer who drew the will received a communication from Mrs. Hussey "asking me to see that Lois deeded the property back to her as it had been before." He talked the matter over with the daughter and while he could not remember exactly what she said he testified that he was left with the impression that she would attend to the matter at her convenience. This, however, was never done. It also appears that the testatrix had for some considerable time been estranged from her husband.

The appellant contends that there is no evidence to support the court's findings of undue influence on her part in connection with the portion of the will in question. It is further argued that no presumption of undue influence arises from proof of activity in the execution of a will on the part of one who occupies a confidential relationship to the decedent unless it also appears that such a person has unduly profited thereby. It is not contended that there was not a confidential relationship here between mother and daughter nor that the appellant was not active in securing the execution of this will, but it is earnestly insisted that it cannot be said that the appellant unduly profited from the execution of this will because this real property really belonged to her and she got nothing more than that to which she was properly entitled.

[1] The general rule is thus stated in Estate of Witt, 198 Cal. 407, 245 P. 197, 202: "A presumption of undue influence arises from proof of the existence of a confidential relation between the testatrix and the beneficiary, 'coupled with activity on the part of the latter in the preparation of the will.'" In some cases, as in Estate of Johnson, 31 Cal.App.2d 251, 87 P.2d 900, 902, the rule is expressed that "'where one who unduly profits by a will sustains a confidential relationship to the testator and actively participates in procuring the execution of the will, the burden is upon him to show that the will was not induced by his undue influence.'" Both of these expressions of the rule are essentially the same, although the first does not refer to "one who unduly profits by a will." There would be no need for such a presumption and it would serve no purpose where any supposed influence had accomplished nothing.

[2, 3] In the instant case, title to this real property stood in the name of the testatrix who had a husband and children, and the appellant would have had no right of inheritance with respect to her property and would not have shared therein in the absence of a will. Assuming that the appellant originally owned the property, she had conveyed a joint interest therein to her daughter and had thereafter transferred the entire title to her. It is suggestive that when she later desired to have the property put back into joint tenancy she found it necessary to ask a lawyer to induce her daughter to have this done. Even this was not successful and the daughter did not comply with the request thus made of her. The portion of the will to which probate is denied would have given the appellant something which she would not have otherwise received and we think that, under these circumstances, the usual rule with respect to a presumption of undue influence applies. Not only did such a presumption here exist but no evidence was offered to overcome it and all of the evidence tends to support that presumption. See Estate of Johnson, 31 Cal.App.2d 251, 87 P.2d 900.

Aside from any such presumption the evidence here, with the reasonable inferences therefrom, is sufficient to support the findings and that part of the order which are attacked. Direct evidence of undue influence will rarely be found in such cases. Such questions must usually be decided from evidence showing the general circumstances, with the inferences reasonably to be drawn therefrom. Here, no one except the appellant had ever discussed her intentions with respect to her will with the testatrix at any time when she was able to talk. All information was furnished by the appellant and at all times material to the execution of the will the testatrix was unable to speak and was in a state of most extreme weakness. The appellant was not only "hard put to arouse her to the importance of what was going on" but the testatrix was actually unable to write her name. It would be hard to imagine a case disclosing greater activity on the part of the person charged with exercising undue influence and that activity resulted, if this part of the will should be sustained, in giving to the appellant something which she would not otherwise have received, and which she had previously tried, without success, to obtain. Certainly, these circumstances justify an inference that undue influence was used. If we could assume that a contrary inference is also possible the matter would still be one for the trial court and its conclusion thereon cannot be disturbed. The evidence, with the inferences which may reasonably be drawn therefrom, is sufficient to support the findings and order which are here in question. Under any view of the matter the burden resting upon the appellant was not sustained.

The portion of the order appealed from is affirmed.

MARKS and GRIFFIN, JJ., concur.

In re MILLER'S ESTATE.

BUTLER v. MILLER.

Civ. Nos. 14238, 14239.

District Court of Appeal, Second District, Division 2, California.

Dec. 21, 1943.

Rehearing Denied Jan. 4, 1944.

Hearing Granted Feb. 17, 1944.

Dismissed May 8, 1944.

1. Executors and administrators ⚷185

Property settlement agreement between husband and wife by which each renounced all rights, interest or claim of inheritance in the estate of the other, renounced right to administer such estate, and renounced all right, title, interest or estate either might have in the property of the other, did not constitute a waiver by wife of her right to a family allowance or to a probate homestead. Civ.Code, § 1238.

2. Executors and administrators ⚷185

In order to constitute a waiver of a wife's right to a family allowance or to a probate homestead by property settlement agreement, intent to waive must be clear and explicit.

W. J. WOOD, J., dissenting.

Appeals from Superior Court, Los Angeles County; Thomas C. Gould, Judge.

Proceedings in the matter of the estate of Earl F. Miller, deceased. On petition of Laurine R. Miller, decedent's widow, for a family allowance and for a probate homestead, contested by Olive Miller Butler. Petition granted, and contestant appeals.

Affirmed.

H. E. Lindersmith and Frank E. Carleton, both of Los Angeles, for appellant.

Derthick, Cusack & Ganahl and William J. Cusack, all of Los Angeles, for respondent.

McCOMB, Justice.

These are appeals from orders of the Superior Court of Los Angeles County, sitting in probate, granting respondent's petition for a (1) family allowance, and (2) probate homestead.

The essential facts are:

Decedent, Earl F. Miller, who died January 8, 1943, and respondent were husband and wife. February 17, 1939, decedent and his wife entered into a property settlement agreement.

This is the sole question necessary for us to determine.

Did the property settlement agreement between the parties constitute a waiver by respondent of her rights to a (1) family allowance, and (2) probate homestead?

[1, 2] This question must be answered in the negative and is governed by these established rules of law:

(1) Whether a wife has waived her rights to a (1) family allowance, or (2) probate homestead by a property settlement agreement depends upon the provisions of the agreement. (Estate of McCoy, 51 Cal.App.2d 483, 488, 125 P.2d 71).

(2) In order to constitute a waiver of a wife's right to a (1) family allowance, or (2) probate homestead by a property settlement agreement, such agreement must show a clear and explicit intent to waive such right or rights and any uncertainty in the language of the agreement will be resolved in favor of the right alleged to have been waived. (Estate of Whitney, 171 Cal. 750, 756, 154 P. 855; Estate of Bidigare, 215 Cal. 28, 30, 8 P.2d 122.)

So far as material here, the property settlement agreement of February 17, 1939, contained the following provision:

"10. It is hereby specifically understood and agreed that each of the parties hereto does hereby waive, renounce and forever quitclaim each to the other any and all right, interest or claim of inheritance in the estate of the other as well as all right to administer the same, and does further forever release, renounce and quitclaim, each to the other, and all right, title, interest or estate either may, might, could or would have in the property of the other no matter wheresoever situate or howsoever acquired or held."

From a reading of the foregoing clause it is clear that respondent did not in the property settlement agreement by "clear and explicit" language waive her right to either a (1) family allowance, or (2) probate homestead. Therefore, the probate court's orders were correct.

The following cases relied on by appellant are factually distinguishable from the present case.

In re Noah, 73 Cal. 583, 15 P. 287, 2 Am.St.Rep. 829, the court found that the wife was not a member of her husband's family at the time he died. In the instant case, respondent was a member of her husband's family at the time of his death, since there was not any divorce, and the probate court found that the separation was because of the continued cruelty of respondent's husband. (Estate of Parkinson, 193 Cal. 354, 357, 224 P. 453, et seq.)

Wickersham v. Comerford, 96 Cal. 433, 31 P. 358, was decided at a time when the law did not permit the selection of a homestead from the separate property of either spouse. It was clear in that case that the property upon which the wife attempted to fasten a homestead was the separate property of her husband. At the present time a homestead may be selected by the wife from the separate property of her husband. (Sec. 1238, Civil Code.)

In Estate of Winslow, 121 Cal. 92, 53 P. 362, the wife had deeded to her husband the real property upon which she claimed a homestead, and the court properly held that this constituted an abandonment of her rights to such land.

In Estate of Yoell, 164 Cal. 540, 129 P. 999, 1003, the property settlement agreement by explicit language clearly waived the wife's rights to a family allowance or probate homestead. So far as material here it provided, "all claim as such heir, *or as surviving husband and wife* respectively, and all right to contest or oppose the last will of the other is expressly waived. * * *"

In Estate of Cutting, 174 Cal. 104, 161 P. 1137 the antenuptial agreement between the husband and wife provided that should the husband predecease the wife she should receive for her support $250 per month for life, and that such sum should be "in lieu of any and all claims against" the property or estate "whether community or any other property or interest" of the husband. Clearly under the foregoing conditions the wife waived her rights to a family allowance.

In Estate of Sloan, 179 Cal. 393, 177 P. 150, 151, the agreement released the husband's property from "all claims, demands and interests against or in the estate of the other upon the death of either." Such language was definite and certain. It was likewise broad enough to include the claims for a family allowance.

For the foregoing reasons the orders appealed from are and each is affirmed.

MOORE, Presiding Justice (concurring).

[1, 2] I concur. While it is true that the ordinary commercial contract couched in such terms as those employed by respondent and decedent would be interpreted liberally, yet in the construction of an agreement made by spouses during coverture a strict construction is preferred. It must be constantly borne in mind that a property settlement agreement is a part of the authorized processes for disestablishing a status. The maintenance of that status and the continuance of obligations arising therefrom have always been jealously guarded by the law as a means of conserving the happiness, peace and serenity of society. Out of regard for this juridical policy, as well as for public policy established by statutes, the courts have been hesitant to supplement an agreement designed to dispose of the estate and the mutual rights and obligations of a community partnership by reading into it what it does not specifically contain. Because of her paramount right growing out of coverture the widow's claim to a "family allowance is strictly favored in our law." Such right is not surrendered by an agreement with her departed husband unless such intention is evidenced by clear and explicit language. In re Woodburn's Estate, 212 Cal. 683, 300 P. 22. The widow's right to an allowance is paramount to the right of inheritance in all other persons. Her right is not one of inheritance. Neither does it depend upon any previous interest in property owned by her deceased husband. Such an interest is readily relinquished by a property settlement. In re Woodburn's Estate, supra. The rights of heirs, legatees

and devisees are subject to the power of the court to award the surviving widow such allowance as the amount and condition of the estate warrant and the needs of the widow require. In re Bain's Estate, 137 Cal.App. 547, 31 P.2d 211.

At the time of decedent's death he was the husband of respondent. Although they were living apart the finding of fact was that their separation was due not to the faults or the acts of respondent or to her choice but that it was brought about by decedent's bad faith and by his cruel and unlawful conduct toward his wife. A separation so induced does not deprive her of her right to a widow's allowance. Neither is her right conditioned upon her having lived in the family relation with her husband immediately prior to his decease. In re Parkinson's Estate, 193 Cal. 354, 224 P. 453. A widow's right to a family allowance is a marital right which is not waived by a property settlement unless upon a critical examination of the agreement such intention on her part is free from doubt. In re Bidagire's Estate, 215 Cal. 28, 8 P.2d 122. In the cited case, notwithstanding the widow had released her rights to maintenance, she was granted a family allowance.

In the instant case the trial court found as a fact that respondent did not intend to waive her right to a widow's allowance. In view of such finding, supported by the absence from the contract of a specific release of her right, this court must not interfere. Mah See v. North American Ins. Co., 190 Cal. 421, 213 P. 42, 26 A.L.R. 123; Anderson v. Los Angeles Transfer Co., 170 Cal. 66, 148 P. 212. All intendments favor the judgment, and we must accept as true all evidence tending to establish the correctness of the findings and indulge in all "legitimate and reasonable inferences * * * to uphold the verdict if possible." Raggio v. Mallory, 10 Cal.2d 723, 76 P.2d 660, 661; Coco Cola Co. v. Feliciano, 45 Cal.App.2d 680, 114 P.2d 604. No competent proof aside from the written agreement having been submitted to the court, it is not within the province of this court to declare that the construction given by the probate court to an ambiguous or uncertain writing should be supplanted by findings of our own. Slama Tire Protector Co. v. Ritchie, 31 Cal.App. 555, 161 P. 25.

W. J. WOOD, Justice (dissenting).

I dissent. The property settlement agreement must be considered in its entirety and in the light of the surrounding circumstances. Petitioner and decedent had lived together as husband and wife for about six and one-half years and during that time he had adopted the minor daughter of petitioner by a former husband. When the property settlement agreement was executed the parties had been separated for nearly two months. It is recited in the agreement that "unhappy marital differences have arisen between said parties, and each of said parties is mutually desirous of finally adjusting and settling their property rights and interests. * * *" By the property settlement agreement they divided all of their property. Decedent agreed to pay the household debts and accounts incurred up to January 1, 1939, and petitioner agreed to take care of her own bills after that date. It was agreed that one spouse should vacate the family dwelling and that petitioner should bear the full burden for the support of the minor child, who at that time was nineteen years of age. Decedent agreed to pay to petitioner the sum of $10,500 for her "full maintenance and support". It was provided that in case of a divorce action both parties would waive the payment of attorney's fees, court costs, alimony and support during the pendency of such action and after its determination. It was also provided that the agreement should be binding upon the heirs, administrators and executors of the parties. Paragraph X of the agreement goes further than the provisions referring to the community property of the parties and expressly provides that each of the parties waives and renounces "any and all right, interest or claim of inheritance in the estate of the other as well as all right to administer the same" and further releases "all right, title, interest or estate either may, might, could or would have in the property of the other no matter wheresoever situated or howsoever acquired or held".

After the separation petitioner did not again live with decedent. She did not talk to him thereafter and did not attend his funeral. She did not seek or receive any support from him other than that mentioned in the agreement.

I am not unaware of the rule that in order to bar a family allowance the intention to waive the right must be clear and explicit. Estate of Whitney, 171 Cal. 750, 154 P. 855, is often cited in support of this rule, but the Whitney case also lays down the rule, at page 760 of 171 Cal., at page

859 of 154 P. that, "to a great extent each writing must be viewed by itself, and the intent of the parties must be ascertained from a study of the particular terms employed, read in the light of the underlying purpose of the transaction and the circumstances under which it was made." It is significant that in the Whitney case the parties had not separated but were living together in harmony. In that case the general words of waiver, taken by themselves, would have been sufficient to cut the widow off from a family allowance. This was pointed out in Estate of Cutting, 174 Cal. 104, 161 P. 1137, where the court denied a family allowance to a widow who in a prenuptial contract agreed that a set sum per month during her life would be accepted "in lieu of any and all claims against the property or estate of * * * Francis Cutting." The court held that it was the intention of the testator and his wife that the monthly payments should be in "lieu of family allowance as well as of all other possible demands against his property, whether in his lifetime or afterwards". The rule that the question whether a wife has waived the right to a family allowance must be answered from a study of all of the terms in the agreement and in the light of the surrounding circumstances was applied in Estate of McCoy, 51 Cal. App.2d 483, 125 P.2d 71.

My views are in harmony with the decisions in the Cutting case, supra, and in Estate of Sloan, 179 Cal. 393, 177 P. 150, 151, where the husband and the wife entered into a property settlement agreement by which releases were made from "all claims, demands and interests against or in the estate of the other upon the death of either." The agreement set forth that the parties had adjusted and "forever determined all their respective rights to, of and in any inheritances the one from the other, respectively." Upon the death of Mr. Sloan, notwithstanding she had signed this agreement, Mrs. Sloan filed a petition asking that a probate homestead be set apart to her. Her petition was dismissed and the Supreme Court in affirming the action of the lower court held that the petitioner had "in express terms and in language that is most apt for the purpose relinquished all claim and right to his property and estate, thus barring herself from the claims made, just as effectually as such an agreement would bar her right as widow, to administer upon the estate of her deceased husband." In the case now before us the property settlement agreement contains waivers substantially the same as the waivers in the Sloan case, for petitioner waived all of her rights and interests in the property of decedent and waived all "claim of inheritance in the estate."

It is stated in the Whitney case, supra, that "the widow's claim to a family allowance is strongly favored in our law", but in my opinion this rule should be applied to cases where the relationship is genuine, as in the Whitney case, and should not be applied to cases where the parties have finally separated and where, as here, an action for divorce had been commenced.

If we apply the rule that the intention of the parties should govern the decision of the court it seems clear to me that the only reasonable conclusion to be reached is that petitioner waived her right to a family allowance and to a probate homestead. It was not necessary to specifically refer in the agreement to the matter of the family allowance. Estate of McCoy, supra; Estate of Cutting, supra; Wickersham v. Comerford, 96 Cal. 433, 31 P. 358; Estate of Yoell, 164 Cal. 540, 129 P. 999. By the express terms of the instrument petitioner waived all her interest in the estate of decedent, her claim of inheritance, her right to administer his estate and her right to receive support for herself and their minor child. The agreement was expressly made binding upon the heirs and executors. There was no expectation that the parties would ever live together again and they clearly intended to make a final settlement of all of their property rights and rights of support. Manifestly the parties did not consider that it was at all necessary to specifically mention in the agreement that either party waived the right to a family allowance. It seems to me incredible that the parties intended to make any reservation whatever concerning a family allowance or a probate homestead. To permit petitioner now to demand and receive a family allowance and a probate homestead is to disregard the clear and explicit terms of the contract which she entered into with decedent.

62 Cal.App.2d 36

APPEL v. MORFORD et al.

Civ. 14046.

District Court of Appeal, Second District,
Division 3, California.

Dec. 21, 1943.

1. Mortgages ⇨270

Evidence that plaintiff, who was majority stockholder, president, and general manager of construction corporation, purchased note and trust deed from it for approximate unpaid balance due at that time, and his uncontradicted testimony that he had no knowledge or information when he bought note that corporation's license had not been renewed, was sufficient to support finding that plaintiff was "holder in due course" of note and therefore entitled to sue thereon and for foreclosure of trust deed. St.1939, pp. 384, 395, §§ 7031, 7138; Civ.Code, § 3137.

See Words and Phrases, Permanent Edition, for all other definitions of "Holder in Due Course".

2. Mortgages ⇨270

The fact that purchaser of note and deed of trust securing it from construction corporation was president and general manager of corporation did not create conclusive presumption of his knowledge that corporation's license had not been renewed when instruments were given to corporation, and that therefore he could not be a "holder in due course" of note. St.1939, pp. 384, 395, §§ 7031, 7138; Civ.Code, § 3137.

3. Mortgages ⇨481

A finding by trial court that plaintiff, suing on note and to foreclose trust deed, which instruments plaintiff purchased from construction corporation, was holder in due course, implied a finding that plaintiff had no knowledge that construction company had failed to renew its license before he purchased note, which failure would have precluded construction company from suing thereon under statute, and also that in taking instruments, plaintiff acted in good faith. St.1939, pp. 384, 395, §§ 7031, 7138; Civ.Code, § 3137.

4. Bills and notes ⇨337

The phrase "good faith" generally imports that in any given case transaction involved was honestly conceived and consummated without collusion, fraud or knowledge of fraud, and without intent to assist in fraudulent or otherwise unlawful design. Civ.Code, § 3137.

See Words and Phrases, Permanent Edition, for all other definitions of "Good Faith".

5. Bills and notes ⇨337

It is sufficient to constitute "good faith" that holder of note had no knowledge of defect of title when he took instrument, though he may have had notice at some previous time. Civ.Code, § 3137.

6. Mortgages ⇨258

The fact that if purchaser of note from construction company, of which purchaser was majority stockholder, president, and general manager, had inquired of bookkeeper and otherwise investigated, he would have found that corporation's license renewal fee had not been paid, and that therefore corporation could not have sued on note or trust deed securing it, would not, in itself, have supported a finding of "bad faith" so as to charge purchaser with notice of infirmity in instruments. St.1939, pp. 384, 395, §§ 7031, 7138; Civ.Code, § 3137.

See Words and Phrases, Permanent Edition, for all other definitions of "Bad Faith".

7. Mortgages ⇨258

Even if failure of president and general manager of construction corporation to keep corporation's license in good standing by payment of renewal fee should be deemed negligent omission of duty, it would not constitute "bad faith" so as to charge him with notice of infirmity in note and trust deed securing it purchased by him from corporation. St.1939, pp. 384, 395, §§ 7031, 7138; Civ.Code, § 3137.

8. Mortgages ⇨270

If, on proof that construction corporation's license had been suspended for nonpayment of license fee, it devolved on president and general manager to prove that he purchased note and deed of trust from corporation in good faith during period of suspension of license, he met such requirement by his uncontradicted testimony that he had no knowledge of corporation's failure to pay renewal fee until long after he purchased note. St.1939, pp. 384, 395, §§ 7031, 7138; Civ.Code, § 3137.

9. Mortgages ⇨481

Trial court's finding, justified by evidence, that plaintiff was holder in due course of note and deed of trust securing it, was alone sufficient to support judgment foreclosing trust deed.

10. Corporations ⚿312(7)

Right of president and controlling stockholder to purchase note from corporate payee could not be questioned by strangers to transaction.

Appeal from Superior Court, Los Angeles County; Kurtz Kauffman, Judge.

Action to foreclose a trust deed by Dave Appel against Garrett A. Morford and others, in which named defendant and certain other defendants filed a cross-complaint against plaintiff and Pacific Construction Finance Company, Limited, and others. From a judgment foreclosing the trust deed, named defendant and certain other defendants appeal.

Affirmed.

Harry T. Young, Earl G. Read, and Arthur Lasher, all of Los Angeles, for appellants.

Ira Ratner, of Hollywood, for respondent.

SHINN, Justice.

Appeal by defendants from a judgment foreclosing a trust deed given to secure payment of a note executed by defendants in favor of Pacific Construction Finance Company, Ltd. Plaintiff sued as assignee of the corporation. The note and trust deed were given in connection with an agreement of the construction company to build a house and garage for defendants and evidenced the major part of the consideration therefor. The building was completed, defendants made certain payments on the note and, after they had defaulted, plaintiff, who had acquired the note from the company in the meantime, brought suit.

One of the special defenses, and the only one urged on the appeal, was that the note was void for the reason that the construction company at the time of entering into the contract and during the construction was in default in renewing its license as a building contractor, as required by section 7138 of the Business and Professions Code, Stats.1939, p. 395; also p. 2718. Plaintiff's answer to this contention is twofold: that, as the court found, the corporation was not, within a proper construction of the pertinent Code sections, "unlicensed" at any time and that plaintiff was a holder in due course and held the note free from the asserted defense.

Section 7031 of the Business and Professions Code, Stats. 1939, p. 384, provides as follows: "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract." Licenses expire on June 30th of each year. Application for renewal, accompanied by the annual renewal fee, must be filed before that date; otherwise the license "shall be ipso facto suspended and shall be renewable only on the payment of the penalty fixed by this chapter in addition to the current renewal fee. Unless so renewed the license shall remain suspended during the remainder of the fiscal year." Sec. 7138.

The building contract was executed August 3, 1940, and was substantially completed in the following November. The corporation had been duly licensed, but it neglected to pay the annual renewal fee which fell due June 30, 1940, until December 16, 1940, at which time a renewal certificate expiring June 30, 1941, was issued.

The court found that the corporation was a duly licensed contractor at all times during the performance of the contract. We find it unnecessary to decide whether the evidence supported this finding.

[1, 2] We are of the opinion that the finding that plaintiff was a holder in due course is supported by the evidence. The evidence was that about a month before the license was renewed plaintiff purchased the note and trust deed from the corporation for $3,535.66, which was the approximate unpaid balance at that time. Plaintiff was the owner of a little more than one-half of the outstanding stock and was president and general manager of the corporation. He testified, without contradiction, that he had no knowledge or information at the time he bought the note that the corporation's license had not been renewed. Defendants' argument is that as president and general manager of the corporation plaintiff will be conclusively presumed to have had knowledge of the fact that the license had not been renewed and that it necessarily follows that he could not be-

come a holder in due course of the note. Defendants cite no authority and we think none is to be found which supports their position.

[3-9] Section 3137 of the Civil Code reads as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect, or knowledge of such facts that his action in taking the instrument amounted to bad faith." It is to be inferred, from the finding that plaintiff was a holder in due course, that the court found it to be a fact that plaintiff had no knowledge of the failure of the corporation to renew its license and also that in taking the instrument he acted in good faith. During the period of the corporation's delinquency it accepted securities from customers amounting to $168,000, and in the same period plaintiff purchased securities from the corporation to the amount of $35,000, and there was no evidence which tended to prove that plaintiff had an ulterior motive in acquiring such securities or that he paid the corporation less than their full value. It was stated in Heney v. Sutro & Co., 1915, 28 Cal.App. 698, at page 702, 153 P. 972, at page 974: "As understood in law, the phrase 'in good faith' has a settled and well-defined meaning, which generally imports that in any given case the transaction involved was honestly conceived and consummated without collusion, fraud, or knowledge of fraud, and without intent to assist in a fraudulent or otherwise unlawful design." In that case defendant's cashier had had actual notice that certain bonds of plaintiff had been lost or stolen, had made a written memorandum of the fact and placed it on the desk of defendant's bookkeeper. Defendant later purchased and then sold one of the bonds, and in an action for conversion of the bond the court found that defendant had acted in good faith. In upholding this finding the court said (28 Cal.App. at page 702, 153 P. at page 974): "The defendant was under no legal obligation to encumber either its memory or the minutes of its business with a record of notices given to it of the loss of immature negotiable commercial paper (Vermilye & Co. v. Adams Express Co., 21 Wall. 138, 22 L.Ed. 609), and therefore, notwithstanding the notice to its cashier, the defendant may well have purchased the bond in suit in good faith, for 'it is sufficient to constitute good faith that the holder has no knowledge of the defect of title at the time when he took the instrument, although he may have had notice at some previous time.' Storey on Promissory Notes, p. 269, note." In the instant case the fact that plaintiff, if he had inquired of the bookkeeper or had otherwise investigated, would have found that the renewal fee had not been paid would not in itself have supported a finding of bad faith. And even if plaintiff's failure to keep the corporation's license in good standing should be regarded as a negligent omission of duty, it still would fall short of bad faith. In the general corporation law, Civ.Code, sec. 330.21(b), in the law relating to sales, Civ.Code, sec. 1796(2), and in the uniform bill of lading law, Civ.Code, sec. 2132b(2), good faith is defined as an act done honestly, whether it be done negligently or not. The obvious distinction between bad faith and negligence as applied to the law of negotiable instruments has been frequently emphasized. 5 Words and Phrases, Perm. Ed., p. 14. If, upon proof that the corporation's license had been suspended, it devolved upon plaintiff to prove that he made a good-faith purchase of the note during the period of the suspension, he met the requirement of proof on this issue by uncontradicted evidence that he had no knowledge of the failure to pay the renewal fee until long after he had purchased the note. The implied finding of good faith is a finding that plaintiff acted honestly and we do not find in the evidence any basis for a contrary finding. If it should be granted that it was a part of the general duties of plaintiff as president and general manager to see to it that the corporation remained in good standing, it is more reasonable to suppose that his failure was negligent than willful. His state of mind and motives must be judged according to what he knew rather than by what he might have learned if he had made inquiry. The finding that plaintiff was a holder in due course was justified and is sufficient in itself to support the judgment.

[10] Defendants question the right of plaintiff to acquire the note because of his position as president of and owner of a controlling stock interest in the corporation. That transaction was of interest only to the contracting parties and may not be questioned by strangers.

The judgment is affirmed.

DESMOND, P. J., and SHAW, Justice pro tem., concur.

PEOPLE v. KLOPSTOCK et al.

Civ. 12371.

District Court of Appeal, First District, Division 2, California.

Jan. 3. 1944.

Rehearing Denied Feb. 2, 1944.

Hearing Granted March 2, 1944.

Courts ⚿107

A decision of District Court of Appeal, reversing so much of judgment in lessor's unlawful detainer action against assignee of lease as awarded rental to lessor in excess of that provided in lease because lessor failed to serve on assignee notice terminating or declaring forfeiture of lease for failure to obtain lessor's written consent to assignment, as required by lease, did not uphold validity of such assignment and subsequent assignments of lease, and hence did not affect lessor's right to maintain that all such assignments were invalid in subsequent eminent domain proceeding.

◆

Appeal from Superior Court, Marin County; Edward I. Butler, Judge.

Eminent domain proceeding by the People, acting by and through the Department of Public Works, against Mathilde Klopstock, the Northwestern Pacific Railroad Company, the City Bank Farmers Trust Company, Bert Elerding, and others. From so much of the judgment as awarded the entire compensation to defendants railroad company and trust company and declared defendant Elerding not entitled to participate in the award, he appeals.

Affirmed.

Randolph V. Whiting and Henry F. Wrigley, both of San Francisco, for appellant.

Holloway Jones, George C. Hadley, Lincoln V. Johnson and Jack M. Howard, all of San Francisco, for respondents.

SPENCE, Justice.

This is an appeal by defendant Elerding from that portion of a judgment in an eminent domain proceeding by which the entire compensation was awarded to defendants Northwestern Pacific Railroad Company and City Bank Farmers Trust Company and by which it was decreed that defendant Elerding was not entitled to participate in the award.

Defendant Elerding claims as the assignee, through several purported assignments, of a lease executed in 1924 by the defendant Northwestern Pacific Railroad Company, as lessor, and Pacific States Construction Company as lessee. That lease covered a portion of the premises here involved and was for a period of one year at a monthly rental of $10. It provided that in case the lessee should hold over, such holding should be deemed a tenancy from month to month. It also provided that the lease could not be assigned without the written consent of the lessor. The lessee went into possession and remained in possession under the lease until March 20, 1940, at which time Consumers Rock Cement Company went into possession under a purported assignment from the lessee. The lessor did not give its consent to said assignment and it refused to accept tenders by said assignee of the monthly rental provided in the lease. The lessor wrote three letters to said assignee dated March 27, 1940, April 8, 1940 and May 13, 1940, stating that it refused to recognize the validity of said assignment but it served no notice terminating or declaring a forfeiture of the lease. Thereafter the lessor brought an action in unlawful detainer against Consumers Rock & Cement Company. In that action, the trial court denied judgment for restitution of the premises upon finding that no notice had been served terminating or forfeiting the lease but it entered its judgment in favor of the lessor for the claimed rental value of the premises which was in excess of the rental provided in the lease. Upon the appeal in that action, the portion of the judgment awarding rental in excess of that provided in the lease was reversed. Northwestern Pac. R. Co. v. Consumers Rock & Cement Co., 50 Cal.App.2d 721, 123 P.2d 872.

The present proceeding in eminent domain was commenced on February 23, 1940, being about one month prior to the time of the purported assignment of the lease by Pacific States Construction Company to Consumers Rock & Cement Company. Defendant Elerding claims through mesne assignments, purporting to vest in said defendant all of the rights of the lessee under said lease. It does not appear however that the lessor consented to any of said assignments. It is because of the provisions of the lease permitting the lessee, under certain conditions, to remove the improvements erected upon the premises that the rights of the assignee of the lessee were claimed to have had a substantial value. The trial court found that the various assignments under which defendant Elerding claimed "were ineffective to vest any right, title or interest in the defendant Bert Elerding, and that said defendant Bert Elerding has no interest in the parcels sought to be condemned and is not entitled to participate in the award or receive any compensation for his alleged interest therein".

On this appeal, defendant Elerding cites and relies upon the decision in Northwestern Pac. R. Co. v. Consumers Rock & Cement Co., 50 Cal.App.2d 721, 123 P.2d 872, 873. He claims that the effect of that decision was to uphold the validity of the assignment of the lease to the Consumers Rock & Cement Company and further to sustain the validity of all subsequent assignments of the lease. We are of the view, however, that defendant Elerding's claims with respect to the effect of that decision may not be sustained. In that case, all parties conceded that the lessor was entitled to recover some rental from the defendant in that action. The sole issue presented on the appeal was whether lessor's recovery should have been limited to the amount of rental provided by the lease. The reversal of the portion of the judgment appealed from was based upon the fact that the lessor had served no notice terminating or declaring a forfeiture of the lease and upon the conclusion that the lessor was therefore not entitled to recover rental in excess of that provided by the lease. Under the limited issue presented on that appeal, it cannot be said that the decision had the effect of upholding the validity of the assignment to Consumer's Rock & Cement Company or of sustaining the validity of any possible subsequent assignments. The holding in that case went no further than to declare that the lessor did not have "the option of merely giving notice of the invalidity of the assignment without declaring a forfeiture of the lease, and then suing for rental in excess of that provided in said lease". The peculiar situation in that case developed from the giving by the lessor to the purported assignee of notice of the invalidity of the assignment followed by the making by the lessor of an unsuccessful attempt to obtain restitution of the premises from the purported assignee.

In the present case, defendant Elerding's rights, if any, are based upon the claim that all the assignments were valid and that all the rights of the original lessee vested in said defendant. The lease provided, however, that the lessee should not "assign this lease or any interest therein without the written consent of the Railroad Company and satisfactory obligation by proposed * * * assignee to be bound by all the terms and provisions of this lease first had and obtained". There is no evidence of any consent by the lessor to any assignment or of any conduct constituting a waiver of said provision of the lease. On the contrary, it appears that the lessor promptly gave notice of the invalidity of the first purported assignment to Consumer's Rock & Cement Company and that said lessor has at all times taken the position that all purported assignments of the lease were invalid. We are of the view that the lessor had the right to take the position that all assignments made contrary to the terms of the lease were invalid and that the lessor was entitled to assert that right either with or without declaring a forfeiture of the lease. If this be true, then the mere fact that the lessor may have made an unsuccessful attempt to obtain restitution of the premises in the above-mentioned action against Consumers' Rock & Cement Company upon the theory that the lease had been terminated by forfeiture should not effect the lessor's right in this action to maintain its position that all assignments were invalid. We find no evidence which would support a finding or conclusion that any of the assignments were valid and it follows that the trial court correctly determined that defendant Elerding was not entitled to participate in the award.

The judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

61 Cal.App.2d 782

PEOPLE v. WOHNON.

Cr. 3745.

District Court of Appeal, Second District, Division 3, California.

Dec. 16, 1943.

1. Burglary ⚿41(1)

Evidence sustained conviction for burglary.

2. Criminal law ⚿543(2)

Whether due diligence has been exercised to procure attendance at the trial of a witness who testified at preliminary examination, so as to authorize the reading of his testimony at the trial, is a matter addressed to the discretion of the trial court. Pen.Code, § 686.

3. Criminal law ⚿543(2)

In determining whether the state exercised due diligence to procure attendance at the trial of a witness who testified at preliminary hearing, the court may consider the length of time during which efforts were made to find the witness and the importance of the testimony. Pen. Code, § 686.

4. Criminal law ⚿543(2)

Where the efforts of the state to locate a witness who testified at preliminary hearing began more than a month before the trial, but were unsuccessful, and the testimony of such witness related to identification of stolen property found on the person of defendant accused of burglary, permitting the testimony of such witness to be read at the trial was not an abuse of discretion. Pen.Code, § 686.

5. Criminal law ⚿784(7), 829(15), 1173(2)

A requested instruction on circumstantial evidence that the circumstances must be consistent with the hypothesis of guilt was unobjectionable, but its refusal did not result in miscarriage of justice in view of other instructions given and strength of the evidence.

◆

Appeal from Superior Court, Los Angeles County; Newcomb Condee, Judge.

Frank J. Wohnon was convicted of burglary in the second degree, and he appeals.

Affirmed.

Philip S. Schuts and Alexander L. Oster, both of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendant was convicted of burglary in the second degree. He admitted that he had been convicted previously of burglary, a felony, and that he had served a term therefor in the penitentiary. He appeals from the judgment and the order denying his motion for a new trial. The record does not show that he moved for a new trial, but it will be assumed that such motion was made.

[1] Defendant's contention that the evidence was insufficient to sustain the judgment cannot be upheld. The evidence shows as follows: The place of business of Willumsen Tire Company was locked and the skylight was closed about 5:45 p. m. on February 1, 1943. The next morning the skylight was open and a steel rolling door at the back of the building, which could not be raised from the outside by the chain gear, was open about 4 feet. A pencil which had been left in the pocket of an employee's shirt, and a pocket knife which had been left on a work bench, were missing. A pencil and knife found on the defendant when he was searched by police officers were like those which had been taken from the building. An identification badge, issued to defendant as an employee of the Alloy Steel and Metals Company, was found on the morning of February 2, 1943, in the alley about 5 feet from the steel rolling door.

An employee of the tire company, George S. Wissmann, whose testimony given at the preliminary hearing was read at the trial, testified that the pencil shown to him (while he was a witness and which was taken from the defendant) was his pencil and the one he had left in the building in the pocket of his shirt on February 1, 1943; and that he had not given defendant permission to take the pencil.

Another employee of the tire company testified that the knife shown to him (while he was a witness and which was taken from the defendant) was his knife and the one he had left in the building on a work bench on February 1, 1943; and that he (witness) had carried the knife, chalk, and tire caps in his pocket.

A police officer, who was a forensic chemist, testified that the chalk on the knife was the same kind of chalk as that found in the pocket of the witness whose knife was missing after the burglary; that certain chalk, submitted to him for inspection by counsel for defendant on cross-examination (which chalk was taken from the place where defendant had been employed), was not the same kind of chalk as that found on the knife.

Defendant's sister testified that defendant was at her home from 6 p. m. on February 1, 1943, until 6 a. m. on February 2, 1943, and thereafter until they both left to go to a clinic where she had an appointment at 8 a. m.

Defendant testified that he did not enter the premises of the tire company; that he was not discharged but was taking some time off; that he was at his sister's home all night on February 1, 1943, and went to a clinic with her the next morning; that he was arrested when he went to the Alloy Steel and Metals Company to get his check; that the pencil and knife were in his possession on February 3, 1943; that he obtained the pencil at a service station; that the knife was given to him by his brother-in-law, who went into the army; that the badge was his and he lost it on January 26th when he left his coat on a counter at a cafe, while he was fixing a flat tire, and when he returned to get his coat the badge was gone. On cross-examination he said "the timekeeper told me I was discharged so I went for my check"; and that he did not report the loss of the badge to his employer because he did not intend to go back to work. The evidence was sufficient to sustain the judgment.

Defendant's next contention,—that the court erred and abused its discretion in permitting the testimony of a witness given at the preliminary hearing to be read in evidence, cannot be sustained. He argues that due diligence to secure the attendance of the witness was not shown. The trial was on April 12, 1943. A process server employed by the district attorney testified, concerning efforts to serve a subpoena upon the witness, as follows: that, having been given a subpoena to serve upon George S. Wissmann, he went on March 10, 1943, to 718 East 8th Street, Los Angeles, (the place where the burglary occurred, and where Wissmann had been employed) but Wissmann was not there; that, being told that he might be at 2931 Denby Street (the residence address of Wissmann as shown by his testimony at the preliminary hearing), he went to that address but Wissmann was not there; that, being given another address, which was "Modesto, at the hotel," a foreign subpoena was sent to the sheriff of Stanislaus County at Modesto; that he, the process server, had not been able to locate any further information as to the whereabouts of Wissmann. There was no cross-examination of the process server by the defendant. The certificate of the sheriff of Stanislaus County on the foreign subpoena stated "that George S. Wissmann was paid off on April 1st, and did not state where he was going." Defendant objected to the reading of the testimony of Wissmann given at the preliminary hearing upon the ground that there was no foundation therefor. The trial court ruled that the witness was not available and that due diligence had been used to obtain the witness.

The deposition of a witness given at a preliminary examination before a committing magistrate may be read at the trial, if the defendant cross-examined or had the opportunity to cross-examine the witness, "upon its being satisfactorily shown to the court that he [the witness] * * * cannot with due diligence be found within the state * * *." Penal Code, sec. 686.

[2-4] The witness (Wissmann) was cross-examined by defendant's counsel at the preliminary examination. Whether or not due diligence has been exercised, in efforts to obtain the attendance of a witness at a trial, is a matter addressed to the discretion of the trial court upon all the facts and circumstances. People v. Ramos, 1921, 52 Cal.App. 491, 492, 199 P. 544; People v. Howard, 1936, 16 Cal.App.2d 349, 351, 60 P.2d 336. Among the facts and circumstances to be considered in determining the issue of due diligence are: the length of time during which efforts were made to find the witness; and, the importance of the testimony of the witness.

The process server began his efforts to find the witness more than a month before the trial. The testimony of the absent witness related to the identification of the pencil which was taken from the defendant. The ownership of the pencil was one of several circumstances tending to show defendant's guilt. The trial court did not abuse its discretion in permitting the testimony of Wissmann to be read.

[5] The last contention of defendant, that the court erred in failing to instruct the jury fully on the law of circumstantial evidence, cannot be sustained. He asserts that since the evidence was wholly circumstantial the court should have further instructed the jury as follows, even though no request therefor was made by defendant: "Where circumstantial evidence is relied upon, the circumstances must be consistent with the hypothesis that the defendant is guilty and at the same time inconsistent with any other rational conclusion."

The court gave the following instruction:

"There are two classes of evidence recognized and admitted in courts of justice, upon either of which juries may lawfully find an accused guilty of crime. One is direct evidence, which is the direct testimony of any eyewitness to a transaction, and the other is circumstantial evidence, which includes all evidence other that that of an eyewitness. Such evidence may consist of any acts, declarations or circumstances admitted in evidence tending to prove the crime charged, or tending to connect the defendant with the commission of the crime.

"If upon consideration of the whole case you are satisfied to a moral certainty and beyond a reasonable doubt of the guilt of the defendant, you should so find, irrespective of whether such certainty has been produced by direct evidence or by circumstantial evidence. The law makes no distinction between circumstantial evidence and direct evidence in the degree of proof required for conviction, but only requires that the jury shall be satisfied beyond a reasonable doubt by evidence of either the one character or the other, or both."

The court also gave the following instruction: "If the evidence in this case, as to any particular count, is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt. You will notice that, in this instruction, this rule of law is made applicable to cases in which there are two opposing interpretations, each of which appears to you to be reasonable. This rule of law does not apply in a case where there are two opposing constructions sought to be placed upon the evidence, one of which appears to you to be reasonable and the other to you appears to be unreasonable. In the latter case it would be your duty, under the law, to adopt the reasonable construction and reject the one which, in your judgment, appears to be unreasonable." The following statement from People v. Wray, 1942, 56 Cal.App.2d 347, at page 351, 132 P.2d 246, at page 248, is applicable here: "Appellant does not attack the instructions given on circumstantial evidence but contends that an additional instruction requested by appellant should have been given also. The requested instruction was to the effect that the circumstantial evidence must be such as cannot be reconciled with any reasonable hypothesis of defendant's innocence. The circumstantial evidence in the case at bar so strongly pointed to guilt and was so inconsistent with any reasonable theory of innocence that no further instruction on the subject of circumstantial evidence was necessary." The instruction above quoted which appellant asserts should have been given, to the effect that the circumstances must be consistent with the hypothesis of guilt, was unobjectionable, but in view of the other instructions which were given and the strength of the evidence, the failure to give it did not result in a miscarriage of justice.

The judgment and order denying the motion for a new trial are affirmed.

DESMOND, P.J., and SHINN, J., concur.

23 Cal.2d 427

Ex parte SCHNEIDER.

Cr. No. 4502.

Supreme Court of California.

Dec. 21, 1943.

1. Criminal law ⚷1211

A decision of District Court of Appeal that one appealing thereto from judgment sentencing him to state prison on conviction of issuing check without sufficient funds must be treated as first offender because trial court, in pronouncing judgment, ignored prior convictions charged in information and found by jury, became "law of the case," so as to require Board of Prison Terms and Paroles to treat defendant as first offender and fix his sentence on basis of six months', rather than five years', minimum. Pen.Code, §§ 18a, 476a, 3024(c).

2. Habeas corpus ⚷105

Where Board of Prison Terms and Paroles, in sentencing one convicted of issuing check without sufficient funds to 10 years in state prison, considered his prior convictions, charged in information and found by jury, and treated him as one required to serve minimum five-year term, he may not be discharged in habeas corpus proceeding brought about three years and four months after his commitment, though Board should have treated him as first offender and fixed sentence on basis of six months' minimum, as Supreme Court cannot say, as matter of fact, that he has served full time required by law. Pen. Code, §§ 18a, 476a, 3024(c).

In Bank.

Habeas corpus proceeding by Andrew Schneider for discharge from the state prison.

Petitioner remanded to custody without prejudice to redetermination of his sentence by the Board of Prison Terms and Paroles.

Andrew Schneider in pro. per.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

SHENK, Justice.

On September 14, 1938, the petitioner was sentenced to serve the period of time prescribed by law in the State Prison at Folsom for violation of section 476a of the Penal Code. He was committed on February 15, 1940. The Board of Prison Terms and Paroles fixed his term of imprisonment at ten years (last three and one-half years on parole), based on the crime of "issuing check without sufficient funds & (7) Priors". The sentence so fixed with credits would expire on May 23, 1946. The prisoner was released on parole on November 23, 1942. He violated the condition and his parole was revoked in May 1943. In June 1943 he filed the present petition whereby he seeks his discharge on the ground that he has served the full period of time prescribed by law.

The petition raises the question whether the board should have treated the petitioner as a first offender. The record of conviction shows that the information as amended accused the petitioner of the violation of said section 476a and seven prior convictions of a felony. The statement of the historical facts in the arraignment for judgment and sentence recited the accusations, the plea of not guilty, the denial of the seven prior convictions, the fact of trial, the verdicts of the jury as " 'Guilty as charged'—seven prior convictions of a felony, true," the denial of various motions, the inquiry by the court if he had any legal cause to show why judgment should not be pronounced against him and Schneider's reply that he had none. The judgment and sentence followed: "And no sufficient cause being shown or appearing to the court, thereupon the court renders its judgment: That whereas the said Defendant Andrew Schneider having been duly convicted in this Court of the crime of Felony, Violating section 476a of the Penal Code, It is therefore ordered, adjudged and decreed that the said defendant Andrew Schneider be punished by imprisonment in the State Prison of the State of California * * * at Folsom, California." The petitioner prosecuted an appeal from the judgment, on the ground among others that the evidence did not support the verdict of guilty on the charge of violation of said section 476a nor the finding that the charge of seven prior convictions was true. The judgment was affirmed (People v. Schneider, 36 Cal.App.2d 292, 98 P.2d 215, 217), the District Court of Appeal holding that there was no merit in any of the appellant's contentions with the exception of the contention that the evidence was insufficient to support the finding of truth in the charge of seven prior convictions, and as to the latter contention the court said: "Appellant further contends that the evidence is insufficient to prove the prior convictions. Regardless, however, of the question of proof, it is apparent that the matter of the prior convictions cannot operate to appellant's prejudice for the reason that the clerk's and the reporter's transcripts alike show that in pronouncing judgment the trial court ignored entirely the matter of prior convictions and sentenced appellant merely as a first offender, and therefore he must be treated as such. People v. Noland, 30 Cal.App.2d 386, 86 P.2d 363; People v. Dawson, 210 Cal. 366, 292 P. 267; People v. Arnest, 133 Cal.App. 114, 23 P.2d 812."

Since the judgment on appeal in People v. Schneider this court has rendered the decision in the case of In re Basuino, 22 Cal.2d 247, 138 P.2d 297. There the defendant pleaded guilty to a charge of violating the State Narcotic Act and admitted one prior conviction of a felony, but, as in this case, the judgment as actually pronounced omitted reference to the prior conviction, although the appropriate recitation in the minutes of the court disclosed the charge and the plea. The question arose whether the Board of Prison Terms and Paroles might properly consider the accompanying record as supplementing the judgment and construe it as imposing the sentence which the law ordained. It was determined that the board must so view the judgment and that it had properly taken into consideration the plea of guilty to the charge of the prior conviction when it fixed the term to be served by the defendant. The cases of People v. Noland, 30 Cal.App.2d 386, 86 P.2d 363, and People v. Schneider, supra, where distinguished in the Basuino case because it did not appear from the reporter's or clerk's transcripts in those cases what actually occurred on the arraignment for judgment.

[1] The record here presented, however, indicates the controlling effect of the Basuino decision on the present proceeding were it not for the holding of the District Court of Appeal in the Schneider case that the appellant must be treated as a first offender. That holding has become the law in so far as the petitioner is concerned. That decision is the law of the case and determines the petitioner's rights and obligations. In re Passerello, 93 Cal.App. 443, 269 P. 719. In accordance with that decision, he must be treated by the Board of Prison Terms and Paroles as a first offender in determining the period of time to be served for violation of said section 476a. True, the ten-year term fixed by the board is within the fourteen-year maximum prescribed by that section, and it may be said that the board would have acted within its powers in fixing a sentence of ten years for a first offender. But the minimum, as well as the maximum term of imprisonment is a factor to be considered in the exercise of the board's power to determine the period of imprisonment in a particular case. Section 18a of the Penal Code prescribes a minimum of six months for a first offender. Under section 3024(c) a minimum of five years must be served by a prisoner who had previously been convicted of a felony. It is a fact that the board in fixing his term at ten years took into consideration the petitioner's prior convictions and treated him as one who was required to serve the minimum five-year term. It is immaterial that the board could have arrived at the same determination as to the maximum period of time had it treated him as a first offender. It was incumbent upon the board so to treat the petitioner and fix the sentence on a basis of a six-month rather than a five-year minimum.

[2] However, inasmuch as this court cannot say as a matter of fact that the petitioner has served the full time required by law, he may not be discharged in this proceeding. His possible discharge depends upon the redetermination by the board of the term of his sentence, based on the minimum of six months' imprisonment provided by said section 18a.

The petitioner should therefore be remanded to custody without prejudice to a redetermination by the Board of Prison Terms and Paroles of the sentence to be served by the petitioner as a first offender.

It is so ordered.

GIBSON, C. J., and CURTIS, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

23 Cal.2d 280

CROWN FINANCE CORPORATION v. McCOLGAN.

WASHINGTON FINANCE CO. v. SAME.

L. A. 18520, 18521.

Supreme Court of California.

Dec. 15, 1943.

1. Taxation ⚷12

The classification "financial corporations" in Bank and Corporation Franchise Tax Act, was made for purpose of complying with federal statute prohibiting tax discrimination between national banks and financial corporations and term was used in same sense as in federal statute. Gen.Laws 1937, Act 8488, §§ 1–4a; 12 U.S.C.A. § 548; Const. art. 13, § 16.

2. Taxation ⚷126

A corporation is not a "financial corporation" within Bank and Corporation Franchise Tax Act, unless it is in substantial competition with business of national banks. Gen.Laws 1937, Act 8488, §§ 4, 4a; 12 U.S.C.A. § 548, subd. 1(b).

See Words and Phrases, Permanent Edition, for all other definitions of "Financial Corporation".

3. Taxation ⚷12

Financial corporations being placed in special class without definition by federal statute prohibiting tax discrimination between national banks and financial corporations, other portions of such statute, prohibiting greater tax on national bank shares than on moneyed capital competing with national banks' business, should control in determining whether corporation is "financial corporation" within state Bank and Corporation Franchise Tax Act. Gen.Laws 1937, Act 8488, §§ 1, 4, 4a; 12 U.S.C.A. § 548, subd. 1(b); Const. art. 13, § 16.

4. Statutes ⚷199

The word "financial", when used with reference to corporations, indicates dealing in money, as distinguished from other commodities.

See Words and Phrases, Permanent Edition, for all other definitions of "Financial".

5. Taxation ⚷12

The feature distinguishing "mercantile, manufacturing and business corporations" and "financial corporations" within federal statute, prohibiting states from imposing higher tax rates on national banks according to their net income than rates assessed on other financial corporations or mercantile, manufacturing and business corporations, is the dealing in moneyed capital by financial corporations. 12 U.S.C.A. § 548, subd. 1(b), (c).

See Words and Phrases, Permanent Edition, for all other definitions of "Mercantile, Manufacturing and Business Corporations".

6. Taxation ⚷12, 376(1), 386(1)

Evidence showed that plaintiffs were substantially competing with national banks in business of dealing in moneyed capital and purchasing conditional sales contracts from retail dealers at discounts and hence were "financial corporations" subject to franchise taxes at same rates. Gen.Laws 1937, Act 8488, §§ 1, 4, 4a; 12 U.S.C.A. § 548; Const. art. 13, § 16.

7. Taxation ⚷12, 376(1), 386(1)

Competition may exist between national banks and corporations dealing in moneyed capital, so as to render such corporations subject, as "financial corporations", to state franchise taxation at rate levied on national banks, though such competition does not extend to all aspects of national banks' business. Gen.Laws 1937, Act 8488, §§ 1, 4, 4a; 12 U.S.C.A. § 548; Const. art. 13, § 16.

8. Taxation ⚷12, 376(1), 386(1)

The facts that national banks, unlike other corporations transacting businesss of purchasing conditional sales contracts from retail dealers, look only to dealers' credit, insist on recourse to dealers, and require reserves, are not controlling in determining whether such other corporations compete with national banks and hence are "financial corporations" subject to franchise taxes at rate levied on such banks. Gen.Laws 1937, Act 8488, §§ 1, 4, 4a; 12 U.S.C.A. § 548; Const. art. 13, § 16.

◆

In Bank.

Appeals from Superior Court, Los Angeles County; Charles E. Haas, Judge.

Consolidated actions by the Crown Finance Corporation and the Washington Finance Company, respectively, against Charles J. McColgan, as Franchise Tax Commissioner, to recover the amount of additional franchise taxes paid by plaintiff according to rates levied on national banks. Judgments for plaintiffs, and defendant appeals.

Reversed.

Prior opinion, 135 P.2d 694.

Earl Warren, Atty. Gen., H. H. Linney, Asst. Atty. Gen., and Valentine Brookes, Deputy Atty. Gen., for appellant.

Benjamin, Lieberman & Elmore, of Los Angeles, for respondents.

CARTER, Justice.

Plaintiffs were successful in the trial court in these actions to recover franchise taxes paid under protest. The actions were consolidated for trial.

The trial court found that each plaintiff, a corporation, was engaged solely in the business of purchasing conditional sales contracts and accounts from neighborhood retail dealers in personal property consisting chiefly of household furniture and furnishings, and with respect to plaintiff, Crown Finance Corporation, also clothing. The latter corporation will be referred to herein as Crown. The taxes were levied on Crown for the years 1937, 1938, 1939 and 1940, and on Washington Finance Company, referred to herein as Washington, for the years 1939 and 1940, pursuant to the Bank and Corporation Franchise Tax Act (Stats. 1929, p. 19, as amended, Deering's Gen. Laws, 1937, Act 8488). They were classified under that act as financial corporations and the tax rate was fixed at 8 per cent. Stats.1929, p. 19, sec. 4a, as amended.

The trial court found that neither of the plaintiffs is a bank, national or otherwise, a financial corporation, or engaged in business in substantial competition with national banking associations. Defendant challenges that finding as being unsupported by the evidence with respect to competition. It contends that even if plaintiffs are not engaged in competition with national banks they are financial corporations; and that under the Bank and Corporation Franchise Tax Act it need only appear that plaintiffs are financial corporations, that is, moneyed corporations or dealers in money, without regard to whether their business competes with national banks.

[1] The classification "financial corporations" in the Bank and Corporation Franchise Tax Act was made for the purpose of complying with the federal statute (42 Stat. 1499, as amended, 12 U.S.C.A. § 548) prohibiting discrimination in taxation between national banks and financial corporations, and the term was used in the same sense as in the federal statute. Section 1 of the Bank and Corporation Franchise Tax Act imposes a franchise tax on national banking associations according to or measured by their net income at the rate fixed by section 4a. Section 2 fixes a tax on other banks on the same basis and rate. Section 4 provides for a tax on "financial corporations" taxable under the provisions of article XIII, section 16, of the California Constitution, according to or measured by their net income at the rate specified in section 4a. (That section also imposes a tax of 4 per cent on corporations, with certain exceptions, other than financial corporations.) The rate set by section 4a is limited to 8 per cent; it is calculated with relation to the rates for other corporations and the taxes paid on personal property by such corporations. The taxes levied on banks are in lieu of all other taxes except real property taxes. Sec. 3. Financial corporations are permitted to offset against the franchise tax, other taxes paid, with certain exceptions as provided in the act. Sec. 4. Article XIII, section 16, of the Constitution provides for the taxation of banks according to or measured by their net income; that the Legislature may provide for any other form of taxation now or hereafter permitted by Congress respecting national banks, provided the form chosen shall apply to all banks; and that the Legislature may provide for the taxation of corporations "by any method *not prohibited by this Constitution or the Constitution or laws of the United States.*" (Emphasis added.) It is indicated by the foregoing that the object is to avoid conflict with the United States Constitution and laws, hence the Bank and Corporation Franchise Tax Act has the same object. The purpose of the act was stated by this court in H. A. S. Loan Service, Inc., v. McColgan, 21 Cal.2d 518, 520, 133 P.2d 391, 392, 145 A.L.R. 349: "Financial corporations are classed with banks both national and state in order that the tax burden they must bear shall not be less than that of banks, and thus in harmony with the federal statute. * * * The manifest purpose of the Legislature in establishing the classification 'financial corporations' was to avoid the tax discrimination denounced by the federal statute." See, also, Morris Plan Co. v. Johnson, 37 Cal.App.2d 621, 100 P.2d 493.

The federal statute involved reads: "The legislature of each State may determine and direct, subject to the provisions of this section, the manner and place of taxing all the shares of national banking associations located within its limits. The several States may (1) tax said shares, or (2) include dividends derived therefrom in the taxable income of an owner or holder thereof, or (3) tax such associations on their net income, or (4) according to or measured by their net income, provided the following conditions are complied with: 1. (a) The imposition by any State of any one of the above four forms of taxation shall be in lieu of the others, except as hereinafter provided in subdivision (c) of this clause. (b) In the case of a tax on said shares the tax imposed shall not be at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of such State coming into competition with the business of national banks: * * * (c) In case of a tax on or according to or measured by the net income of an association, the taxing State may, except in case of a tax on net income, include the entire net income received from all sources, but the rate shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing, and business corporations doing business within its limits: * * *." 12 U.S.C.A. § 548. The state act adopts the fourth method mentioned in the federal act. Stats.1929, p. 19, sec. 1 as amended. Inasmuch as financial corporations are taxed the same as banks, and the method for the latter is the one specified in the federal statute, the implication follows that financial corporations were so designated to avoid the charge of discriminating against national banks, and that the basic test of financial corporations should be the same under both laws. That view is further fortified by the history of bank and corporation franchise tax legislation (see Union Oil Associates v. Johnson, 2 Cal.2d 727, 43 P.2d 291, 98 A.L.R. 1499), and the investigation and reports of the tax commission and tax research bureau. See Final Report California Tax Commission (1929); Summary Report of California Tax Research Bureau (1932).

[2-5] Neither the federal statute nor the state act defines the term "financial corporations." However, in the federal act, in the case of a tax on national bank shares as distinguished from a tax measured by or according to the income, it is provided that the tax may not be greater than upon moneyed capital coming into competition with the business of national banks. 12 U.S.C.A. § 548, clause 1(b). That clause is interpreted to mean that: "The purpose of the restriction is to render it impossible for any state, in taxing the shares, to create and foster an unequal and unfriendly competition with national banks, by favoring shareholders in state banks or individuals interested in private banking or engaged in operations and investments normally common to the business of banking." First Nat. Bank v. Anderson, 269 U.S. 341, 347, 46 S.Ct. 135, 138, 70 L.Ed. 295. Inasmuch as the broad purpose of the restriction in the federal statute on state taxation of national banks is to prevent discrimination between national banks and financial corporations (see Tradesmen's Nat. Bank v. Oklahoma Tax Comm., 309 U.S. 560, 60 S.Ct. 688, 84 L.Ed. 947), and there would not likely be any discrimination where the financial corporations were not competing with national banks, we believe that a corporation may not be classed as financial under the state act unless it is in substantial competition with the business of national banks. Moreover, financial corporations being placed in a special class without definition, the other portions of the federal statute (12 U.S.C.A. § 548, clause 1(b), which refer to activities similar to those customarily associated with corporations engaged in financial business, should control. The reference in section 548, clause 1(b), is to "moneyed capital." The word "financial" when used with reference to corporations indicates dealing in money as distinguished from other commodities. Morris Plan Co. v. Johnson, supra, 37 Cal.App.2d at page 624, 100 P.2d 493. The distinguishing feature between "mercantile, manufacturing, and business" corporations mentioned in section 548 and financial corporations would therefore appear to be the dealing in moneyed capital. It is reasonable to assume that discrimination would not be present unless the financial corporation was competing with national banks. This is indicated in the above quotation from First National Bank v. Anderson, 269 U.S. 341, 347, 46 S.Ct. 135, 70 L.Ed. 295.

[6-8] The question then becomes one of whether the evidence was sufficient to

support the finding that plaintiffs were not financial corporations and were not engaged in competition with national banks. Viewing the evidence most favorable to plaintiffs, the record shows the following: Plaintiffs were engaged exclusively in purchasing at a discount conditional sales contracts of household furnishings and other low price articles of personal property from small local retail sellers of those articles under such contracts. They never made loans. From 1937 to 1941 the percentage of such contracts purchased by Crown without recourse to the seller thereof increased from 60 per cent to 100 per cent, while Washington took most of its contracts with recourse. The period of deferment of payment in the contracts ran from six months to two years. A carrying charge was added to the contract by the retail merchant before the sale of the contract. Plaintiffs required credit references and information from the buyers named in the contracts, which must meet their approval before they would purchase the contracts. Usually the dealer would require that approval before it would sell the merchandise on credit. The Crown's business volume was $900,000 to $1,100,000 a year since 1938; that of Washington was $300,000 to $325,000. No part of the payment to the dealer for the contracts was withheld as a reserve to protect plaintiffs if the credit buyer defaulted.

From the testimony of an officer of a national banking association doing business in the same area as plaintiffs, it appears that it makes personal loans in substantial amounts for the purchase of household equipment, but solely on the borrower's credit, not taking the furniture as security; that it commenced purchasing, at a discount, conditional sales contracts from dealers in household equipment in 1937, and has a substantial business in that field, but in purchasing such contracts it relies solely upon the credit of the dealer rather than the buyer named in the contract, taking all contracts with recourse, withholds payment to the dealer of 20 to 40 per cent of the price as a reserve against default under the contract, does not repossess the property sold for a default under the contract, and requires the dealer to take up the contracts in default; that its business is in the nature of a loan or advance to the dealer and is not similar to the business carried on by finance companies who purchase conditional sales contracts without recourse or without withholding the reserve.

The only reasonable conclusion from that evidence is that plaintiffs were in substantial competition with national banks. Both national banks and plaintiffs are engaging in the same general investment business, that is, a business where the dealing is in moneyed capital as distinguished from other commodities, and purchasing at a discount conditional sales contracts from retail dealers in household furnishings and equipment. While in all phases of the business of each there is not a parallel, that is, plaintiffs do not loan money whereas national banks do, competition may exist although it does not extend to all aspects of the business of national banks. See Boise City Nat. Bank v. Ada County, D.C., 48 F.2d 222; National Bank of Commerce v. King County, 153 Wash. 351, 280 P. 16; Public Nat. Bank of New York v. Keating, 2 Cir., 47 F.2d 561, 81 A.L.R. 497, affirmed 284 U.S. 587, 52 S. Ct. 137, 76 L.Ed. 507; State of Minnesota v. First National Bank, 273 U.S. 561, 47 S. Ct. 468, 71 L.Ed. 774; First National Bank v. Hartford, 273 U.S. 548, 47 S.Ct. 462, 71 L.Ed. 767, 59 A.L.R. 1; First Nat. Bank v. Anderson, supra, 269 U.S. at page 348, 46 S.Ct. 135, 70 L.Ed. 295. It is true that it was testified that the business of the national banks and plaintiffs was not similar, for the reason, however, that, contrary to plaintiffs' course of business, the national banks looked only to the dealer's credit, insisted upon recourse to the dealer, and required a reserve. The last-mentioned differences in the mode of transacting the business of investing in instruments calling for the payment of money by purchasing of conditional sales contracts, are not controlling. It cannot be doubted that for that class of business both plaintiffs and the national banks are interested in at least that group of dealers who are financially responsible and whose credit standing is sufficient to make acceptable and valuable their guarantee of payment on the contract, and who can afford to have the reserve withheld. The fact that plaintiffs deal chiefly with small local dealers does not preclude the assumption that some of those dealers may be in a position to deal with a national bank, or that national banks will accept such business when offered. It is not logical to say that where two concerns are engaged in trading in a similar commodity (money and conditional sales contracts in the instant case) they are not in competition because one offers more favorable terms or prices than the other.

First National Bank of Shreveport v. Louisiana Tax Commission, 289 U.S. 60, 53 S.Ct. 511, 77 L.Ed. 1030, 87 A.L.R. 840, is not contrary to these views. The first part of the opinion was concerned with discrimination under the Fourteenth Amendment to the Constitution of the United States and merely held in that connection that there was a basis for a distinction between banks and other corporations loaning money, in that banks used deposited money and the others did not. In regard to small loan and finance companies, the court stated, in concluding that there was no competition with national banks, 289 U. S. at page 66, 53 S.Ct. at page 513: "'And that [there is no competition with national banks] is true of the so-called finance and securities companies, whose business is to lend money on long series of notes given for the price of automobiles, refrigerators, radios, etc., and secured by chattel mortgages. The national banks would never handle such business. They prefer to—and do in fact—lend to such companies.' These findings are supported by the record." The record in the instant case discloses that national banks do a substantial business in purchasing conditional sales contracts of the same character as those bought by plaintiffs. See Morris Plan Co. v. Johnson, supra. Other cases cited by plaintiffs involve situations in which national banks were not, as in the case at bar, engaged in the same class of small loan business based upon conditional sales contracts. The cases in this state hold that finance companies are financial corporations within the purview of the Bank and Corporation Franchise Tax Act when they engage in business in competition with national banks. H. A. S. Loan Service, Inc., v. McColgan, supra; Morris Plan Co. v. Johnson, supra. The only difference between the instant case and those last cited is in the terms upon which the same class of transactions are handled by the respective competitors for the business. That, as we have seen, is not controlling.

The judgments are reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and SCHAUER, JJ., concurred.

TRAYNOR, J., did not participate.

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23 Cal.2d 444

CATE v. CERTAINTEED PRODUCTS CORPORATION.

L. A. 18769.

Supreme Court of California.

Dec. 22, 1943.

1. Bankruptcy ⚷303(1)

Each of elements necessary to establish a voidable preference must be established by bankruptcy trustee to avoid a transfer, and especially the element that creditor at time of transfer had reasonable cause to believe that debtor was insolvent. Bankr.Act § 60, subs. a, b, 11 U.S.C.A. § 96, subs. a, b.

2. Bankruptcy ⚷304, 306

In determining whether a transfer constitutes a voidable preference under Bankruptcy Act, the question whether at time of transfer creditor had reasonable cause to believe that debtor is insolvent is one of fact for trier of facts, and finding supported by substantial evidence is conclusive on appeal. Bankr.Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

3. Bankruptcy ⚷166(4⅝)

The phrases "having reasonable cause to believe such a person is insolvent" and "having reasonable cause to suspect such a person is insolvent" are not synonymous, since a creditor must not only suspect insolvency of his debtor, but he must have such a knowledge of facts as to induce a reasonable belief of debtor's insolvency in order to invalidate a security taken for his debt. Bankr.Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

See Words and Phrases, Permanent Edition, for all other definitions of "Having Reasonable Cause to Believe Such a Person Is Insolvent" and "Having Reasonable Cause to Suspect Such a Person Is Insolvent".

4. Bankruptcy ⚷303(4)

In action by trustee in bankruptcy to recover alleged preferences, substantial evidence supported finding that defendant had no reasonable cause to believe that bankrupt was insolvent at time of transfers to defendant. Bankr.Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

5. Bankruptcy ⚷306

A finding contrary to asserted preference on ground that creditor had no reasonable cause to believe that bankrupt was insolvent at time of transfer will not be disturbed on mere showing that bankrupt was short in cash and had no free capital. Bankr.Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

6. Bankruptcy ⚷166(4¾)

That a debtor sells out his business does not necessarily put creditor on inquiry to do more than demand payment of his account, in determining whether a transfer to creditor constitutes a voidable preference. Bankr.Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

7. Bankruptcy ⚷166(4¼, 4⅝)

Mere suspicion of insolvency, or fact that creditor knows his debtor is financially embarrassed and that creditor is pressing him for payment, are not sufficient to show that creditor has reasonable cause to believe that debtor is insolvent so as to constitute transfer a voidable preference. Bankr.Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

8. Bankruptcy ⚷166(4¼)

The postdating of a first check given creditor and refusal of drawee to pay the check on two occasions did not establish "reasonable cause to believe the debtor is insolvent" so as to constitute subsequent payment a voidable preference where lack of funds might have been indication that debtor's collections on accounts receivable were slow, and upon creditor's insistence that check be covered debtor explained concerning collections and indicated that it would be made good. Bankr.Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

See Words and Phrases, Permanent Edition, for all other definitions of "Reasonable Cause to Believe the Debtor Is Insolvent".

9. Bankruptcy ⚷159

In determining whether a transfer constitutes a voidable preference, each case must be decided on its particular facts. Bankr.Act § 60, subs. a, b, 11 U.S.C.A. § 96, subs. a, b.

10. Bankruptcy ⚷304

The court's failure to find upon issue of debtor's insolvency at time of alleged preferential transfers was immaterial, where court found that creditor did not have reasonable cause to believe that debtor was insolvent at time of transfers, and under Bankruptcy Act all elements must be established to avoid a transfer. Bankr.Act § 60, subs. a, b, 11 U.S.C.A. § 96, subs. a, b.

11. Appeal and error ⚷1071(6)

If judgment is supported by facts found, an omission to find upon an issue when a finding would not necessitate any change in judgment is not prejudicial error.

12. Bankruptcy ⚷306

In bankruptcy trustee's action to recover alleged preferences, alleged error in excluding schedules, claims, inventory, and appraisement filed in bankruptcy proceeding, and testimony of the trustee of value and collectibility of debtor's accounts receivable, was not prejudicial where there was other evidence given on issue of debtor's insolvency, and, even if debtor was insolvent, it was necessary to prove that defendant had reasonable cause to believe that such insolvency existed upon which subject court found against trustee. Bankr. Act § 60, sub. b, 11 U.S.C.A. § 96, sub. b.

◆

In Bank.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by Clyde E. Cate, as trustee in bankruptcy for the Central Valley Wholesale Lumber Company, against the Certainteed Products Corporation to recover alleged preferences given by the bankrupt to the defendant. From a judgment for defendant, plaintiff appeals.

Affirmed.

Prior opinion 136 P.2d 799.

Henry O. Wackerbarth, of Los Angeles, and Ralph Robinson, of Fresno, for appellant.

David E. Peckinpah and L. N. Barber, both of Fresno, for respondent.

CARTER, Justice.

In this action by a trustee in bankruptcy to set aside certain transfers by the debtor which, it is alleged, accomplished voidable preferences, judgment was rendered for defendant creditor.

A petition was filed on June 24, 1939, by three creditors to have Central Valley Wholesale Lumber Company, referred to as the debtor, declared an involuntary bankrupt. The transfers alleged to have created the preferences were made to defendant, a creditor of the bankrupt, within four months prior thereto.

The debtor was engaged in the wholesale building material business at Fresno, and defendant in manufacturing and selling such materials at Richmond, California. Defendant sold materials to the debtor from June to November, 1938, on open account with thirty to sixty days' credit. On March 1, 1939, the debtor was in default on the account in the sum of $1,956.36. The first alleged preference occurred when defendant's agent went to Fresno on March 2, 1939, to collect the account. At that time he obtained from the debtor an order for $1,400 upon the Commercial Credit Company with whom the debtor had an arrangement under which that company purchased the debtor's accounts receivable, paying 75 per cent of the face value and retaining a contingent reserve of 25 per cent. The order was accepted by the Commercial Credit Company on March 3, 1939. The second alleged preference arose out of a check for $506.36 given to defendant's agent by the debtor on March 2, 1939, postdated to March 6, 1939. The debtor sold its merchandise by bulk sale, pursuant to a notice thereof recorded on March 15, 1939. The check was refused payment by the drawee bank for insufficient funds and a second check was likewise refused payment. On March 21, 1939, the debtor sent defendant a certified check for $556.35, in full settlement of the account.

[1, 2] The bankruptcy law with reference to preferences reads: "(a) A preference is a transfer, as defined in this title, of any of the property of a debtor to * * * a creditor for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing * * * against him of the petition in bankruptcy, * * * * the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. * * (b) Any such preference may be avoided by the trustee if the creditor receiving it * * * has, at the time when the transfer is made, *reasonable cause to believe that the debtor is insolvent*." (Emphasis added.) (11 U.S.C.A. § 96, subs. a, b). The elements necessary to establish a voidable preference under the foregoing section have been stated to be four and sometimes five in number, depending upon the grouping. Remington on Bankruptcy, 5th Ed., vol. 4-A, secs. 1657-1658, pp. 91-94. Each and every one of those elements, and the parts thereof, must be established by the trustee in order to avoid a transfer. 11 U.S.C.A. § 96, Haas v. Sachs, 8 Cir., 68 F.2d 623; Collier on Bankruptcy, sec. 60, pp. 1248-1249. Particularly, it is necessary that the plaintiff trustee in bankruptcy establish that the creditor, at the time of the transfer, has reasonable cause to believe that the debtor is insolvent. 11 U.S.C.A. § 96, sub. b; Patrick v. Rice, 3 Cir., 98 F.2d 550; Cusick v. Second Nat. Bank, 73 App. D.C. 16, 115 F.2d 150. That issue is essentially one of fact for the trier of fact, including the facts proved and all reasonable inferences which may be drawn from them. If there is any substantial evidence supporting the finding of the trier of fact, it is conclusive on appeal. Kaufman v. Tredway, 195 U.S. 271, 25 S.Ct. 33, 49 L. Ed. 190; Pyle v. Texas Transport, etc., Co., 238 U.S. 90, 35 S.Ct. 667, 59 L.Ed. 1215; Boston Nat. Bank v. Early, 1 Cir., 17 F.2d 691; Westcott v. Nixon, 132 Cal.App. 490, 23 P.2d 75; 8 C.J.S., Bankruptcy, § 215; Remington on Bankruptcy [5th Ed.], vol. 4-A, sec. 1707.

In the instant case the court found that defendant had no reasonable cause to believe that the bankrupt was insolvent at the time of either of the transfers. Hence if there is any substantial evidence to support that finding, it will not be disturbed.

[3] The cases decided under the Bankruptcy Act of 1867 are pertinent generally (Remington on Bankruptcy, 5th Ed., vol. 4-A, sec. 1705) and under the act of 1910, inasmuch as it was held that to show reasonable cause to believe that the enforcement of a transfer would effect a preference, it first must be shown that the creditor has reasonable cause to believe the debtor insolvent. Remington on Bankruptcy, 5th Ed., vol. 4-A, sec. 1706. The general rule in regard to what constitutes reasonable cause is stated in Grant v. First National Bank, 97 U.S. 80, 81, 24 L.Ed. 971: "Some confusion exists in the cases as to the meaning of the phrase, 'having reasonable cause to believe such a person is insolvent.' Dicta are not wanting which assume that it has the same meaning as if it had read, 'having reasonable cause to suspect such a person is insolvent.' But the two phrases are distinct in meaning and effect. It is not enough that a creditor has some cause to suspect the insolvency of his debtor; but he must have such a knowledge of facts as to induce a reasonable belief of his debtor's insolvency, in order to invalidate a security taken for his debt. To make mere suspicion a ground of nullity in

such a case would render the business transactions of the community altogether too insecure. It was never the intention of the framers of the act to establish any such rule. A man may have many grounds of suspicion that his debtor is in failing circumstances, and yet have no cause for a well-grounded belief of the fact. He may be unwilling to trust him further; he may feel anxious about his claim, and have a strong desire to secure it,—and yet such belief as the act requires may be wanting. Obtaining additional security, or receiving payment of a debt, under such circumstances is not prohibited by the law. Receiving payment is put in the same category, in the section referred to, as receiving security. Hundreds of men constantly continue to make payments up to the very eve of their failure, which it would be very unjust and disastrous to set aside. And yet this could be done in a large proportion of cases if mere grounds of suspicion of their solvency were sufficient for the purpose. The debtor is often buoyed up by the hope of being able to get through with his difficulties long after his case is in fact desperate; and his creditors, if they know anything of his embarrassments, either participate in the same feeling, or at least are willing to think that there is a possibility of his succeeding. To overhaul and set aside all his transactions with his creditors, made under such circumstances, because there may exist some grounds of suspicion of his inability to carry himself through, would make the bankrupt law an engine of oppression and injustice. It would, in fact, have the effect of producing bankruptcy in many cases where it might otherwise be avoided. Hence the act, very wisely, as we think, instead of making a payment or a security void for a mere suspicion of the debtor's insolvency, requires, for that purpose, that his creditor should have some reasonable cause to believe him insolvent. He must have a knowledge of some fact or facts calculated to produce such a belief in the mind of an ordinarily intelligent man."

Plaintiff points to the following circumstances as contrary to the finding of the trial court: That defendant knew that the debtor's account was over four months delinquent and did not ship any materials to it for that reason; that reports from Dun & Bradstreet, a credit rating agency, showed the bankrupt was slow in paying its obligations, one account being over six months in default, and that its accounts with the debtor should be watched closely; that on March 15, 1939, that organization advised defendant that the debtor was going to have a bulk sale of its stock in trade, and on March 21, 1939, an investigator found that the sale was to be made for $1,400; that defendant's agent contacted the debtor to obtain a settlement and found the latter's place under attachment; that a settlement was made as heretofore stated; that the check first given and above mentioned was postdated from March 2 to March 6, and was not paid when presented to the bank on two successive occasions because of insufficient funds; that insistent demands were made to have the check covered; that thereafter a certified check for the balance was given; and that defendant was notified by Dun & Bradstreet of the bulk sale.

On the other hand, there is evidence that in September, 1938, the credit rating by Dun & Bradstreet of the debtor was $27,351.45, their report stating that although the bankrupt's position was "weak," "The various houses to whom credit is extended are gradually being weeded out and he [debtor's agent] claims that the accounts receivable are all good. * * * Business is done with a more selective group of customers and collections improving," but that current obligations, however, were heavy; that on September 30, 1938, a summary of six creditors of the debtor showed "two as slow 30, satisfactory," one as "slow 30," one as "slow 60," one as "slow 180, unsatisfactory," and one, no payments. In a report on January 12, 1939, it appeared that the debtor's president had advised Dun & Bradstreet that its worth was $30,000, that special effort on collections was being made and credit sales were being curtailed; that although the current position was "relatively weak" and the account was being watched, he was being sold by his supply houses. Defendant's account with the debtor rose from $1,608.28, due in October, 1938, to $3,207.53, due in December, 1938. On January 3, 1939, a $1,000 payment was made. When defendant's agent called for a settlement on March 2, 1939, he learned for the first time of the attachment and then only to the extent that it embraced the debtor's principal assets at its place of business. The attachment was released on March 3, 1939. The debtor's agent stated that he told defendant's agent on the March 2nd occasion that if all the creditors worked with the debtor the attachment could be lifted, that it would be lifted, and that all the creditors would cooperate. The debtor did not advise defendant that it had bad accounts, or that the building in which business was transacted was worth only $1,500 instead of over $6,000, as reported to Dun & Bradstreet. When the order on the Commercial Credit Company and the check were given, the debtor said it was going to stay in business. On March 15, 1939, the debtor wrote to defendant, stating: "We have decided to discontinue our Fresno yard and become strictly a wholesale and commission account. This will relieve us of carrying an inventory at Fresno and also relieve us of considerable overhead. The company is not quitting business but is changing its policy of operation." Defendant's agent stated that he believed the debtor to be solvent because he did not believe $30,000 would be dissipated in two months. The debtor had never said anything to defendant about being forced into bankruptcy until after the transfers. When the debtor's check was not paid the debtor wrote to defendant on March 11, 1939, as follows: "We have been doing our best to get you the $500.00 but it has been very slow. The Commercial Credit have acknowledged your order and in the meantime have notified our customers to remit to them. Consequently we are not receiving our portion of the payments until the Commerical Credit Company and your order have been paid. We will send you the money at the earliest possible date and in the future will issue no post dated checks. If I should be in San Francisco in the next few days I will call you. Your co-operation is appreciated."

[4-7] We cannot say as a matter of law that the finding is not supported by the evidence or that defendant had reasonable cause to believe the bankrupt insolvent or knew of facts that put it on inquiry to make further investigation. That conclusion is indicated by holdings that certain factors do not necessarily establish cause for belief of insolvency. The factual background of the following cases is not the same as in the case at bar, but the principles stated are of some assistance. Various circumstances have been held to not necessarily show grounds for reasonable belief, such as mere doubt of solvency (In re Salmon, 2 Cir., 249 F. 300, 161 C.C.A. 308), anxiety about the claim on the part of the creditor and a strong desire to have it paid or demands for payment by another creditor. Valley Nat. Bank v. Westover, 9 Cir., 112 F.2d 61. A finding on that subject contrary to the asserted preference will not be disturbed where "It must be remembered that a man who is always short in cash is only a man who has no free capital. It does not follow necessarily, as both sides concede, that he is insolvent because he is not quick pay. However, the fact that a man in business is not able to pay up when he is pressed in many cases may well be a ground for inquiry, and even for sufficient suspicion of insolvency to justify a suit like this, as, for example, in the case of a large business conducted with prudence and accuracy; but it does not seem to me that, in the case of a man who concededly did business in such an unbusinesslike way as this bankrupt, shortness of cash and absence of free capital, continuing for so long a period of time without any insolvency, ought to be enough to put on inquiry all those who dealt with him. It must be remembered that something more than suspicion is necessary." Brookheim v. Greenbaum, D.C., 225 F. 635, 637, affirmed, 2 Cir., 225 F. 763, 141 C.C.A. 89. It is said in Stucky v. Masonic Savings Bank, 108 U.S. 74, 75, 2 S.Ct. 219, 220, 27 L.Ed. 640: "That case [referring to Grant v. National Bank, 97 U.S. 80, 24 L.Ed. 971] establishes the doctrine that a creditor dealing with a debtor whom he may suspect to be in failing circumstances, but of which he has no sufficient evidence, may receive payment or security without violating the bankrupt law. 'He may be unwilling to trust him further; he may feel anxious about his claim and have a strong desire to secure it, yet such belief as the act requires may be wanting. Obtaining additional security or receiving payment of a debt under such circumstances is not prohibited by law.'"

The fact that the debtor sells out his business does not necessarily put the creditor on inquiry to do more than demand payment of his account. Newman v. Tootle-Campbell Dry Goods Co., 174 Mo.App. 528, 160 S.W. 825. In the instant case the debtor indicated that he did not intend to discontinue business entirely. Mere suspicion of insolvency (Grant v. National Bank, supra; Gray v. Little, 97 Cal.App. 442, 275 P. 870) or the facts that the creditor knows his debtor is financially embarrassed and that he is pressing him for payment are not sufficient. Gray v. Little, supra.

[8, 9] Plaintiff urges that the postdating of the first check given him and the refusal

by the bank to pay it on two occasions conclusively established reasonable cause to believe the debtor was insolvent and to put defendant to the duty of making inquiry. It may be inferred from the evidence that the lack of funds to pay the check was not necessarily an indication of insolvency but rather that the debtor's collections on his accounts receivable were slow and hence that the debtor was short of ready cash. Shortage of cash would not necessarily indicate to a reasonably prudent business man that the aggregate of the debtor's property, exclusive of that which he may have transferred with intent to hinder or delay his creditors, was not at a fair valuation sufficient to pay his debts. Upon defendant's insistence that the check be covered, the debtor explained concerning his collections and indicated that it would be made good. The cases cited by plaintiff do not hold that under all circumstances the postdating or refusal of payment of the debtor's check conclusively establishes reasonable cause to believe the debtor insolvent or to put the creditor on inquiry. In Williams v. Plattner, D.C., 46 F.2d 467, it was held that a prima facie case was made out and other circumstances were present. In Irving Trust Co. v. Textile Banking Co., D.C., 3 F.Supp. 816, Bronner v. Safinna, D.C., 25 F.Supp. 791, and Smyth v. Kaufman, 2 Cir., 114 F.2d 40, 130 A.L.R. 951, additional circumstances were also involved. Moreover, the Smyth case was an affirmance of the trial court's finding of reasonable cause to believe. Each case must be decided on its particular facts, a matter within the province of the trier of fact.

[10, 11] It is immaterial that the court made no finding upon the issue of the debtor's solvency at the time of the alleged preferential transfers. We have seen that all the elements specified in the bankruptcy law (11 U.S.C.A. § 96) must be established to avoid a transfer. The finding that defendant did not have reasonable cause to believe the debtor insolvent was against plaintiff and is supported by the evidence. That element lacking, no recovery may be had regardless of whether the debtor was solvent or insolvent. If solvent, the element of insolvency would be lacking. Even though the debtor was insolvent, the element of lack of reasonable cause to believe it was insolvent, is lacking. A finding on the subject would not alter the result in the case. "In other words, when the facts found support the judgment, an omission to find upon an issue when a finding would not necessitate any change in the judgment is not prejudicial error which warrants a reversal or new trial." 24 Cal.Jur. 943.

[12] Whether or not it was error on the part of the trial court to refuse to admit in evidence the schedules, claims, inventory and appraisement filed in the bankruptcy proceeding, and the testimony of the trustee of the value and collectibility of the debtor's accounts receivable, need not be determined. If there was error, it was not prejudicial. There was other evidence given by plaintiff on the issue of insolvency of the debtor and, as we have seen, even if the debtor was insolvent it still was necessary to prove that the defendant had reasonable cause to believe that such insolvency existed, upon which subject the court found adversely to plaintiff.

The judgment is affirmed.

GIBSON, C. J. and SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

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23 Cal.2d 454

In re LUCAS' ESTATE.

FEW v. BROWN.

L. A. 18504.

Supreme Court of California.

Dec. 23, 1943.

1. Executors and administrators ⚷269

A public administrator in doubt as to advisability of compromising claim against estate properly sought assistance of court, since no compromise could be effected without court's approval. Probate Code, §§ 588, 718.5.

2. Executors and administrators ⚷269

An order directing public administrator to compromise a claim was appealable. Probate Code, §§ 588, 1240.

3. Executors and administrators ⚷269

An order made pursuant to statute authorizing executor or administrator with approval of court to compromise claims is appealable either as an order "instructing or directing an executor or administrator" or as one "directing or allowing the payment of a debt" or claim. Probate Code, §§ 588, 718.5, 1240.

4. Executors and administrators 🔑269

An unappealed from order instructing public administrator to compromise a claim, became final and a creditor's written objections to settlement of final account of public administrator because of compromise must be considered in nature of a collateral attack upon such order. Probate Code, §§ 588, 718.5, 1240.

5. Executors and administrators 🔑269

A creditor whose objection to settlement of public administrator's account was in nature of collateral attack upon order which authorized public administrator to compromise a claim, must establish that order was void. Probate Code, §§ 588, 718.5.

6. Executors and administrators 🔑87, 269

At common law, an executor or administrator could settle or compromise claims, and settlement or compromise could be set aside only upon proof of bad faith or fraud, which power generally extends to compromise or settlement of even doubtful claims against the estate. Probate Code, § 718.5.

7. Executors and administrators 🔑269

A representative, who in good faith compromises a claim against estate, will not, in settlement of his accounts, be denied credit for the amount paid. Probate Code, § 718.5.

8. Executors and administrators 🔑269

An executor or administrator securing probate court's approval of compromise of claim is protected from liability under possible charge that claim was invalid or the settlement imprudent. Probate Code, §§ 588, 718.5.

9. Executors and administrators 🔑87, 269

The statutes requiring court approval for compromise of a claim by executor or administrator neither enlarge nor abrogate the common law power of executors and administrators to enter into compromise or settlement, but merely afford them additional protection from liability. Probate Code, § 578, 588, 718.5.

10. Executors and administrators 🔑269

The statute authorizing executor or administrator with approval of court to compromise or settle "any claim" or "any suit" is not restrictive of type of claim or suit which may be compromised or settled, provided advantage to the estate is shown. Probate Code, § 718.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Any Claim" and "Any Suit".

11. Executors and administrators 🔑269

If court order approving compromise of claim against estate is obtained by fraud, relief may be had in equity, and "bad faith" is shown where claim is wholly without foundation to personal representative's knowledge. Probate Code, §§ 578, 588, 718.5.

See Words and Phrases, Permanent Edition, for all other definitions of "Bad Faith".

12. Executors and administrators 🔑269

The failure to appeal from probate court order granting public administrator's petition for instructions and approving compromise of a claim precluded inquiry as to sufficiency of showing of advantage to the estate. Probate Code, §§ 588, 718.5.

13. Executors and administrators 🔑269

Where public administrator's petition for instructions as to whether claim should be compromised showed his doubt as to advantage to the estate, and probate court authorized and approved the compromise, record did not justify charge that public administrator or his counsel acted in bad faith or in fraud of the court. Probate Code, §§ 588, 718.5.

14. Executors and administrators 🔑269

The statute providing that no claim against estate barred by limitation shall be allowed or approved is a specific application of rule requiring personal representative to protect the estate against unlawful claims and does not qualify the power to compromise claims. Probate Code, §§ 708, 718.5.

15. Executors and administrators 🔑213

Where claim against estate is on its face barred by limitations, neither the representative nor probate court may approve or allow it. Probate Code, §§ 708, 718.5.

16. Executors and administrators 🔑269

Where action to foreclose a mortgage against estate raised serious doubt as to applicability of statute of limitations and the right could not be conclusively determined without litigation, public administrator acting in good faith could compromise the action. Probate Code, §§ 708, 718.5.

17. Statutes 🔑159

If two statutes contain irreconcilable inconsistencies, the later statute should prevail.

18. Executors and administrators 🔑269

In settlement of estates, prompt distribution of assets should be a primary consideration, and hence sole question when approval of compromise is sought should be whether settlement is advantageous to the estate. Probate Code, § 718.5.

19. Executors and administrators 🔑269

At hearing upon petition for approval of compromise of claim against state, any interested party may present objections, and fact that state could not quiet title without paying the debt, and amount of attorney's fees which estate would incur should enter into computation of amount for which it would be advisable for the estate to effect a compromise. Probate Code, §§ 708, 718.5.

20. Executors and administrators 🔑269

The best interests of the estate is the criterion upon which probate court's decision approving compromise of claim against estate must be based, and when time for appeal has passed, advantage of compromise cannot be questioned. Probate Code, §§ 718.5, 1240.

21. Executors and administrators 🔑269

An order granting public administrator's petition for instructions whether to compromise claim against estate was not fatally defective because of mandatory direction to carry out the compromise where that portion of order properly was made with reference to petition for instructions under section 588 and not in exercise of court's power to approve a compromise under section 718.5. Probate Code, §§ 588, 718.5.

22. Executors and administrators 🔑269

An order instructing public administrator to enter into compromise and approving compromise of claim based on mortgage was not erroneous on ground that court adjudicated claim of third person to property of the estate, since probate court may authorize compromise of third party's adverse claim to property claimed by estate. Probate Code, § 718.5.

23. Executors and administrators 🔑269

Where probate court's order approving public administrator's compromise of claim allegedly barred by limitation was valid, objections to allowance to public administrator upon his accounting of the compromise item presented no justifiable issue of fact upon question of limitations requiring a finding. Probate Code, §§ 708, 718.5.

24. Executors and administrators 🔑508(1)

An order settling public administrator's final account was not defective on ground that there were neither written findings upon issues of fact raised by objections nor a written decision of the court upon them, where order was "entered at length in the minutes book of the court". Probate Code, § 1221.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Proceeding in the matter of the estate of Nelia Lucas, deceased, wherein Ben H. Brown, public administrator, filed a final account, opposed by George Few, as administrator of the estate of Eliza Jacobs. From an order settling and approving the final account, George Few, as administrator, etc., appeals.

Affirmed.

Prior opinions, App., 137 P.2d 709; App., 138 P.2d 803.

Edgar T. Fee, of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and Ernest Purdum, Deputy Co. Counsel, both of Los Angeles, for respondent.

Arch H. Vernon, Earl E. Johnson, Gilbert E. Harris, all of Los Angeles, for California Land Title Ass'n.

O'Melveny & Myers, Overton, Lyman & Plumb, and Hollbrook & Tarr, all of Los Angeles, amici curiae for respondent.

EDMONDS, Justice.

During the administration of the estate of Nelia Lucas, a suit was commenced to foreclose a mortgage made by her in 1928 as security for a note of $2,500 which, it was alleged, in 1934 had been extended for three years. On behalf of the estate, Ben H. Brown, Public Administrator, demurred to the complaint, pleading the bar of statute of limitations. Later the probate court authorized a compromise of the action for $500. The appeal of George Few, administrator of the estate of Eliza Jacobs, a creditor of the Lucas estate, upon jurisdictional grounds challenges the order of compromise as void.

The note sued upon, by its terms, is in favor of Silvanus J. Reid and was payable in 1931. Its payment was secured by a mortgage upon real property which is the only asset of any value in the Lucas estate. Brown rejected the claim of Reid's executor for the payment of the principal and interest assertedly due upon it. Thereupon Reid sued to foreclose the mortgage, alleging that on May 15, 1934, the time for payment of the note was extended by agreement for a period of three years from that date. Before a ruling upon Brown's demurrer to this complaint, he presented to the probate court a petition for instructions as to whether to accept an offer of compromise.

By his petition Brown presented the facts concerning the pending action and also showed that he had approved the claim of appellant amounting to $1,208. He also told the court of an opinion given by counsel for the Jacobs estate stating that the Reid suit could be defeated both upon the ground of lack of consideration and the statutes of limitation. This opinion included an offer of assistance in the defense of the action. On the other hand, the attorneys representing the plaintiff in the foreclosure action expressed a willingness to dismiss the suit upon an agreement that Brown sell the real estate described in the mortgage and pay 50 per cent of the net proceeds of the sale in compromise of the asserted debt. However, counsel representing the creditor holding the allowed claim objected to an acceptance of the proposed compromise. Because of these circumstances, the petitioner concluded, he asked the court to instruct him whether to compromise the action upon the terms offered, or other terms more favorable to the estate, or to continue the litigation.

To this petition the appellant filed objections asserting that the suit to foreclose the mortgage was one over which the probate court had no jurisdiction; that the note was barred by the statute of limitations and that the allegation in the foreclosure action pleading an extension of the due date of the note was an insufficient compliance with section 360 of the Code of Civil Procedure and section 2922 of the Civil Code. But when Brown by letter notified the appellant that counsel for the Reid estate offered to accept $500 in settlement of the indebtedness, his attorney replied: "The offer of compromise is fair and to the best interest of all concerned and no doubt the Court will approve the same. It is not my intention to object thereto, only I do not want to be placed in a position whereby * * * [any waiver of right] can be used against my client. * * *"

Six days later, the petition for instructions came on for hearing, and the probate court made its order reciting that a written proposal of the executor of the estate of Silvanus J. Reid, deceased, had been presented offering to accept the sum of $500 in full settlement of his claim against the Lucas estate upon the note and mortgage and the pending action and to deposit in escrow a release to clear the title of the Lucas estate to the mortgaged premises. "No objection to the said proposal having been made," the court's order continued, "and it having been approved as a fair and proper settlement in open court by" the appellant's attorney, the respondent's petition was granted and he was instructed to make the compromise and to pay $500 through escrow upon the sale of the property or in such other manner as might be agreed upon. No appeal was taken from this order.

Four months later, the respondent filed his first and final account showing the sale of the real estate at its full appraised value and the carrying out of the compromise. The appellant filed written objections to the settlement of the account, contesting the respondent's payment pursuant to the order. According to this pleading, the account discloses upon its face that the claim of Silvanus J. Reid was, at the time of the death of Nelia Lucas, barred by the statute of limitations. Furthermore, it alleges, the mortgage ceased to be a lien upon the real estate after the note was barred by the statute of limitations, and any attempt of the probate court to compromise and settle the foreclosure action brought by the Reid estate was without jurisdiction and void.

At the hearing upon the final account, the court overruled the appellant's objections, and made its order allowing and settling the account of the respondent and, finding the estate insolvent, discharged the administrator from further duties and responsibilities. The appeal is from that order.

Under the provisions of section 2911 of the Civil Code, contends the appellant, the lien of the Reid mortgage was extinguished by the lapse of time within which an action could be brought upon the principal obligation. No allegation appears in the foreclosure action or in any other pleading before the court that an extension of the mortgage was executed in writing as required by section 2922 of the Civil Code. Since, by section 708 of the Probate Code, it is mandatory that the administrator of an estate reject a claim barred by the statute of limitations, not only was it the duty of the respondent to reject the claim and contest the suit based upon the note and mortgage, but also his failure to do so is a fraud upon the court.

Attacking the order instructing the respondent to enter into the compromise with the executor of the Reid estate, the appellant claims that, under section 718.5 of the Probate Code, the court can only approve a compromise of such claims as are valid and legally enforceable; it therefore had no jurisdiction to approve the compromise of a claim barred by the statute of limitations, and the order instructing the respondent to carry out the Reid compromise was void. The probate court also exceeded its jurisdiction, says the appellant, in making a mandatory direction to the administrator to secure a release of the note and mortgage, to clear title to the premises, and to obtain a dismissal of the foreclosure suit before any of the adjudicated claims were paid. Furthermore, he asserts, the Reid estate was a third person claiming title to the property of the estate and the probate court has no jurisdiction to adjudicate title under such circumstances. And the appellant insists that the probate court has no power to authorize the compromise of the adverse claims of a third party, much less a suit in equity.

The appellan cites In re Estate of Dobkin, 38 Cal.App.2d 276, 100 P.2d 1091, as authority for his position that the order approving the compromise was not a final one and that it became so only at the time of the hearing on the final account and petition for distribution. In reliance upon this decision, he says, he did not appeal from the order approving the compromise but properly waited until the hearing upon the final account to contest the compromise. In addition, he claims that the order approving and settling the final account of the respondent is defective in that there are neither written findings upon the issues of fact raised by his objections to the final account, nor is there a written decision of the court upon them, as required by section 632 of the Code of Civil Procedure and sections 1221 and 1230 of the Probate Code.

Answering these contentions, the respondent asserts that an order instructing or directing an executor or administrator is appealable under section 1240 of the Probate Code. And, since no appeal was taken from the order directing him to pay $500 by way of compromise of the Reid claim, it has become final and is res judicata. The administrator was required to obey it and cannot now be personally charged with this amount on the theory that the order of the court was wrong. Each proceeding in probate is separate and distinct, and an attack in a later proceeding upon a decree or order made final in an earlier one is collateral in character; thus, in the present case, the appellant's effort to overturn the ruling of the probate court approving the final account of the administrator is a collateral attack upon the order authorizing the payment of the amount agreed upon in the Reid compromise. And on collateral attack, the order granting his petition for instructions is entitled to every presumption in favor of its validity.

But even if the appellant were in a position to challenge the order upon the merits, he urges, there is no basis for questioning the court's action approving the compromise. The amount claimed was practically ten times that paid in settlement of the compromise. The costs and attorney's fees to be paid by the estate would be large if the foreclosure action were to be defended, and because of the possible applicability of mortgage moratorium laws enacted in 1935, 1937 and 1939, only by a decision of this court would it have been finally determined whether the suit upon the note and mortgage was barred by the statute of limitations. And even if the respondent would have been successful in defeating the foreclosure suit, he could not have quieted the estate's title to the real estate, in order to establish a marketable title, without paying the debt. Furthermore, he says, the interested parties were estates, and the court was justified in approving an arrangement which would take into consideration the best interests of all.

Specifically answering the appellant's claim that the order instructing the respondent to enter into the compromise was void because in violation of section 708 of the Probate Code, the respondent contends that the order did not approve a compromise of a claim barred by the statute of limitations, but merely authorized the compromise of a controversy as to whether the statute barred a pending lawsuit. In addition, since section 588, authorizing an executor or administrator to petition for instructions as to the administration of the estate he represents, and section 718.5, authorizing him, with the approval of the court, to compromise "any claim against the estate or any suit brought against the executor or administrator as such, by the transfer of specific assets of the estate or otherwise", were enacted subsequent to the adoption of section 708, in the event of inconsistency, the later statutes must prevail. And, obviously, the words "any claim" and "any suit" are all inclusive. Furthermore, the purpose of a compromise is to avoid the time, expense and uncertainties of litigation involved in determining the merits of a legal controversy; if the merits of the controversy must be determined before a compromise is permitted, there is nothing left to compromise.

In any event, the respondent claims, the appellant is estopped from objecting to the payment of the $500 to the Reid estate. For by his conduct, the appellant led the administrator to believe that his original objections to the proposal had been withdrawn and that there would be no further question made as to the propriety of the compromise. Under these circumstances, to require the respondent personally to refund the $500 would be manifestly unjust. And since the decree approving the final account was set out at length in the minute book as required by section 1221 of the Probate Code, it is sufficient as to form.

Section 1240 of the Probate Code provides that: "An appeal may be taken to the supreme court from an order * * * instructing or directing an executor or administrator; directing or allowing the payment of a debt, claim, legacy or attorney's fee * * *." The respondent's petition for instructions was made under the authority of two sections of the Probate Code. Section 588 reads: "In all cases where no other or no different procedure is provided by statute, the court on petition of the executor or administrator may from time to time instruct and direct him as to the administration of the estate and the disposition, management, operation, care, protection or preservation of the estate or any property thereof." Section 718.5 of the Probate Code provides that: "* * * the executor or administrator, with the approval of the court, may compromise, compound or settle any claim against the estate or any suit brought against the executor or administrator as such, by the transfer of specific assets of the estate or otherwise. To obtain such approval, the executor or administrator shall file a verified petition with the clerk showing the advantage of the compromise, composition or settlement." Each section makes the same requirement for notice of the hearing.

[1] The respondent, being in doubt as to the advisability of entering into the proposed compromise with the executor of the Reid estate, sought the assistance of the court in determining the question, since, in any event, no compromise could be effected under section 718.5, supra, without the court's approval. Also incorporated in his verified petition were allegations bearing upon the advantage of the estate of the proposed compromise, as required by that statute.

[2, 3] Insofar as the court under the authority of section 588, supra, directed him to make the compromise, the order was appealable under section 1240, supra. And with respect to the power of the court to approve the proposed compromise under section 718.5, supra, an order made pursuant thereto is appealable either as an order "instructing or directing an executor or administrator"[1] or as one "directing or allowing the payment of a debt" or claim. Although In re Estate of Dobkin, supra, contains language to the contrary, it was unnecessary to the decision and is disapproved.

[4] The judgment roll shows that due notice of the petition for instructions was given. In addition, the appellant's knowledge of the petition is shown, first by the

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[1] It should be noted that both sections 588 and 718.5 of the Probate Code require the filing of petitions by the executor or administrator and the giving of notice under section 1200 of the Probate Code.

filing of his written "Objections to Allowance of Petition to Compromise Action," and also by the recital in the order granting the petition for instructions, that "no objection to said proposal having been made, and it having been approved as a fair and proper settlement in open court by" counsel for the appellant, at the hearing upon the amended offer of compromise. As no appeal was taken from the order instructing the respondent to enter into the compromise, within the time allowed by law, it became final and the appellant's written objections to the settlement of the first and final account must be considered in the nature of a collateral attack upon the prior decree. Security-First National Bank v. Superior Court, 1 Cal.2d 749, 755, 37 P.2d 69; In re Estate of Keet, 15 Cal.2d 328, 333, 100 P.2d 1045.

[5] In order to succeed, therefore, the appellant must establish that the order directing the administrator to compromise the claim was not merely erroneous, but was void. Such a position is necessarily predicated upon the theory that the probate court had no jurisdiction to authorize the compromise of a claim or suit such as that contemplated by the order.

[6-8] At common law, an executor or administrator had the power to settle or compromise claims for or against the estate, and the settlement or compromise could be set aside only upon proof of bad faith or fraud. This power, as a general rule, still is uniformly recognized, and extends to the compromise or settlement of even doubtful claims against the estate. Matter of Leopold's Estate, 259 N.Y. 274, 181 N.E. 570, 85 A.L.R. 197; Scully v. McGrath, 201 N.Y. 61, 94 N.E. 195; Heisler v. Sharp's Ex'rs, 44 N.J.Eq. 167, 14 A. 624; Rogers v. Hand, 39 N.J.Eq. 270; Meeker v. Vanderveer's Ex'r, 15 N.J.L. 392; Bidwell v. Beckwith, 86 Conn. 462, 85 A. 682; Scott v. Crider, 217 Mo.App. 1, 272 S.W. 1010; Todd v. Terry, 26 Mo.App. 598; Home Mixture Guano Co. v. Woolfolk, 148 Ga. 567, 97 S.E. 637; Fender v. Phillips, 59 Ind.App. 85, 108 N.E. 971; Simes v. Ward, 78 N.H. 533, 103 A. 310; and see note, 85 A.L.R. 199–204; 21 Am. Jur., Executors and Administrators, sec. 301, p. 552. Accordingly, a representative who acts in good faith for the best interests of the estate, in compromising a claim against it, will not, in the settlement of his accounts, be denied credit for the amount so paid. Fender v. Phillips, supra; Lake's Adm'r v. Pattie, 116 Va. 130, 81 S.E. 78; Badders v. O'Brien, 114 Md. 451, 79 A. 917; In re Baruth, 62 Misc. 596, 116 N.Y.S. 1125; In re Wagner, 40 Misc. 490, 82 N.Y.S. 797; Newell v. West, 149 Mass. 520, 21 N.E. 954; Heisler v. Sharp, supra; Rogers v. Hand, supra; Meeker v. Vanderveer, supra; Bruner's Appeal, 57 Pa. 46; see note, 85 A.L.R. 199, 202, 203. In one case, for example, it was held that executors who compromise a claim in good faith, and from a reasonable fear that the litigation may go against them, or that their success therein may prove more costly than a partial surrender, are entitled to credit for the sum paid even though it be subsequently shown that the claim had no foundation. In re Baruth, supra. And when the representative secures the probate court's approval of compromise, he is protected from subsequent liability on any possible charge that the claim was invalid or the settlement imprudent. Matter of Leopold's Estate, supra, 259 N.Y. page 277, 181 N.E. 570, In re Corbin's Estate, 227 App.Div. 87, 236 N.Y.S. 653; see note, 85 A.L.R. 199, 202.

[9-11] In some states, including California, statutes have been enacted which restrict this common-law power by subjecting the representative's action to court approval. (Prob.Code, secs. 578, 718.5; see note 85 A.L.R. 199, 202; 21 Am.Jur., Executors and Administrators, sec. 301, pp. 552, 553.) It is generally held, however, that such statutes neither enlarge nor abrogate the common-law power of the executors and administrators to enter into a compromise or settlement, but merely afford them additional protection from liability. 21 Am.Jur., Executors and Administrators, sec. 301, n. 4, p. 553; and see note 85 A.L.R. 199, 202; Moulton v. Holmes, 57 Cal. 337, 343, 344; Taylor v. Sanson, 24 Cal.App. 515, 517, 518, 141 P. 1060; 11b Cal.Jur., Executors and Administrators, sec. 876. Nothing in the language of section 718.5, supra, is restrictive of the type of claim or suit which a representative may "compromise, compound or settle"; on the contrary, as contended by the respondent, the power expressly extends, without qualification, to "any claim" and "any suit" against the estate or its representative. The only prerequisite necessary for the securing of the order of approval, is the requirement that there be some showing by the respondent of the advantage to the estate resulting from the

compromise. Of course, if an order approving a compromise is obtained by fraud, relief therefrom may be had in equity. In re Estate of Ross, 180 Cal. 651, 182 P. 752; McPike v. Superior Court, 220 Cal. 254, 259, 30 P.2d 17; see 11b Cal.Jur., Executors and Administrators, sec. 275, p. 291. And bad faith is shown where the claim which is the subject of the compromise is wholly without foundation and known by the personal representative to be so. See McPike v. Superior Court, supra, 220 Cal. page 259, 30 P.2d 17.

[12, 13] Although from what appears in the record, it may not reasonably be denied that a sufficient showing of advantage to the estate of the compromise was made to the probate court upon the petition for instructions, any inquiry into that question was concluded by the failure to appeal from the order granting the petition for instructions and approving the compromise. And nothing in the record before the court justifies a charge that the respondent or his counsel acted at any time in bad faith or in fraud of the court. On the contrary, his petition for instructions shows his own doubt as to advantage of the compromise as the reason for invoking the aid of the probate court, under section 588, supra, to decide that question for him. And the probate court in instructing him to settle the litigation, under section 588, at the same time gave its approval of the compromise as required by section 718.5, supra.

[14-18] But the appellant asserts that section 708 of the Probate Code, in providing that "no claim which is barred by the statute of limitations shall be allowed or approved by the executor or administrator, or by the judge" qualifies the power to compromise under section 718.5, supra. Section 708, however, is merely a specific application of the rule requiring the personal representative and the probate court to protect the estate against unlawful claims. (See cases collected in 11a Cal. Jur., Executors and Administrators, secs. 558, 559, 564.) Obviously where the claim, as presented, is admittedly and on its face barred by the statute of limitations, neither the representative nor the court may approve or allow it as a valid claim against the estate. Fontana Land Co. v. Laughlin, 199 Cal. 625, 250 P. 669, 48 A.L.R. 1308; In re Estate of Cates, 195 Cal. 319, 232 P. 972; In re Estate of Aldersley, 174 Cal. 366, 163 P. 206; Reay v. Heazelton, 128 Cal. 335, 60 P. 977; Etchas v. Orena, 127 Cal. 588, 60 P. 45; Vrooman v. Li Po Tai, 113 Cal. 302, 45 P. 470; Boyce v. Fisk, 110 Cal. 107, 42 P. 473; Jacobson v. Mead, 12 Cal.App.2d 75, 55 P.2d 285, 1267. However, when additional facts are brought to the attention of the executor or administrator, or to the court, as for example, by the complaint to foreclose the Reid mortgage, which raise serious doubts as to the applicability of the statute, a different question is presented. If, considering those facts, the rights of the respective parties cannot be conclusively determined without litigation, the representative, if acting in good faith and for the best interests of the estate, is entitled to enter into a compromise with the claimant. To hold otherwise not only would require the interpolation in section 718.5 of restrictive words not used by the legislature,[2] but it also to a great degree would nullify the practical utility and purpose of the power to compromise were section 708 construed so as to require every claim in which the bar of the statute by any possibility might arise to be finally adjudicated before a compromise could be effected. In addition, so restrictive a construction of section 718.5 would deprive the representative of an estate of the right to act as a prudent business man would under the same circumstances. For by ordinary business principles, a compromise or settlement may be much more advantageous than costly litigation over a doubtful issue of fact or question of law. And in the settlement of estates, a prompt distribution of the assets to those entitled to them should be a primary consideration. The sole question, therefore, when the approval of a compromise is sought under section 718.5, supra, should be whether the settlement is advantageous to the estate, and this is the only requirement expressly included in the language of the statute.

[19, 20] At the hearing upon the petition for approval of a compromise, any interested party may present such a question as the possible or probable bar by the statute of limitations of the claim sought to be compromised. Such a position, if sustained by law or evidence, obviously would be relevant to any inquiry as to the advantage to be gained by compromise. But, even though the court may be convinced that the claim is barred, additional facts may appear, as they do in the present case, where the estate may benefit by paying something on the claim as consideration for its satisfaction. Thus, the fact that the estate could not quiet title to the real estate without paying the debt, even though the claimant in turn could not successfully foreclose the mortgage (See Boyce v. Fisk, supra, 110 Cal. page 113, 42 P. 473; Howell v. Dowling, 52 Cal.App.2d 487, 496, 126 P.2d 630), would make it desirable for the estate to effect some sort of a compromise with him. In addition, the amount of attorney's fees which the estate would have incurred, were the foreclosure action to be contested, reasonably should enter into the computation of an amount for which it would be advisable for the estate to effect a compromise. The best interest of the estate, under the facts presented, is the criterion upon which the probate court's decision must be based, and in the event of a ruling adverse to the objector, he may appeal from the order approving the compromise. See Guardianship of Carlon, 43 Cal.App.2d 204, 110 P.2d 488. But when the time for appeal has passed, as in the present case, the advantage of the compromise approved is no longer open to judicial examination.

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[2] In this regard, it should also be noted that section 718.5 of the Probate Code was enacted subsequent to the adoption of section 708 of that code, making applicable the rule of construction that, in the event of irreconcilable inconsistencies between two statutes, the one most recently enacted should prevail.

[21] But the appellant contends that the order granting the petition for instructions was fatally defective because it contained a mandatory direction to the administrator to carry out the compromise. The case of McPike v. Superior Court, supra, relied upon by the appellant in support of this position, does not compel such a conclusion, however. In that case, this court merely held that, under section 578 of the Probate Code, the probate court has power only to approve a compromise and has no authority to compel its execution by the representative of the estate. However, that portion of the order directing the respondent to enter into the compromise here challenged properly was made with reference to the petition for instructions under section 588, supra, and not as an exercise of the court's power to approve a compromise under section 718.5, supra.

[22] The appellant's further contention that, by the order instructing the respondent to enter into the compromise and approving it, the probate court was unlawfully adjudicating the claim of a third person to property of the estate, is specifically answered by the case of McPike v. Superior Court, supra. As there stated (page 257 of 220 Cal., page 18 of 30 P.2d), "The probate court has the power to authorize the compromise of an adverse claim of a third party to the property of an estate."

[23, 24] Considering the appellant's criticism of the form of the probate court's determination approving the final account, for the reasons stated, his objections to the allowance of the $500 item presented no justiciable issue of fact upon the question of the statute of limitations requiring a finding. And the form of the order settling the account is not subject to attack for the decree was "entered at length in the minute-book of the court." Prob.Code, sec. 1221.

The order is affirmed.

GIBSON, C. J., and SHENK, CURTIS, and TRAYNOR, JJ., concurred.

SCHAUER, Justice.

I concur in the judgment, and in the opinion generally, but feel that a further answer should be made to appellant's contention that "the order approving and settling the final account of the respondent is defective in that there are * * * [no] findings upon the issues of fact raised by his objections to the final account." Issues of fact as to the bona fides of the mortgage claim, the asserted extension of the mortgage, the compromise of the claim, and the conduct of the County Counsel, etc., were raised by such objections and were tried by the court without a jury, and therefore findings of fact were required unless waived by the parties. See Prob. Code, sec. 1230; Code Civ.Proc., sec. 632; In re Estate of Dodds (1942), 52 Cal.App. 2d 287, 288, 126 P.2d 150.

This appeal was initially taken upon the judgment roll alone. The record has since been augmented by the filing, upon stipulation of the parties, of what is designated "Clerk's Supplemental Transcript." Such supplemental transcript does not purport to be a complete transcript of the proceedings in the case and, in fact, is limited to matters specifically enumerated in the stipulation for the filing thereof. Therefore, for the purposes of the question which we are considering, the effect is the same as though the appeal were upon the judgment roll alone. There is in the record no affirmative showing as to whether findings were or were not waived. Under such circumstances we must presume that they were waived. It was stated in Carpenter v. Pacific Mut. Life Ins. Co. (1937), 10 Cal.2d 307, 326, 74 P.2d 761, 773: "From an early date it has been held in this state that on a judgment roll appeal the mere nonappearance of findings where required by statute does not necessarily establish error. * * * Where findings do not appear, and are required [,] on a judgment roll appeal it will be conclusively presumed, in the absence of a proper record showing the contrary, in support of the judgment, that such requirement was waived." See, also, Leadbetter v. Lake (1897), 118 Cal. 515, 50 P. 686; Bank of Italy Nat. T. & S. Ass'n v. Bettencourt (1932), 214 Cal. 571, 575, 7 P.2d 174.

CARTER, J., concurred.

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23 Cal.2d 469

JORDAN v. GUERRA.

L. A. 18749.

Supreme Court of California.

Dec. 23, 1943.

Rehearing Denied Jan. 20, 1944.

1. Appeal and error 🔑1176(2)

If trial court should have directed judgment for defendant notwithstanding verdict for plaintiff, Supreme Court on appeal may order judgment to be so entered. Code Civ.Proc. § 629.

2. Death 🔑25

A release for alleged wrongful death of plaintiff's infant son, if obtained by deception on plaintiff, will be construed as a settlement of those matters only as to which minds of parties met.

3. Release 🔑17(2), 58(6)

The rule that release obtained by deception will be construed as settlement of those matters only as to which minds of parties met is not confined to cases where plaintiff cannot read, or was prevented by defendant from reading release, or was mentally incompetent to comprehend meaning of its language, regardless of any other deception employed to mislead him, but it is for trier of facts to determine what plaintiff understood was covered by the writing and whether his understanding different from the writing was induced by defendant.

4. Release 🔑24(2)

The rule requiring rescission and return of consideration for contract releasing claim for damages before it can be avoided does not apply where person seeking to avoid release has been deceived into signing contract different from contract which he understood he was executing.

5. Release 🔑17(2)

Though law does not discourage settlement of controversies by agreements and is disposed as far as possible to uphold them, it is equally ready to relieve parties from fraud and imposition through which they have been induced to barter away their rights, and in cases affording opportunity for overreaching the law demands good faith on part of releasee and full understanding by person injured as to his legal rights.

6. Death 🔑103(3)

In action for alleged wrongful death of plaintiff's infant son, in which issues raised by defense pleading releases were first tried, it was province of jury to determine whether circumstances furnished opportunity for overreaching, whether defendant or his agent took advantage thereof, and whether plaintiff was thereby misled. Code Civ.Proc. § 597.

7. Appeal and error 🔑930(1)

On defendant's appeal from judgment for plaintiff, in which issues raised by defense pleading releases were first tried, evidence must be regarded in light most favorable to jury's conclusion in favor of plaintiff on such issues. Code Civ.Proc. § 597.

8. Death 🔑103(3)

In action for wrongful death of plaintiff's infant son run over by defendant's automobile, evidence that plaintiff was called from funeral parlor to make settlement with liability insurance adjuster, though such fact was not disclosed to plaintiff, that entire discussion centered around expense of funeral and plaintiff's loss of time, and that adjuster represented that defendant was not liable because accident occurred on defendant's premises, was sufficient to go to jury on issue whether release of all liability of defendant, including that for child's death, was due to fraud and therefore void. Code Civ.Proc. § 597.

9. Release ⚷17(2)

A release obtained by insurance adjuster should not be upheld if there is any fraud, deceit, oppression, or unconscionable advantage in transaction, and in passing on validity of release, all surrounding conditions should be fully developed and relative attitudes of contracting parties clearly shown.

10. Automobiles ⚷245(4, 70)

In action for wrongful death of infant struck by defendant's automobile on defendant's land on which child's mother was working as cotton picker, evidence as to defendant's knowledge of presence of cotton pickers and their children, and that there were no barriers between cotton patch and driveway where children might be expected to play, made issues of defendant's negligence and mother's contributory negligence for jury. Code Civ.Proc. §§ 597, 629.

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In Bank.

Appeal from Superior Court, Fresno County; Dan F. Conway, Judge.

Action by Elmer Jordan against Paul Guerra for wrongful death of plaintiff's minor child. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion, App., 136 P.2d 367.

W. H. Stammer and Galen McKnight, both of Fresno, for appellant.

L. M. Linneman, of Dos Palos, and Rae B. Carter, of Fresno, for respondent.

SHENK, Justice.

The plaintiff sued for damages for the alleged wrongful death of his fourteen months old son who was run over by an automobile driven by the defendant. The defendant answered, denying the allegations of negligence, alleging contributory negligence of the mother, and pleading releases executed by the plaintiff. The plaintiff did not file an affidavit denying the genuineness and due execution of the pleaded instruments and the only issue in respect thereto was the question of their invalidity by reason of fraud. Pursuant to section 597 of the Code of Civil Procedure, and the motion of the defendant, the issues raised by the defense pleading the releases were first tried. Those issues were submitted to a jury which returned a verdict for the plaintiff. Judgment was entered declaring the releases ineffective as a bar to the action. The trial then proceeded before a different jury on the issues of negligence and contributory negligence. That jury returned a verdict for the plaintiff in the sum of $1,000, and judgment was entered accordingly. On each trial the defendant moved for a directed verdict and for judgment notwithstanding the verdict, and each of the motions was denied. He has appealed from the judgments and from the orders denying his motions for judgment notwithstanding the verdict.

[1] If it appear on these appeals that the trial court should have directed judgment for the defendant notwithstanding the verdicts, then this court may order judgment to be so entered. Sec. 629, Code Civ.Proc.; Barthelmess v. Cavalier, 2 Cal. App.2d 477, 38 P.2d 484. Such an order may be made only when it appears that a motion for a directed verdict should have been granted. Sec. 629, Code Civ.Proc.; In re Estate of Yale, 214 Cal. 115, 123, 4 P.2d 153; In re Estate of Fleming, 199 Cal. 750, 753, 251 P. 637.

The evidence favorable to the plaintiff on the questioned validity of the releases is the following: Paul Guerra, the defendant, owned a ranch near Dos Palos in Fresno County on which he had a cotton patch. At the times hereinafter mentioned cotton pickers were engaged in harvesting the crop. They had been employed by a neighbor, acting as agent for Guerra. The plaintiff and his wife, Thelma Jordan, were the parents of four children, the eldest seven years of age, two were three and four and one-half years respectively, and the youngest, Murvian Leroy, was fourteen months. On Friday, November 15, 1940, Mrs. Jordan drove to the defendant's place where she had been employed in picking cotton during the previous days in that week. She took with her the three younger children. With Mrs. Guerra's permission, previously obtained, she parked her car in the graveled driveway near some eucalyptus trees to take advantage of the shade. The two older children played in a graveled yard beyond the driveway, and Murvian Leroy was left in the car during the morning while Mrs. Jordan worked in the cotton patch. After the lunch hour and about 1:30 o'clock, because of the heat, Mrs. Jordan placed the child in a sitting position against one of the eucalyptus trees. She had one more row of cotton to pick, which would take from thirty to forty minutes. The child could not walk, although he was able to creep. Mrs. Jordan observed the sharp gravel of the driveway and concluded the baby would not creep on it, at least before she would return.

The defendant Guerra had left for his employment elsewhere about 7 a. m. of that day, and as usual returned at 2 o'clock in the afternoon. He drove slowly up the driveway, passed Mrs. Jordan's car, and angled in front of it toward the row of eucalyptus trees. He came to a stop about six feet from the tree where Mrs. Jordan had placed Murvian Leroy. When he stepped down and walked around to the front of his car he saw the child caught between the right front wheel and the bumper of his car. The child had died from the impact. There was no other witness present at the time of the accident.

About 10:30 o'clock on the following morning, while the plaintiff and his father were at the funeral parlors in Dos Palos making arrangements for the child's burial, the plaintiff received a telephonic summons to go to the Guerra home. He went there accompanied by his father. On arrival they saw Mr. and Mrs. Guerra and a Mr. Goodwin who was an adjuster for Guerra's public liability insurance carrier, although that fact was not disclosed to them. Mr. Goodwin stated that Mr. Guerra was not capable of taking care of his own business and he was there to talk to Jordan on Guerra's behalf; that Guerra wanted to help toward the funeral expenses. Goodwin inquired how much the funeral would cost. The plaintiff replied, "Around seventy-five or eighty-five dollars." Goodwin remarked that the accident was unavoidable. The plaintiff expressed the opinion that the accident could have been avoided, but that he realized Mr. Guerra did not run over the child intentionally. Goodwin pointed out that Guerra had a perfect right to be on his own premises and asked how much plaintiff thought he would be out. The plaintiff said he was also out some "time," and indicated that ninety or a hundred dollars would cover the items. "And he [Goodwin] told me if I got over $85 I would be getting in dangerous territory." The plaintiff's father interjected that they did not come prepared to talk to any attorney. Goodwin disclaimed being an attorney; he said he was down just on behalf of Mr. Guerra. The plaintiff then told him he thought he would be out around $100. But Goodwin said he would "do better than that. I will give you $150." He told them that that sum was all that the plaintiff could get and was more than anyone else ever received that he knew of. He then prepared two papers for the plaintiff's signature. One, which Goodwin wrote by his own hand, narrated the event of the accident, and continued: "As a result of the death of my child I incurred funeral bills of approximately $80.00, and some loss of time from work. I realize that Mr. Guerra did not intentionally run over my child and that it was an accident. Therefore in view of such circumstances I accept the sum of $150.00 as a compromise payment for settlement of any claim I might have as a result of this accident. I understand that in accepting this payment that this is all I can get, and that I voluntarily take such sum and thereby release Mr. Guerra from all liability resulting from this accident. I have read and understand the two pages and they are true." The last sentence was written by Jordan in his own hand at Goodwin's dictation. The second paper was a printed form of general release which was filled in by Mr. Goodwin, except that a sentence, "I have read and understand this release," was written by the plaintiff at the request of Goodwin. After signing the papers, the plaintiff was handed a draft on Farmers Automobile Inter-Insurance Exchange signed by Goodwin for $150 payable at a bank in Los Angeles. The draft purported to be in settlement of all claims arising out of the accident on November 15, 1940. On the reverse side, preceding the place for endorsements, was a printed statement that endorsement constituted a release of all claims of the endorser against the insurance company on account of the accident referred to on the face of the instrument.

It was then almost noon on Saturday. Goodwin suggested that the plaintiff and he meet in Dos Palos where the draft would be cashed. They met at the defendant's place of business where the plaintiff endorsed and delivered the draft and received $150 in cash from the defendant's brother.

At the time of the settlement the plaintiff had no money or property, with the exception of some change on his person and $50 in wages due him for fifteen days' labor. No explanation was made by Goodwin to the plaintiff of his rights or of the effect of the instruments he was signing, except that it was a final settlement. The plaintiff was twenty-nine years of age. He had had a seventh grade education and could read and write. He testified that he understood that the settlement was final, that he was satisfied with it, but that he did not know he had a right to anything except the items of funeral expenses and time lost, which were the only subjects of discussion, and that he thought those were all that the releases covered.

One month later attorneys for the plaintiff sent a notice of rescission to the insurance company which was not accompanied by a return of the $150. Subsequently the plaintiff commenced this action for general and special damages. During the trial the court granted the plaintiff's motion to strike any claim for recovery of special damages, and the plaintiff's alleged cause of action was thus confined to recovery for general damages.

The defendant contends that the record is devoid of substantial evidence to support the jury's implied finding of fraud as a basis for the judgment that the releases were invalid; that in any event no rescission had been effected with a return or tender of return of consideration paid.

[2] The judgment on this phase of the case is supported by the decision in Meyer v. Haas, 126 Cal. 560, 58 P. 1042, and similar cases, wherein it was held that such a release because of the deception practiced upon the claimant must be construed as a settlement of those matters only as to which the minds of the parties met, and may not be considered to be in satisfaction of anything not consented to by the plaintiff. In the cited case the plaintiff fell into an unguarded elevator shaft maintained by the defendants. He signed a receipt for $25 which he thought covered loss of time only but which was worded to include also claims of every kind and description.

[3-5] The defendant seeks to distinguish the Meyer case because it involved a foreigner who could read and write English only imperfectly, and because the adjuster, who was also the injured man's physician and his agent in the settlement, occupied a place of trust and confidence toward him. We cannot say that the rule must be confined to cases where the plaintiff could not read or was prevented by the defendant from reading the release, or was mentally incompetent to comprehend the meaning of its language, regardless of any other device or deception employed to mislead him. In any case it is for the trier of the facts to determine what the plaintiff understood was covered by the writing and whether his understanding different from the writing was induced by the defendant. If a misconception be found and that the defendant was responsible therefor, the contract insofar as it purports to release claims other than those understood by the plaintiff to be included, is ineffective to that extent, and rescission and tender as to the excluded items are unnecessary. The application of the rule of the Meyer case was recognized in Garcia v. California Truck Co., 183 Cal. 767, 770, 192 P. 708. See, also, Raynale v. Yellow Cab Co., 115 Cal.App. 90, 300 P. 991; Wetzstein v. Thomasson, 34 Cal.App.2d 554, 93 P.2d 1028. In the Raynale case the distinction was made between cases of contracts of known content voidable because induced by fraud, and cases of no contract beyond the boundaries of mutual intent, citing the Meyer and other cases. In Carr v. Sacramento Clay Products Co., 35 Cal. App. 439, 447, 170 P. 446, 450, it was said: "It is true that the law does not discourage settlements of controversies by agreement, and is disposed as far as possible to uphold them, but it is equally ready to relieve parties from fraud and imposition through which they have been induced to barter away their rights." It was held that in cases affording opportunity for overreaching, "the law demands good faith on the part of the releasee and a full understanding on the part of the person injured as to his legal rights." See, also, Backus v. Sessions, 17 Cal.2d 380, 110 P.2d 51; O'Meara v. Haiden, 204 Cal. 354, 268 P. 334, 60 A.L.R. 1381; Rued v. Cooper, 119 Cal. 463, 51 P. 704.

[6-8] It is the province of the jury to determine whether the circumstances furnished the opportunity for overreaching, whether the defendant or his agent took advantage of it, and whether the plaintiff was thereby misled. In reviewing the case the evidence must be regarded in the light most favorable to the jury's conclusion. Regarded in that light it cannot be said that here there is no evidence of sufficient substantiality to support the verdict. The

jury was justified in concluding that the adjuster sped to Dos Palos on the morning following the death of the child and on his arrival summoned the plaintiff from the funeral parlor in order to effect a settlement before the plaintiff could have an opportunity to secure independent advice. It was also justified in finding that the settlement purported to be covered by the language of the releases was inadequate; that Goodwin, in order to secure such a settlement for his employer, the insurance carrier, led the plaintiff into the belief that he was acting solely on behalf of Guerra, who could not act for himself because of his participation in the accident but desired to help out on the funeral expenses. (See Restatement: Restitution, sec. 8, p. 32 et seq.; California Annotations pp. 11-12.) The jury could also find that the subject of general liability was not discussed and that Goodwin's purpose in telling the plaintiff that Guerra had a right to be on his own premises was to mislead the plaintiff into believing that he had no claim except for the items of funeral expenses and time lost; and that those were the only items within the mutual understanding of the parties and covered by the releases.

[9] In cases of this kind it has been said that the facts will be carefully scrutinized to discover whether the defendant has dealt fairly with the plaintiff. In Kansas City, M. & B. Ry. Co. v. Chiles, 86 Miss. 361, 38 So. 498, quoted in Wilson v. San Francisco-Oakland Terminal Railways, 48 Cal.App. 343, 350, 191 P. 975, 978, it was said: " 'No release of this nature should be upheld if any element of fraud, deceit, oppression, or unconscionable advantage is connected with the transaction. And in passing on the validity of such release, when assailed, all surrounding conditions should be fully developed, and the relative attitudes of the contracting parties clearly shown. So that the jury, in the clear light of the whole truth, may rightly decide which story bears the impress of verity.' "

[10] The defendant contends that the court should have granted its motion for a directed verdict following the trial on the issues of negligence and contributory negligence. The evidence bearing on the happening of the accident produced on the second trial was substantially the same as on the first. From this evidence the jury was justified in finding that the defendant knew of the presence of the cotton pickers and of the children upon his premises; that in the absence of boundaries or barriers between the cotton patch, the graveled yard and the driveway, children at play would be expected to be found on any part of the premises; that workers, in order to engage in the employment, must be accompanied by their children was also known to the defendant; that under the circumstances children of workers were invitees to whom he owed the duty of ordinary care to look out for their safety; that the defendant neglected to exercise that duty by failing to keep the proper outlook as he approached the areas where children might be expected; and that the mother was not guilty of such negligence as would bar a recovery.

Inasmuch as the record discloses sufficient evidence on all of the issues to require the plaintiff's case on both trials to be submitted to the jury, the verdicts and the orders should not be disturbed.

The judgments and the orders are and each of them is affirmed.

GIBSON, C. J., and CURTIS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

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23 Cal.2d 439

MARX v. McKINNEY et al.

L. A. 18410.

Supreme Court of California.

Dec. 22, 1943.

Rehearing Denied Jan. 20, 1944.

1. Creditors' suit 🔑46

In an action in the nature of a creditor's suit by the assignee of a note for a sum assigned by the maker to the payee out of collections on conditional sales contracts assigned by the maker to secure indebtedness to a manufacturer, evidence supported the trial court's finding that collections were sufficient to pay both that sum and the indebtedness.

2. Evidence 🔑424

Persons who are not parties to or claiming under a written contract may offer extrinsic evidence to show the true agreement.

3. Evidence ⚷424

In an action in the nature of a creditor's suit by the assignee of a note for moneys collected on conditional sales contracts assigned by the maker of the note to secure his indebtedness to a manufacturer, trial court properly considered maker's testimony that such indebtedness was less than was stated in a written agreement between him and defendant, manufacturer's successor, as well as the maker's other testimony showing the true agreement.

4. Creditors' suit ⚷46

In an action in the nature of a creditor's suit by the assignee of a note for a sum assigned by the maker to the payee out of collections on conditional sales contracts assigned by the maker to secure indebtedness to a manufacturer, trial court properly found that manufacturer's successor had collected enough to pay such sum, even after deducting another assignment.

5. Appeal and error ⚷891

In an action in the nature of a creditor's suit, where record contained no evidence to support trial court's finding that payee of a note had assigned to plaintiff his chose in action against defendant, Supreme Court, under the statute, appointed trial judge as its referee to receive evidence on question of assignment. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

6. Assignments ⚷78

The assignment of a debt ordinarily carries with it all incidental rights, including collateral securities or liens. Civ.Code, § 1084.

7. Assignments ⚷78

Evidence of the payee's assignment of a note to plaintiff in an action in the nature of a creditor's suit supported trial court's finding that plaintiff also received right to certain moneys which maker had assigned to payee as partial security.

8. Appeal and error ⚷103, 106, 870(2)

Orders denying a continuance and leave to file an amended answer and cross-complaint are not appealable and may be reached only through appeal from the judgment. Code Civ.Proc. § 963.

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In Bank.

Appeals from Superior Court, Los Angeles County; John Beardsley, Judge.

Action in the nature of a creditor's suit by Mrs. Betty Marx against Fred P. Glick and others. From a judgment for plaintiff against defendant named, such defendant appealed, and attempted to appeal also from orders denying his motion for leave to file an amended answer and cross-complaint and motion for a continuance.

Judgment affirmed, and attempted appeals from the orders dismissed.

Prior opinion, 135 P.2d 704.

Ben Gould, of Los Angeles, for appellant.

J. F. Rosen and H. Wolpin, both of Los Angeles, for respondent.

SCHAUER, Justice.

Plaintiff herein sued upon two alternative causes of action:

1. For money received prior to November 1, 1938, by defendant and sole appellant Fred P. Glick, "individually and doing business as Fabriform Steel Products Co., successor to the Welded Products Co. Inc., * * * for the use and benefit of one, George Karp, the plaintiff's assignor."

2. For money claimed to have been owing by defendant-appellant Glick to a judgment debtor of plaintiff, one R. L. McKinney (also named as a defendant herein), at the time of levy upon appellant, under the provisions of section 542, subdivision 6, and sections 543 and 688 of the Code of Civil Procedure, of a writ of execution issued upon plaintiff's judgment against McKinney.

The trial court, sitting without a jury, awarded judgment to plaintiff and against appellant Glick in the sum of $3,036, together with interest thereon at seven per cent per annum from May 20, 1940. Appellant makes various attacks upon the judgment, directing them at each of the two causes of action. As to the first of such causes he contends that the evidence sustains neither the finding that prior to November 1, 1938, Glick received the sum of $3,036 for the use and benefit of Karp, nor the finding that Karp assigned to plaintiff such chose in action against Glick. Inasmuch as we conclude that the evidence as augmented before us is sufficient to support the mentioned findings, and therefore the judgment, it is unnecessary to discuss the contentions advanced by appellant as to the second cause of action.

[1] Prior to December 21, 1936, Welded Products Company, a California corporation, manufactured and sold to defendant

McKinney a number of cleaning machines. McKinney resold the machines to various purchasers under conditional sales contracts, and then assigned such contracts to the Welded Products Company as collateral security for the balance owing from McKinney to the corporation for the machines. On December 21, 1936, McKinney and Welded Products Company agreed in writing that as of that date the corporation was holding assigned contracts with a total balance owing on them of $48,004.32, to secure an indebtedness from McKinney to the corporation of $33,972.83; thus the total unpaid balance on such contracts amounted to some $14,000 more than McKinney then owed the corporation. On September 11, 1937, and as partial security for a promissory note executed by McKinney in favor of George Karp (plaintiff's alleged assignor, first cause of action), McKinney assigned to Karp "the sum of $3,036 out of monies due me from [the] contracts" held as security by Welded Products Company. The company was immediately notified of the assignment.

During the course of the above described transactions and prior to May 1, 1938, appellant Glick, doing business as Fabriform Steel Products Company, became the successor to Welded Products Company. During the same period of time and thereafter various sums were collected by the company and by Glick on the contracts held as security. Plaintiff contends that by November 1, 1938, the total of such collections was sufficient to pay off the $33,972.83 indebtedness from McKinney to the corporation (which the contracts secured), and also to pay to Karp the $3,036 which had been assigned to him by McKinney out of the same monies but which Glick refused to pay over to Karp. The trial court found in accordance with such contention; and although the evidence concerning the collections made on the assigned contracts is none too clear, after studying it carefully we have concluded that it was sufficient to support the finding. Such evidence includes that hereinafter epitomized.

[2, 3] It appears that on May 1, 1938, and subsequent to the assignment (made September 11, 1937) from McKinney to Karp, a written agreement was entered into between "Fred P. Glick, doing business under the firm name and style of Fabriform Steel Products Co., successor to Welded Products Co. Inc., hereinafter referred to as the 'Company,' and R. L. McKinney," whereby the parties stipulated that as of that date McKinney's indebtedness to the company on account of the cleaning machines mentioned hereinabove "shall be and is hereby settled, established and confirmed in and at the sum of Four Thousand Six Hundred Dollars." The agreement provided further that the total "balance of the * * * collateral security [the assigned contracts] for which the Company shall be accountable to R. L. McKinney" then stood at $13,762.89. McKinney testified however that, contrary to the provisions of this agreement, the company had "received practically every dollar owing them January 1st, 1937," that "they held out $4,600.00 as a liability of mine for the purpose of protecting themselves on assignments that I made," and that of the $4,600, when it was collected by the company, the California State Board of Equalization was to receive $1,800 pursuant to an assignment he, McKinney, had made to such board to cover delinquent sales taxes, and the other $2,800 was to be paid by the company to Karp. As it is established that persons who are not parties to, or claiming under, a written contract are not bound by its terms but may offer extrinsic evidence tending to show the true agreement between the parties thereto (see Burlingham v. Gray (1943), 22 Cal.App.2d 87, 93, 137 P.2d 9, and cases there cited; 10 Cal.Jur. 918, sec. 186), the trial court clearly had the right to consider McKinney's testimony introduced for such purpose.

[4] The testimony of appellant's bookkeeper, called as a witness by appellant, discloses that between May 1, 1938, and November 1, 1938, appellant collected on the assigned contracts the sum of $2,616.90 and that on other occasions subsequent to May 1, 1938, additional sums aggregating $2,632 were collected. (The witness testified further that on specified dates between March 14, 1939, and January 31, 1940, Glick had collected an additional $1,906.11 on the contracts.) Although the evidence does not affirmatively show that such $2,632 was received by appellant prior to November 1, 1938, it is not contended that that date is controlling or that failure to establish that the sum had been paid by then is fatal to the judgment. Interest was allowed only from May 20, 1940. Moreover, the only person in a position to prove the exact dates of such payments was appellant, who received them, and he has failed to do so. Thus the trial court was justified in find-

ing that after the agreement of May 1, 1938, between Glick and McKinney there was received by Glick the total sum of at least $5,248.90 ($2,616.90 plus $2,632) to which Karp's assignment attached, and that even after deducting from such total the $1,800 owing and assigned by McKinney to the Board of Equalization, there still remained in Glick's hands the sum of $3,448.90 from which he was obligated to pay to Karp (plaintiff's alleged assignor) the sum of $3,036 which McKinney had assigned to Karp.

[5-7] We turn next to appellant's contention that the evidence fails to support the finding that Karp assigned to plaintiff his chose in action against Glick. After closely studying the record of proceedings in the trial court we concluded that it contained no evidence to support this finding. Therefore, acting pursuant to the provisions of section 956a of the Code of Civil Procedure (see also Cal.Const., art. VI, sec. 4¾) and in order to give plaintiff an opportunity to present such evidence if it existed, we appointed the trial judge to act as our referee to receive "evidence * * * directed to, and responsive to, the issues raised by the allegations" of assignment from Karp to plaintiff and "by such denial of those allegations as is contained in the answer of defendant Fred P. Glick" to the complaint. At the hearing before the trial judge sitting as our referee the plaintiff introduced into evidence a written assignment to herself of the promissory note executed by McKinney in Karp's favor for which, it will be recalled, the assignment from McKinney to Karp of "the sum of $3036 out of monies due me from [the] contracts" held by Glick, was given as partial security. Inasmuch as the assignment of a debt ordinarily carries with it all rights which are incidental to it, including all collateral securities or liens (see Civ.Code, sec. 1084; Union Supply Co. v. Morris (1934), 220 Cal. 331, 338-340, 30 P.2d 394; 3 Cal.Jur. 279, sec. 32, and cases there cited; 6 C.J.S., Assignments, p. 1143, § 87), the evidence of the assignment of the promissory note to plaintiff is sufficient to support the finding that the chose in action securing such note also passed to plaintiff.

[8] Appellant has attempted to appeal from an order denying his motion for leave to file an amended answer and cross-complaint and from an order denying his motion for a continuance. Such orders are not appealable and may be reached only through the appeal from the judgment. (See Code Civ.Proc. sec. 963.) Inasmuch as appellant's contentions that such motions should have been granted are not founded on any showing of substantial prejudice, no useful purpose would be served by discussing them.

The judgment is affirmed. The attempted appeals from the orders are dismissed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, CARTER, and TRAYNOR, JJ., concurred.

23 Cal.2d 288

CRANE et al. v. SMITH et al.

L. A. 18754.

Supreme Court of California.

Dec. 15, 1943.

Rehearing Denied Jan. 13, 1944.

1. Appearance ⚷25

The statutory requirement that a complaint be amended when the identity of one sued by a fictitious name is ascertained was waived by the appearance and plea of a defendant, which alleged that it was sued as one of the fictitious defendants named in the complaint. Code Civ.Proc. § 474.

2. Negligence ⚷134(4)

Evidence that three-year-old plaintiff could easily have inserted finger in nozzle of coffee grinder, was within reach of coffee grinder, made an outcry heard by clerk while grinder was running, that blood was found on floor under spout of grinder, and that immediately after outcry plaintiff's finger was badly lacerated and had ground coffee upon it, was substantial evidence to support finding that plaintiff's finger was inserted in the grinder, notwithstanding that no one saw plaintiff do so.

3. Negligence ⚷32(1), 52

A possessor of land who knows, or reasonably should know, of a natural or artificial condition upon his premises which he should foresee, exposes his business visitors to an unreasonable risk, and who has no basis for believing that they will discover the condition or realize the risk involved therein, is under a duty to exercise ordinary care either to make condition reasonably safe or give adequate warning to enable them to avoid harm.

4. Negligence 🔑32(4)

A proprietor who invites children upon his premises has duty to keep premises reasonably safe so far as such children are concerned and must recognize that children do not have ability to avoid danger to the same degree as do adults.

5. Negligence 🔑7

The known characteristics of children, including their childish propensities to intermeddle, must be taken into consideration in determining whether ordinary care for safety of a child has been exercised under particular circumstances.

6. Negligence 🔑50

One who invites children upon his premises must take whatever precaution ordinary care would dictate to protect the invited children from any instrumentality he maintains upon the premises which is likely to affect them and to subject them to dangers which a reasonably prudent person would anticipate.

7. Negligence 🔑32(2)

It is sufficient to constitute one an "invitee" or "business visitor", to whom proprietor of premises must exercise ordinary care, that he be on premises for the convenience or necessity of one who is upon the premises for the purpose of the possessor's business, and it is not necessary that the visitor should himself be upon the premises for such purpose.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Visitor" and "Invitee".

8. Negligence 🔑32(4)

A child taken into a store by a customer is a "business visitor", regardless of whether it is necessary for the customer to have the child with her in order to shop.

9. Negligence 🔑32(4)

Three-year-old child, who accompanied her mother into defendant's store, was a "business visitor" to whom defendant was under duty to maintain the premises in a reasonably safe condition so far as such child was concerned.

10. Negligence 🔑134(4, 8)

Evidence authorized the finding that defendant's failure to place brightly painted coffee grinder which, when in operation, was attractive to children, in a place reasonably inaccessible to immature children or to warn three-year-old child against meddling with machine, constituted actionable negligence when child stuck finger into nozzle of grinder and was injured.

11. Negligence 🔑32(4)

The proprietor of a business establishment is not the insurer of the safety of infant invitee and liability attaches to the act or omission of such proprietor only if his action or failure to act is unreasonable under the particular circumstances.

12. Negligence 🔑32(1)

In determining whether the proprietor of a business establishment exercised a proper degree of care, the courts apply the rule that, where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.

13. Negligence 🔑32(1)

In determining reasonableness of care exercised by proprietor of a business establishment, if proprietor can accomplish same results by other conduct which involves less opportunity for harm to others, risk incurred by manner of doing business which results in injury is unreasonable

14. Negligence 🔑22

Where no particular interest of store proprietor was advanced by maintaining in the aisle a brightly painted coffee grinder which was attractive to small children when in operation and which was not equipped with a guard, and utility of grinder would be as adequate if placed in the less dangerous position behind the counter, the risk to intermeddling children outweighed the utility to proprietor of maintaining machine in the aisle, and proprietor, by so doing, was negligent.

15. Negligence 🔑32(4)

Where, at time three-year-old plaintiff sustained injury when she put finger into coffee grinder, the grinder was on an aisle in a portion of the store open to business visitors, the rule that one may be an invitee upon particular premises for specific purpose and yet become a mere licensee with respect to certain parts of the premises or appliances contained within it which were not intended for the use of visitors, had no application.

16. Negligence 🔑23(1)

Where three-year-old plaintiff, at the time of injury resulting when she put finger in coffee grinder, was in store as a business visitor, plaintiff was not obliged to rely upon the "attractive nuisance" doctrine to sustain a recovery, the purpose of which doctrine is merely to relax some of the rigors of the ancient rule of nonliability to trespassers.

See Words and Phrases, Permanent Edition, for all other definitions of "Attractive Nuisance".

17. Negligence 🔑82

Where trial court found upon sufficient evidence that proprietor of store should reasonably have anticipated that an immature child, who was unable to appreciate danger, might be injured by inserting a finger into coffee grinder, so that proprietor should have taken precautions to guide against childish propensity to intermeddle, act of three-year-old plaintiff in inserting her finger into coffee grinder was not such an "independent intervening act" as to constitute it the proximate cause of plaintiff's injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Independent Intervening Act".

18. Negligence 🔑89(3)

The negligence of a mother in caring for three-year-old child in a store is imputable to the father and is a defense to his action in behalf of the community to recover for injuries to which such negligence contributed.

19. Negligence 🔑95(1)

A want of due care by a parent in caring for a child in a store does not excuse the negligence of the proprietor in failing to take proper precaution for the safety of children whom he has expressly or impliedly invited upon the premises.

20. Negligence 🔑85(3)

Three-year-old child could not be guilty of contributory negligence.

21. Appeal and error 🔑1008(1)

Where mother of three-year-old child was watching clerk weigh her purchase and did not see child put finger in coffee grinder and there was nothing to show that mother knew or had reason to believe that coffee grinder would not be adequately equipped with guards for protection of children, whether mother was negligent so as to bar action for consequential damages by father was for trier of facts.

22. Damages 🔑132(13)

$4,800 for the loss to a three-year-old girl of a portion of the end joint of an index finger was not excessive.

23. Appeal and error 🔑1004(1)

An award cannot be held excessive as a matter of law because lesser amounts have been deemed adequate compensation for similar injuries.

24. Appeal and error 🔑195

Where, by voluntary appearance in action of one sued as a fictitious defendant, such defendant has invoked judgment of the court, it may not for first time on appeal complain of plaintiff's failure to amend complaint in accordance with statute directing that a complaint shall be amended when the identity of one sued by a fictitious name is ascertained. Code Civ.Proc. § 474.

In Bank.

Appeal from Superior Court, of Los Angeles County; Raymond McIntosh, Judge.

Action by Janice Crane, by her guardian ad litem, Bruce Crane, and by Bruce Crane, against C. S. Smith and others to recover for injuries sustained by the minor plaintiff and for consequential damages to the guardian ad litem when infant plaintiff inserted her finger in a coffee grinding machine maintained by the defendant C. S. Smith Metropolitan Market Company. From a judgment for plaintiffs, C. S. Smith Metropolitan Market Company appeals.

Affirmed.

Prior opinion 136 P.2d 606.

Russell H. Pray, of Long Beach, Samuel P. Block, of Compton, and S. J. Nordorf and William C. Price, both of Long Beach, for appellant.

Ben C. Cohen and George Cohn both of Los Angeles, and Barnett Shapiro, of Santa Monica, for respondents.

EDMONDS, Justice.

Janice Crane, a three-year-old child, was awarded damages for injuries received when she placed her finger in a grinder used by C. S. Smith Metropolitan Market Company to prepare coffee for the customers of one of its stores. The appeal from the judgment presents for decision questions concerning the liability of a merchant for maintaining machinery which may be reached by children with possible injury to them.

The action was brought in the name of the child by Bruce Crane, her father, as guardian ad litem. He is also a plaintiff in his individual capacity. C. S. Smith and several persons sued by fictitious names were charged as defendants.

In the first count of the complaint, it is alleged, Janice, a three-year-old girl, was in the Smith market with her mother. Mrs. Crane was purchasing grocery supplies, including some coffee. The defendants "carelessly, recklessly and unlawfully placed and maintained a coffee grinder * * * in one of the aisles frequented by the patrons of [the] * * * market and easily accessible to patrons and to children of tender years, which facts were well known, or should have been known, to defendants." This coffee grinder, when operated, "was particularly attractive to and dangerous to children of tender years," the defendants knew or should have known this, and the accident would not have occurred if the grinder had not been placed and maintained so as to be easily accessible to young children. Janice, the complaint continues, because of her age, was "wholly unable to appreciate or to guard or to protect herself against the dangerous appliance," and "unwittingly and unknowingly inserted the fourth finger of her left hand in the coffee grinder," receiving the injuries which form the basis of her claim for damages. In addition to these allegations, the second count charges the defendants with negligence in failing to place proper safeguards around the coffee grinder to prevent injury to young children who would be attracted to it when in operation, and, according to the third count, they were guilty of negligence in the operation of the coffee mill. The fourth count sets forth Bruce Crane's claim for the amount of medical expenses paid or incurred for his daughter's treatment.

C. S. Smith Metropolitan Market Company filed an answer, reciting that it was sued as John Doe Company. According to the answer it, and not the defendant C. S. Smith, owned and operated the market in which the injury occurred. All of the allegations in the complaint, other than those relating to Janice Crane's presence in the market with her mother, were denied. As affirmative defenses the market company asserts that the injury, if any, was the result of an unavoidable accident, that a recovery by Janice is barred by her contributory negligence, and that Bruce Crane may not recover by reason of his contributory negligence, and that of his wife, in permitting "a child of tender and immature years to wander about the premises without any proper care or supervision."

According to uncontradicted evidence, it was the custom of patrons, when purchasing coffee in the "self serve" market where the accident occurred, to inform a clerk as to the amount desired. He placed the coffee beans in the machine which was a part of the store's equipment and supervised the grinding of them. This grinder was located on an aisle readily accessible to the public.

Witnesses for the child were called to show the usual manner of placing coffee grinders. These witnesses, testifying from much experience in the sale of such equipment, stated that machines of the type used in the Smith market were ordinarily placed behind the counter; they had never seen a machine of the kind which caused the injury on a store aisle. They described it as of a type in common use 15 to 25 years ago and having no guard to protect one from injury if a finger were inserted in the nozzle. For purposes of safety of children, the modern style of grinder has a guard, such as small wires in the spout. Customarily an unprotected grinder is put behind the counter, or if a small model, upon the back of the check stand.

According to one of these witnesses, the mill was ornamented and painted as an attractive fixture. It had a north and a south hopper for receiving beans, but only the north hopper was used. A spout or nozzle protruded from each hopper and discharged the ground coffee into a canister.

From Mrs. Crane's testimony it appears that on the day of the accident, she asked a clerk to grind one-half pound of coffee. The child was standing at her mother's right, close to the coffee grinder. Suddenly the child rushed to her mother and showed her a lacerated finger. The mother immediately took the child to the automobile in which Mr. Crane was sitting and, in looking at her daughter's finger, noticed "some brown stuff" on it which she testified was ground coffee. Re-entering the store, Mrs. Crane saw blood on the floor under the spout on the south side of the mill. The motor was running when the child left her mother and until she returned exhibiting the injured finger. The canister was pushed to one side of the spout, leaving the nozzle exposed. Mrs. Crane testified that she did not see the child put her finger in the mill because she was watching the clerk weigh the coffee.

Upon this evidence the court found in accordance with the allegations of the complaint. It specifically found that the coffee grinder, when in operation, was particularly attractive and dangerous to a child of the age of Janice, which fact was well known, or should have been known to the market company and its employees. And Janice, the court found, was too young to appreciate the dangerous character of the mill. As the direct and proximate result of the store's negligence in placing the grinder in the passageway so as to be easily accessible and dangerous to children of tender years, Janice, being too young to comprehend the attendant danger, inserted the fourth finger of her left hand in a spout of the machine while the mill was being operated by one of its employees in the scope of his employment. The child suffered lacerations, fracture and severe injury to the finger, resulting in the amputation of a portion of the distal phalanx and a consequent permanent disfigurement. The court also found that the market company negligently failed to provide the coffee mill with proper safeguards to protect a young child such as Janice, who would likely be attracted to the grinder when it was in operation.

Other findings are that the market company, through its employees, was negligent in failing to warn Janice of the danger after knowledge of her presence near the machine. In addition, it was negligent in failing to keep the mill and canisters in good condition, and, as a result of this negligence, Janice is entitled to $4,800 as damages for the injuries sustained, and her father has incurred medical expense of $45. Finding the affirmative defenses to be untrue, judgment was ordered accordingly.

Upon appeal, the market company contends that the evidence does not establish its negligence, for at the time of the accident Janice was a mere licensee or trespasser and its sole duty was to refrain from willfully or wantonly injuring her. But even assuming that the child was an invitee to whom was owed the duty of ordinary care, its negligence has not been established. Furthermore, says the appellant, the evidence fails to establish that any alleged negligence upon its part was a proximate cause of injury. Not only does the testimony of Mrs. Crane show that Janice was not injured by the coffee grinder but, assuming that the child did insert her finger in the mill, that act was an independent intervening cause of the resulting injury. And because the action was dismissed against all of the defendants named in the complaint, it is not a party against whom judgment may be rendered. And finally, it contends, the award of $4,800 is excessive for the injury sustained.

Answering these contentions, the respondents insist that the determination of the question of whether the marketing company was guilty of negligence is entirely one of fact which the court, upon substantial evidence, resolved in their favor. At the time of the accident, so they say, the minor child was an invitee, and, as such, the appellant owed a duty to exercise toward her the care and prudence required of a reasonable person under such circumstances. The care required to be exercised by it was to anticipate that children of immature years might tamper with the coffee mill, and it should have taken steps to safeguard the minor in the manner of the placement and operation of the machine. The finding of the court that the coffee grinder was negligently maintained and equipped is amply supported by the evidence. Since Janice was too young to be guilty of contributory negligence, and as the contributory negligence of a parent is not imputable to an infant suing in its own right, the judgment in her favor must be upheld.

[1] Upon the procedural question, the respondents deny that the action was dismissed as to the appellant. Although section 474 of the Code of Civil Procedure directs that a complaint shall be amended when the identity of one sued by a fictitious name is ascertained, this requirement may be, and here was, waived by the appearance and plea of the appellant. And they main-

tain that the award of damages, being a determination within the discretion of the trial court, should not be disturbed.

[2] Considering the appellant's assertion that there is no evidence showing injury to Janice by the coffee grinder, it is true that no witness saw the child insert her finger in the spout of the machine. The appellant, in support of its claim, refers the court to certain none-too-clear statements of Mrs. Crane on cross-examination as to the position of the child in respect to the coffee mill at the time of the accident. But the record also disclosed testimony that the child was within reach of the coffee grinder when her hand was disengaged from that of her mother and she made an outcry which was heard by the clerk while the machine was in operation. Furthermore, the canister was ajar and the spout exposed before and after the accident so that the child could easily have inserted a finger in the nozzle. Moreover, blood was found on the floor immediately under the south spout, which was the one nearest to the child. In addition, immediately after the outcry, the child's finger was badly lacerated and had ground coffee upon it. Certainly, considering all of these facts, the finding that Janice's finger was inserted in the machine has substantial support in the evidence.

[3-6] A possessor of land who knows, or reasonably should know, of a natural or artificial condition upon his premises which, he should foresee, exposes his business visitors to an unreasonable risk and who has no basis for believing that they will discover the condition or realize the risk involved therein, is under a duty to exercise ordinary care either to make the condition reasonably safe for their use or to give a warning adequate to enable them to avoid the harm. Kataoka v. May Dept. Stores Co., 60 Cal.App.2d 177, 182, 140 P.2d 467; Koppelman v. Ambassador Hotel Co., 35 Cal.App.2d 537, 540, 96 P.2d 196; Tuttle v. Crawford, 8 Cal.2d 126, 130, 63 P.2d 1128; 2 Rest., Torts, sec. 343; 45 C.J., Negligence, sec. 237, pp. 826-830. And where the proprietor invites children upon the premises, he has a duty to keep his property reasonably safe so far as they are concerned. Kataoka v. May Dept. Stores Co., supra, 60 Cal.App.2d page 184, 140 P.2d 467; Hillerbrand v. May Mercantile Co., 141 Mo.App. 122, 131, 121 S.W. 326; Graves v. May Dept. Stores Co., Mo. App.1941, 153 S.W.2d 778, 782; 45 C.J., Negligence, sec. 248, p. 838. As children have neither an adult's capacity to appreciate the risk involved in a potentially dangerous natural or artificial condition nor the ability to avoid danger to the same degree as do adults, and all persons dealing with them are chargeable with such knowledge, the possessor of land owes the invited children the duty to exercise a greater degree of care than that which he must exercise for the safety of adults. Kataoka v. May Dept. Stores Co., supra, 60 Cal. App.2d pages 182-184, 140 P.2d 467; Harrison v. Gamatero, 52 Cal.App.2d 178, 183, 184, 125 P.2d 904; Hernandez v. Murphy, 46 Cal.App.2d 201, 208, 115 P.2d 565; Brizzolari v. Market St. Ry. Co., 7 Cal.App.2d 246, 248, 46 P.2d 783; Shannon v. Central-Gaither U. School Dist., 133 Cal.App. 124, 129, 23 P.2d 769; 45 C.J. Negligence, sec. 248, p. 838, sec. 78, p. 702. The known characteristics of children, including their childish propensities to intermeddle, must be taken into consideration in determining whether ordinary care for the safety of a child has been exercised under particular circumstances. Kataoka v. May Dept. Stores Co., supra, 60 Cal.App.2d page 184, 140 P.2d 467; Hillerbrand v. May Mercantile Co., supra, 141 Mo.App. pages 131-133, 121 S.W. 326; Graves v. May Dept. Stores Co., supra, 153 S.W.2d page 782; 45 C.J., Negligence, secs. 78, 248. One who invites children upon his premises must take "whatever precautions ordinary care would dictate to protect the invited children from any instrumentality he maintains upon his premises which is likely to attract them and subject them to dangers which a reasonably prudent person would anticipate." Kataoka v. May Dept. Stores Co., supra, 60 Cal.App.2d page 185, 140 P.2d page 472.

[7-9] In order to be an invitee or business visitor, it is not necessary that the visitor should himself be upon the land for the purpose of the possessor's business but it is sufficient that he be on the premises for the convenience or necessity of one who is upon the land for such a purpose. Bellon v. Silver Gate Theatres, Inc., 4 Cal.2d 1, 47 P.2d 462; Allred v. Orth, 206 Cal. 494, 274 P. 955; Goldstein v. Healy, 187 Cal. 206, 201 P. 462; Jacobi v. Builders' Realty Co., 174 Cal. 708, 164 P. 394, L.R.A.1917E, 696; Muller v. Hale, 138 Cal. 163, 71 P. 81; Hamilton v. Union Public Market, 15

Cal.App.2d 340, 59 P.2d 459; Skoglund v. Moore Dry-Dock Co., 11 Cal.App.2d 287, 53 P.2d 1001; Gulley v. Traders Oil Corp., 102 Cal.App. 557, 283 P. 97; Roach v. Wells Fargo Bank & Union Trust Co., 102 Cal.App. 380, 282 P. 967; Spore v. Washington, 96 Cal.App. 345, 274 P. 407; Primmer v. C. C. Harris Oil Co., 51 Cal.App. 401, 196 P. 921; Runyon v. City of Los Angeles, 40 Cal.App. 383, 180 P. 837; 2 Rest., Torts, sec. 332, comment d. Accordingly, a child taken to a store is a business visitor regardless of whether it is necessary for the customer to have the child with her in order to shop. Gulf Refining Co. v. Moody, 172 Miss. 377, 387, 160 So. 559, 562; Carlisle v. J. Weingarten, Inc., 137 Tex. 220, 224–226, 152 S.W.2d 1073, 1076; 2 Rest., Torts, sec. 332, comment d; and see Primmer v. C. C. Harris Oil Co., supra; Runyon v. City of Los Angeles, supra, 40 Cal.App. page 392, 180 P. 837. Janice, therefore, was a business visitor of the appellant's when she accompanied her mother in the store, and the appellant was under a duty to maintain the premises in a reasonably safe condition so far as she was concerned.

[10] The testimony of the respondents' witnesses that the coffee mill was brightly painted and would attract children when in operation affords ample support for the trial court's finding that it was particularly attractive and dangerous to a child of three. And no basis appears upon which to question the finding that Janice was too young to appreciate the dangerous character of the machine. The record contains substantial evidence that machines were available which had adequate safeguards against childish propensities to meddle with them. In any event, there is evidence that the customary position of unguarded coffee mills is behind the counter and not upon an aisle. Under these circumstances, there was substantial evidence justifying the trial court's finding that the failure of the appellant to place the coffee grinder in a place reasonably inaccessible to immature children, or to warn the child against meddling with the machine, constituted actionable negligence.

[11-14] These rules do not make the proprietor of a business establishment the insurer of the safety of infant invitees. See 45 C.J., Negligence, sec. 248, p. 838. Liability attaches to the act or omission of the land occupier only if his action or failure to act is unreasonable under the particular circumstances. As in all cases where a standard of conduct is involved, the reasonable character of the care depends upon whether the interference with the actor's own affairs is warranted by the other's danger. The broad concept underlying the determination of reasonableness of conduct in tort law is stated as follows: "Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done." 2 Rest., Torts, sec. 291 [1]; see also secs. 292, 293; see Mastrangelo v. West Side U. H. S. Dist., 2 Cal.2d 540, 549, 42 P.2d 634; Cooley v. Public Service Co., 90 N.H. 460, 465–467, 10 A.2d 673, 676, 677; Vigneault v. Dr. Hewson Dental Co., 300 Mass. 223, 227, 228, 15 N.E.2d 185, 187, 188, 129 A.L.R. 95. And in balancing the utility of the conduct as against the magnitude of risk involved in it, the extent of the chance that the actor's interest can be adequately advanced or protected by another and less dangerous course of conduct must be considered. 2 Rest., Torts, sec. 292 [c]; Vigneault v. Dr. Hewson Dental Co., supra, 300 Mass. pages 227, 228, 15 N.E.2d 185, 129 A.L.R. 95. If the actor reasonably can accomplish the same result by other conduct which involves less opportunity for harm to others, the risk incurred by the manner of doing business which resulted in injury is clearly unreasonable. Vigneault v. Dr. Hewson Dental Co., supra, 300 Mass. pages 227, 228, 15 N.E.2d 185, 129 A.L.R. 95. So far as the present action is concerned, no particular interest of the appellant was advanced by maintaining the mill upon the aisle, and the utility of the machine would be as adequate were it to have been placed in the less dangerous position behind the counter. Consequently the risk to intermeddling children outweighs the utility to the proprietor of maintaining the machine upon the aisle, and its conduct in so placing the machine was not that of a reasonably prudent person.

Counsel for the appellant relies upon two decisions from other jurisdictions in which recovery was denied children who suffered injuries to their fingers by inserting them into the spouts of coffee grinders. However, in Connelly v. Carrig, 244 N.Y. 81, 154 N.E. 829, 830, the child was ten years old. Nothing in the opinion indicates that he was too young to appreciate the risk involved in sticking his finger into the coffee mill. In addition, the New York Court of Appeals emphasized, there was no claim that the appearance of the machine was such as to attract a child of the plaintiff's age nor proof that any usual or customary guards had been omitted. Accordingly, the court concluded, "There was nothing to indicate that [the coffee grinder] was not adequately protected or that any protection was necessary." In the other case, Holbrook v. Aldrich, 1897, 168 Mass. 15, 46 N.E. 115, 36 L.R.A. 493, 60 Am.St.Rep. 364, the court affirmed a judgment denying recovery to a child less than seven years of age who lost her fingers when she put her hand up the spout of the coffee mill in an attempt to get some whole kernels. In so ruling, the court said: "As the common law is understood by the most competent authorities, it does not excuse a trespass because there is a temptation to commit it, or hold property owners bound to contemplate the infraction of property rights because the temptation to untrained minds to infringe them might have been foreseen." This statement is contrary to the present great weight of authority, including the decisions of this jurisdiction, in so far as it excuses one by whose acts or omissions a child may be injured, from taking into consideration the known characteristics and propensities of its immature and "untrained" mind and is squarely inconsistent with the rule announced in Kataoka v. May Dept. Stores Co., supra. See cases collected in 45 C.J., Negligence, sec. 78, p. 702, sec. 237, p. 838; see California cases cited in Kataoka v. May Dept. Stores Co., supra, 60 Cal.App.2d page 183, 140 P.2d 467.

The appellant consistently has maintained, however, that although Janice was an invitee when she accompanied her mother into the store, when she meddled with the coffee mill her status changed to that of a "mere licensee or trespasser," to whom was owed "no duty except to abstain from willful or wanton injury." Powers v. Raymond, 197 Cal. 126, 239 P. 1069, 1071. In support of its position, the appellant invokes the rule that one may be an invitee upon particular premises for a specific purpose and yet become a mere licensee with respect to certain parts of the premises or appliances contained within it, which were not intended for the use of the visitor. Powers v. Raymond, supra, 197 Cal. page 131, 239 P. 1069; Irvine v. J. F. Shea Co., Inc., 41 Cal.App.2d 458, 459, 460, 107 P.2d 80; Koppelman v. Ambassador Hotel Co., supra, 35 Cal.App.2d page 541, 96 P.2d 196; Tharp v. San Joaquin Cotton Oil Co., 27 Cal.App.2d 554, 559, 81 P.2d 443, 82 P.2d 21; Buckingham v. San Joaquin Cotton Oil Co., 128 Cal.App. 94, 98, 16 P.2d 807; State Comp. Ins. Fund v. Allen, 104 Cal. App. 400, 413, 285 P. 1053.

[15] The rule relied upon by the appellant, however, has no application to the facts of this case. At the time of the injury, the coffee mill was on an aisle in a portion of the store open to business visitors. To say that a three-year-old girl accompanying her mother was such a visitor as she stood in front of the machine but a trespasser when she followed a childish impulse to put her hand on or in the fascinating red contrivance which made such interesting sounds would be to extend the doctrine of the cases denying compensation to one who has exceeded the scope of his invitation beyond their logical scope. Moreover, such reasoning would nullify the land occupier's duty to keep his premises free of natural or artificial conditions which involve an unreasonable danger to his business visitors when he has reason to believe that they will not realize the risk involved in the condition. Certainly, evidence shown by the present record justifies a finding that the child's act was one which a reasonably prudent person should have anticipated and guarded against.

[16] In repeatedly asserting that the judgment may not be sustained upon the theory of attractive nuisance, the appellant relies upon a statement made by the respondents' counsel at the commencement of the trial. But in stating to the court that recovery is not sought under the doctrine of attractive nuisance but upon the ground that the child was an invitee, lawfully upon the premises, and not a trespasser such as a plaintiff in a turntable case, counsel took a legally sound position. Janice, at the time of the injury, was in the market as a business visitor, and consequently "there is no need to invoke a rule whose purpose is merely to relax some of the rigors of the ancient rule of non-liability to trespassers." Kataoka v. May Dept. Stores Co., supra, 60 Cal.App.2d page 185, 140 P.2d page 472.

[17] The appellant claims, however, that the independent intervening act of Janice in inserting her finger into the coffee grinder was the proximate cause of her injury. But, according to the trial court's finding, the appellant should reasonably have anticipated that an immature child who was unable to appreciate the danger might be injured by inserting its finger in the machine. The childish propensity to intermeddle was the characteristic which the appellant should have taken reasonable precautions to guard against. Kataoka v. May Dept. Stores Co., supra; Hillerbrand v. May Mercantile Co., supra; Graves v. May Dept. Stores Co., supra; 45 C.J., Negligence, sec. 248, p. 838, sec. 78, p. 702.

[18-20] The appellant also contends that, when a child is accompanied by a parent and is in the latter's custody and control, the duty to keep the child from harm is upon the parent and may not be shifted to the storekeeper. It is true that the negligence of Mrs. Crane, if any, in caring for Janice is imputable to the father and is a defense to his action in behalf of the community to recover for injuries to which such negligence contributed. Kataoka v. May Dept. Stores Co., supra, 60 Cal.App.2d page 189, 140 P.2d 467; Dull v. Atchison T. & S. F. Ry. Co., 27 Cal.App.2d 473, 479, 81 P.2d 158. Any want of due care upon the part of a parent, however, does not excuse the negligence of the proprietor in failing to take proper precautions for the safety of children whom he has expressly or impliedly invited upon the premises, so far as the children are concerned, and therefore would not bar the minor plaintiff's action for its own injuries. Zarzana v. Neve Drug Co., 180 Cal. 32, 37, 179 P. 203, 15 A.L.R. 401; Kataoka v. May Dept. Stores Co., supra, 60 Cal.App.2d page 188, 140 P.2d 467. And since Janice was too young to be guilty of contributory negligence, the appellant's liability to her is established. Gonzales v. Davis, 197 Cal. 256, 240 P. 16; Hillerbrand v. May Mercantile Co., supra, 141 Mo.App. pages 132, 133, 121 S.W. 326.

[21] Even with respect to the repondent Bruce Crane's action, it may not be said that, as a matter of law, Mrs. Crane was guilty of negligence contributing to the injury to Janice. Mrs. Crane did not see Janice put her finger in the coffee mill; she was watching the clerk weigh her purchase. There is nothing to show that she knew, or had any reason to believe, that the machine would not be adequately equipped for the protection of children. And the question of her negligence was one for the trier of fact, who decided it in her favor. Kataoka v. May Dept. Stores Co., supra, 60 Cal.App.2d page 189, 140 P.2d 467.

[22, 23] The appellant's claim that the amount of damages awarded Janice is excessive, concerns an issue which is primarily factual in nature and is not therefore a matter which can be decided upon the basis of the awards made in other cases. Although $4,800 for the loss of a portion of the end joint of an index finger may seem quite large, damages are not excessive as a matter of law because a lesser amount has been deemed adequate compensation for a similar injury. Considering the effect which such a physical defect may have upon the child's mental state as well as her future choice of employment, the award does not warrant the conclusion that it was the result of passion, prejudice or corruption; it is therefore beyond the reach of an appellate court. Corvello v. Baumsteiger, 115 Cal.App. 194, 200, 1 P.2d 484.

Also, the fact that the complaint was not amended in conformity with section 474 of the Code of Civil Procedure, to designate the market company as a defendant, does not entitle it to a reversal. At the conclusion of the plaintiffs' presentation of their case, the market company's counsel moved "for a dismissal of the fictitious defendants and [the] specifically mentioned defendant, C. S. Smith." This motion was granted. He then argued a motion for nonsuit as to C. S. Smith Metropolitan Market Company on the ground of insufficiency of the evidence, which motion was denied. The market company subsequently presented its defense.

[24] Under these circumstances, it clearly appears that there was no intention on the part of the appellant, the respondents, or the court to dismiss the action as to the appellant. Obviously, if the contrary were true, the appellant would not have continued with the presentation of its motion for nonsuit and its defense to the action. Where by its voluntary appearance, the appellant has invoked the judgment of the court, it may not for the first time complain upon appeal of the respondents' failure to amend their complaint in accordance with the provisions of section

474, supra. See Bayle-Lacoste & Co. v. Superior Court, 46 Cal.App.2d 636, 644, 116 P.2d 458; City of Santa Barbara v. Eldred, 95 Cal. 378, 382, 30 P. 562.

The judgment is affirmed.

GIBSON, C.J., and SHENK, CURTIS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

23 Cal.2d 271

DILLARD et al. v. KERN COUNTY.

L. A. 18706.

Supreme Court of California.

Dec. 14, 1943.

1. Automobiles 🔑230
Counties 🔑213

The statute requiring filing of claims with specified public agencies, including counties, for personal injuries or property damage because of dangerous or defective condition of such agencies' property, is inapplicable, where agency's liability is predicated on negligence of officer or employee thereof, as in operating motor vehicle. Gen.Laws 1937, Act 5149; Vehicle Code, § 400, St.1935, p. 152.

2. Counties 🔑213
Municipal corporations 🔑741(1)
Schools and school districts 🔑115

The statute requiring that claim for personal injuries or property damage, resulting from dangerous or defective condition of public property and public officer's negligence, be filed with such officer and clerk or secretary of legislative body of municipality, county, or school district, applies only to actions against public agencies' officers or employees, not to actions against such agencies themselves, and is applicable to only such liabilities as arise from negligence connected with dangerous or defective condition of public property. Gen.Laws 1937, Act 5150; St.1943, p. 896.

3. Counties 🔑201, 213

The statute requiring itemization of all claims against county and providing that all such claims, whether founded on contract or on any act or omission of county or any officer or employee thereof, shall be presented to board of supervisors, as therein provided, before bringing suit thereon, embraces claims founded on torts, as well as contract claims. Pol. Code, § 4075.

4. Counties 🔑201

The words "presented and acted upon", in statute requiring that claims, not founded on contracts, against county be presented and acted upon in same manner as claims founded on contracts, include objections to, or waiver of sufficiency of, itemization of claims, by board of supervisors, as authorized by preceding portion of act applying only to contract claims, though such words may also refer to filing of claims with clerk of board, total or partial rejection of claims and reconsideration thereof, and rejection ensuing from failure to act thereon within 90 days. Pol.Code, §§ 4075–4077.

See Words and Phrases, Permanent Edition, for all other definitions of "Presented and Acted Upon".

5. Counties 🔑201

Itemization of claim against county, as required by statute, means that various elements thereof should be stated with particularity, whether claim is founded on contract or tort. Pol.Code, § 4075.

6. Statutes 🔑174

In construing statute, technicality in form should not be used to avoid a substantive right.

7. Automobiles 🔑230

A county, making no objection to form of claim against it for wrongful death of one riding in automobile struck by county's truck, is in no position to object that claim was not sufficiently specific on claimant's appeal from judgment for county in claimant's action for damages after rejection of claim on merits. Pol.Code, § 4075.

8. Automobiles 🔑230

A claim against county for wrongful death of claimants' husband and father, causing loss of his support, protection, society, and comfort, as result of collision at stated time and place between automobile in which he was riding and truck negligently operated by county and state forestry department through their agents and servants, sufficiently itemized facts, as required by statute, in absence of request by county for further details or amplification of those stated. Pol.Code, § 4075; Code Civ.Proc. § 377.

9. Counties ⚿201

Generally, substantial compliance with claim statutes in presenting claims, as against county, is sufficient. Pol.Code, § 4075.

10. Counties ⚿201

The phrase "all other details necessary", in statute requiring that claim, not founded on contract, against county, state certain details and all other details necessary for consideration of merits of claim, does not necessarily include requirement that claimant give his address. Pol.Code, § 4075.

11. Counties ⚿201

The statutory requirement that claim, not founded on contract, against county state public officers or employees alleged to be at fault, is substantially complied with by statement that negligence of county's agents and servants caused injury for which claim is made, without naming them or describing their duties or official capacities. Pol.Code, § 4075.

12. Automobiles ⚿230

A claim against county, for death of one riding in automobile struck by truck negligently operated by county and state forestry department "through their agents and servants", substantially complied with statutory requirement that public officers or employees alleged to be at fault be stated, though it did not name or describe duties or official capacities of such agents and servants. Pol.Code, § 4075.

13. Master and servant ⚿329

In action against employer for injuries caused by employee's negligence, plaintiff, in pleading employer's negligence, based on respondeat superior doctrine, need not ordinarily allege employee's name.

14. Automobiles ⚿230

In action against county and county fire department for death of one riding in automobile struck by defendants' truck, complaint, alleging defendants' negligent operation of truck through their agents and servants, without naming them or describing their duties or official capacities, was not demurrable for uncertainty as to which of defendants was operating truck at time of collision, since defendants were in superior position to know such matters.

15. Pleading ⚿225(1)

Plaintiff must be permitted to amend complaint, demurred to for uncertainty, if he can state cause of action by so doing.

16. Appeal and error ⚿673(1)
Counties ⚿202

A statement, in verification on copy of claim against county, attached to complaint in action on such claim, that matters recited in claim were true of claimant's own knowledge, was sufficient, though verification appearing in record on appeal from judgment for defendant stated that claim was just and correct claim against state and state forestry department without mentioning county.

◆

In Bank.

Appeal from Superior Court, Kern County; William A. Bradshaw, Judge.

Action by Geneva Dillard and another against the County of Kern and another to recover damages for the wrongful death of Henry Dillard as the result of a collision between an automobile in which he was riding and a truck operated by defendant county. From a judgment for defendant after a demurrer to plaintiffs' second amended complaint was sustained without leave to amend, plaintiffs appeal.

Reversed.

Prior opinion, Cal.App., 134 P.2d 275.

Charles I. Rosin, of Los Angeles, for appellants.

Borton, Petrini, Conron & Borto, of Bakersfield, for respondent.

CARTER, Justice.

A judgment of dismissal was entered after the demurrer of defendant Kern County was sustained without leave to amend, in a wrongful death action based upon section 400 of the Vehicle Code, St. 1935, p. 152, and arising from the alleged negligence of the county and its agents and servants in the operation of a motor vehicle.

The chief controversy presented by this appeal is the sufficiency of the claim filed by plaintiffs with Kern County under the claim statutes. Plaintiffs allege that the accident resulting in the death occurred on September 24, 1940, and that on March

24, 1941, they presented to the county a claim reading in part as follows: "Claim of Geneva Dillard, Widow of Henry Dillard, Deceased, and Arley Dillard, a Minor Child of Henry Dillard, Deceased: Damages suffered by claimants, Geneva Dillard, widow of Henry Dillard, Deceased and Arley Dillard, a minor child of Henry Dillard, Deceased, as a result of the negligence of the County of Kern and the State Department of Forestry, State of California, through their agents and servants causing truck operated by said County of Kern and the California State Department of Forestry, to collide with automobile in which claimants' husband and Father, Henry Dillard, deceased, was riding, to-wit: On September 24, 1940, at approximately the hour of 8:00 o'clock P. M. at the intersection of the Edison Highway and Weedpatch Road, Kern County, State of California: Death of Husband and Father of claimants and loss of his support, society and comfort ...$30,000.00." The claim was rejected on its merits, no notice being given of any deficiency in its form.

[1] In 1931 two claim statutes were passed. Stats.1931, p. 2475, Deering's Gen. Laws, 1937, Act 5149; Stats.1931, p. 2476, Deering's Gen.Laws, 1937, Act 5150. The first act, Stats.1931, p. 2475, requires the filing of a claim with the specified agency where any person has been injured or any property damaged by reason of the dangerous or defective condition of the property of any of the public agencies therein designated. That statute does not apply where the liability of the public agency is predicated upon the negligence of an officer or employee and the doctrine of respondeat superior, as differentiated from the situation where the liability is based upon negligence in connection with the dangerous or defective condition of the public agency's property. Specifically, it does not apply to the liability of a public agency based upon the negligence of an officer or employee in the operation of a motor vehicle under section 400 of the Vehicle Code. Raynor v. City of Arcata, 11 Cal.2d 113, 77 P.2d 1054.

[2] The second act, Stats.1931, p. 2476, likewise provides for the filing of claims in certain instances. But that statute, even as amended in 1937, Stats.1937, p. 585, applies only to actions against officers or employees of the public agency and not to actions against the public agency. Redlands, etc., School Dist. v. Superior Court, 20 Cal.2d 348, 125 P.2d 490. Moreover, that statute does not apply to a liability unless it arises from negligence connected with the dangerous or defective condition of public property. That was declared to be the limit of its application in its original form in 1931 and after its amendment in 1933. St.1933, p. 2147. Jackson v. City of Santa Monica, 13 Cal.App.2d 376, 57 P.2d 226; Kenney v. Antioch L. O. School Dist., 18 Cal.App.2d 226, 63 P.2d 1143; Ogando v. Carquinez G. School Dist., 24 Cal.App.2d 567, 75 P.2d 641. Its amendment in 1937, Stats.1937, p. 585, did not change that limitation. Jackman v. Patterson, 42 Cal.App.2d 255, 108 P.2d 682. It should be noted that claim provisions are now embraced in the Government Code. Stats.1943, ch. 134, p. 896.

In the instant case the appeal is from a judgment after an order sustaining the demurrer of defendant Kern County and it does not appear that the negligence arose out of the dangerous or defective condition of public property, hence neither of the 1931 claim statutes applies.

[3-7] Section 4075 of the Political Code is applicable to claims of the character involved in the instant case. Artukovich v. Astendorf, 21 Cal.2d 329, 131 P.2d 831. It provides that no claim against the county shall be considered by the board of supervisors unless it is itemized, giving names, dates, etc., and is presented within a year after the last item of the claim accrued; that "*If, in case of any claim which requires itemizing, the board do not hear or consider the same because it is not itemized, they shall cause notice to be given to the claimant or his attorney of that fact and give time to have the claim itemized* and reverified; provided that the verification of claims may be dispensed with as provided in section 4076 of this code. All claims against any county * * * whether such claim be founded upon contract * * * or upon any act or omission of the county or any officer or employee thereof, * * * shall be presented to the board of supervisors as herein provided before any suit may be brought on any such claim, and no suit shall be brought on any such claim until said claim has been presented as herein provided and rejected in whole or in part. In presenting any claim not founded upon contract full details as to the nature of the claim, the time and place when and

where it arose, the public property and public officers or employees alleged to be at fault, the nature, extent and amount of the injury or damage claimed, and all other details necessary to a full consideration of the merit and legality of such claim shall be stated in writing signed by the claimant or someone authorized by him, *and in all other respects such claims shall be presented and acted upon in the same manner as claims founded upon contracts.*" (Emphasis added.) Apparently the first part of that section is concerned with contract claims, requiring that they be itemized and setting forth the particular matters that must be stated. Under that section, as it read prior to its amendment in 1931 (St.1915, p. 1185), it was held that, under the first sentence of the foregoing quoted portion thereof, the failure of the board of supervisors to give notice to the claimant on a contract claim of an insufficiency of the itemization, coupled with a rejection of the claim on the merits rather than as to form, constituted a waiver by the county of any objection to the sufficiency of the itemization. Pedro v. County of Humboldt, 217 Cal. 493, 19 P.2d 776; Nohl v. County of Del Norte, 45 Cal.App. 306, 187 P. 761. The amendment of 1931 added all but the first sentence of the above-quoted excerpt therefrom and thereby embraced claims founded upon tort. Stats.1931, p. 197. It was clearly the intent of the Legislature that the first sentence of the quoted portion in regard to the waiver of insufficiency of itemization was to be applied to the portion added in 1931. That is evidenced from the last sentence of the amendment, "and in *all other respects* * * * claims shall be *presented and acted upon* in the *same manner as claims founded upon contracts.*" (Emphasis added.) "Presented and acted upon" include an objection or waiver by the board of the sufficiency of the itemization in the course of the board's procedure. Merely because that sentence may also refer to the filing of the claim with the clerk, Pol.Code, sec. 4076, the total or partial rejection of the claim and reconsideration thereof, Pol. Code, sec. 4077, and a rejection ensuing from a failure to act in ninety days, does not mitigate against that interpretation. The itemization of a claim means that the various elements thereof should be stated with particularity. The statement with regard to the requirement being the same as for contract claims is in the same section stating the rules for contract claims, and certainly an objection to the sufficiency or the particularity of the facts required to be stated is embraced within the procedure of presenting and acting upon the claims. Such an interpretation is wholly reasonable in view of the established rule that technicality in form should not be used to avoid a substantive right. It is no more than proper that a claimant should be entitled to amend his claim. The section requires certain facts to be stated in tort claims, which are the particular matters which must be included, or the itemization of the claim. Hence, the tort claims are "required to be itemized" within the meaning of the first sentence of the quoted portion of the section, and a failure to sufficiently itemize them should be availed of by the board by giving the notice mentioned. In the instant case it is alleged that no objection was made as to the form of the claim. It was rejected on the merits. Therefore, even if it be assumed that the various matters to be stated were not sufficiently specific, defendant is not now in a position to object thereto.

Cases involving the claim statutes, Stats. 1931, pp. 2475, 2476, stating that the public agency cannot be estopped to assert the insufficiency of the claim are not in point because those statutes do not contain a waiver clause as appears in section 4075 of the Political Code. See Cooper v. County of Butte, 17 Cal.App.2d 43, 50, 61 P.2d 516. There is nothing in the last-cited case contrary to these views. There the court held that the 1931 claim act, Stats.1931, p. 2475, not section 4075 of the Political Code, applied, and thus no estoppel. We have seen the 1931 act does not apply in the instant case.

[8] The objection to the claim in the instant case goes only to the sufficiency of the itemization of the facts. The claim states the time and place of the accident. The nature and extent of the injury is the death of the husband and father, respectively, of plaintiffs, causing loss of "support, protection, society, and comfort." The cause of the accident is given as negligence in the operation of a truck. It is stated that the negligence was that of the defendant county and the State Department of Forestry through their agents and servants. If defendant required further details or an amplification of those stated, it should have requested them.

[9] There is a further ground for holding the claim sufficient. With reference to claim statutes, it is the general rule that substantial compliance will suffice. Ridge v. Boulder Creek, etc., School Dist., 60 Cal.App.2d 453, 140 P.2d 990; Kelso v. Board of Education, 42 Cal.App.2d 415, 109 P.2d 29; Sandstoe v. Atchison, T. & S. F. Ry. Co., 28 Cal.App.2d 215, 82 P.2d 216; Uttley v. City of Santa Ana, 136 Cal.App. 23, 28 P.2d 377; Milovich v. City of Los Angeles, 42 Cal.App.2d 364, 108 P.2d 960; 38 Am.Jur., Municipal Corporations, sec. 690; 106 A.L.R. 857; McQuillin, Mun.Corps. [2d ed. rev.], vol. 6, p. 631, sec. 2633; see Hall v. City of Los Angeles, 19 Cal.2d 198, 120 P.2d 13; Hennessy v. County of San Bernardino, 47 Cal.App.2d 183, 117 P.2d 745.

The instant claim substantially complied with the statute. The details as to the nature of the claim clearly appear. It is a claim for wrongful death arising out of a collision resulting from negligence in the operation of a truck. The time and place of the collision are precisely stated. The extent and amount of the injury or damage claimed is clearly set forth. The extent of the injury was the death of the husband and father of the claimants, and the damage is in the amount of $30,000 for loss of support, society and comfort. For a wrongful death the damages recoverable are such as "under all the circumstances of the case, may be just." Code Civ.Proc. sec. 377. Such an allegation of damages, even when stated in a complaint in an action for wrongful death, would be sufficient. Waterbury v. Elysian Spring Water Co., 139 Cal.App. 355, 33 P.2d 1048; Bond v. United Railroads, 159 Cal. 270, 113 P. 366, 48 L.R.A.,N.S., 687, Ann.Cas.1912C, 50.

[10] Section 4075 does not require that the claimant must give his address, such as is true in some other claim statutes. Nor may it be said that such requirement is necessarily included in the phrase "all other details necessary" for the consideration of the merits of the claim. Sufficient facts constituting substantial compliance are set forth for investigation and consideration of the claim.

[11-13] The chief contention of defendant is that there was lack of compliance with the requirement that there be stated the "public officers or employees alleged to be at fault." It will be recalled that the claim states the death was caused by the negligence of Kern County and the State Department of Forestry "through their agents and servants" in the operation of a truck. The statute does not require that the officers or employees be named or that their duties or official capacity be described. If the purpose of the statute is to enable the county to make an investigation and determine the claim on the merits, there is substantial compliance when it is advised that the negligence of its agents and servants caused the injury without further describing them. The employer, defendant county, is more apt to know the names and capacities of its employees. It was informed that a truck operated at a precise time and place caused the injury. It could readily ascertain from its superior position the particular employee who was involved. Ordinarily, in pleading the negligence of defendant employer, based upon respondeat superior, the plaintiff need not allege the name of the employee because of the superior position of the employer. See 45 Corpus Juris, 1089–1090; 3 C.J.S., Agency, § 312; 19 C.J.S., Corporations, § 1334.

The authorities cited by defendant (see Hall v. City of Los Angeles, supra; 9 Cal.Jur. 10-yr. Supp., Public Officers, sec. 190) are not contrary to the foregoing views because they involved a failure to file any claim, or a claim which completely omitted one of the required elements.

[14, 15] There is no merit in the contention that the complaint is uncertain in that it cannot be ascertained therefrom which of the defendants was operating the truck at the time of the collision. The demurrer here involved was to the second amended complaint, at which time the defendants named were Kern County and Kern County Fire Department. The other defendants were sued by fictitious names. The complaint charges all the defendants and their agents and servants with having negligently operated, driven and managed the truck. Liberality in pleading compels the conclusion that the demurrer should not have been sustained. Defendants were in a superior position to know the matters concerning which the uncertainty is charged. (see authorities cited, supra.) In any event, justice requires that plaintiff be permitted to amend his complaint if by doing so he can state a cause of action.

[16] The verification on the claim is sufficient. As it appears in the record it

reads, after the introductory words: "That this is a just and correct claim and demand against the State of California and State Department of Forestry; that she has had the matters above recited, read to her and that the same is true of her own knowledge." Defendant Kern County is not mentioned. However, plaintiffs assert, and defendant does not deny, that the copy of the claim attached to their complaint omitted a statement in the original claim as in fact filed with the county reading: "That this is a true claim and demand against the County of Kern. . . . ." In any event, the verification on the copy of the claim attached to the complaint is clearly sufficient. The first clause thereof may be disregarded, leaving the last clause which contains all the elements of a verification, that is, a sworn statement that the facts stated are true.

The judgment is reversed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

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61 Cal.App.2d 565

In re MUNFREY'S ESTATE.

SWAN et al. v. SWAN et al.

Civ. 12545.

District Court of Appeal, First District, Division 1, California.

Dec. 31, 1943.

1. Wills 🔑229

The right to contest a later will should not be denied to a beneficiary under an earlier will because he is unable physically to produce the earlier will on which he relies at the time of filing his contest. Probate Code, § 321.

2. Wills 🔑278

Where beneficiaries under an earlier will seek to contest a later will, the contestants should by their pleading either make specific allegations concerning terms of earlier will and the manner and time of its execution or plead facts justifying their failure to do so. Probate Code, § 321.

◆

Appeal from Superior Court, Stanislaus County; G. B. Hjelm, Judge.

On petition for rehearing.

Petition denied.

Prior opinion, 143 P.2d 414.

G. V. Weikert, of Los Angeles, for appellants.

Vernon F. Gant, of Modesto, for respondents.

PETERS, Presiding Justice.

[1, 2] It is suggested in the petition for rehearing that in any case where an earlier will is secreted or withheld the provisions of Probate Code, § 321, would afford ample legal means to the beneficiaries thereunder to compel its production, but Probate Code, § 321, could in any event only afford relief to a party who knows the person "who has possession of a will." Cases can readily be envisaged in which a contestant would know that he was a beneficiary under an earlier will which was in existence at the testator's death, without knowing what had become of it thereafter. The right to contest the later will should not be denied to a beneficiary under an earlier will because he is unable physically to produce the earlier will on which he relies at the time of filing his contest. We agree with the suggestion in the petition for rehearing that the contestants should by their pleading either make specific allegations concerning the terms of the earlier will and the manner and time of its execution or plead facts justifying their failure to do so. But here the sustaining of the demurrer without leave to amend has deprived the contestants of the opportunity to amend their pleading in this as in every other particular.

The petition for rehearing is denied.

62 Cal.App.2d 206

PEOPLE v. BARBER et al.

Cr. No. 624.

District Court of Appeal, Fourth District, California.

Jan. 5, 1944.

1. Homicide 🔑250

Evidence supported conviction of deceased's brother of manslaughter, but was insufficient to support conviction of deceased's wife.

2. Criminal law 🔑1159(2)

Where evidence relied upon by prosecution is of such a character as to justify an appellate court in saying that a reasonable mind, uninfluenced by passion or prejudice, could not reach conclusion of guilt, a "question of law" is presented which warrants the court in setting verdict aside.

See Words and Phrases, Permanent Edition, for all other definitions of "Question of Law".

3. Criminal law 🔑829(1)

Refusal to give a requested instruction is not error if subject matter thereof is substantially incorporated in the instructions given.

4. Criminal law 🔑829(1)

A party is not entitled to have jury instructed in any particular phraseology and may not complain on ground that his requested instructions were refused if trial court, on its own motion, or otherwise, correctly announced substance of the law applicable, even though requested instructions stated principles involved more clearly than those given.

5. Homicide 🔑297, 300(7)

Where defendant at all times denied that he had any hand in decedent's death, defendant could not complain of failure to give his particular requested instructions on self-defense or justifiable homicide. Pen.Code, § 197.

6. Criminal law 🔑1168(4)

In manslaughter prosecution, refusal to strike portion of claimed conversation between defendant and deputy district attorney while defendant was confined in county jail, which involved question of defendant's memory on night of fatal fracas, and which had no particular bearing on what took place at scene of fracas, was not prejudicial error.

◆

Appeals from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Eugene D. Barber and Erlene Barber were convicted of manslaughter, and they appeal.

Judgment as to defendant Eugene D. Barber affirmed, and judgment as to defendant Erlene Barber reversed.

Martin C. Casey, of San Bernardino, for appellant Eugene D. Barber.

Raymond E. Hodge, of San Bernardino, for appellant Erlene Barber.

Robert W. Kenny, Atty. Gen., and T. G. Negrich and Eugene M. Elson, Deputy Attys. Gen., for respondent.

GRIFFIN, Justice.

Defendants were charged with the crime of murdering one Leslie Barber. Decedent and defendant Erlene Barber were husband and wife. Defendant Eugene Barber was a brother of decedent. After the trial, the jury returned a verdict of manslaughter against both defendants and recommended leniency. Motions for new trial were denied. The trial court sentenced them to state prisons. They appealed from the judgment and order denying them a new trial.

On June 16, 1943, Leslie Barber, the decedent, and his wife, Erlene, together with a Mr. and Mrs. Jones, started to go on a fishing trip to Big Bear Lake. Leslie induced his brother Eugene to accompany them. The infant child of Leslie and Erlene was left with her mother. Those five persons left in a 1929 Ford two-door sedan automobile. Before leaving San Bernardino they purchased intoxicating liquor. During the ascent of the mountain range they stopped occasionally and imbibed. During the trip nearly all of the driving was done by Mr. Jones, who drank less because of his responsibility in driving the car. His wife also remained more sober than the defendants or decedent. While proceeding up the mountain, someone remarked that defendant Eugene was behind in his drinking and was asked to catch up. When the automobile reached Crestline, more whiskey was purchased and the drinking continued. Then they left Crestline for Big Bear Lake. During the trip up, the defendant Erlene was seated in the rear seat. Her husband was in the front seat. He was teasing her by pulling the hairs on her legs. She was wearing shorts at the time. Later, Leslie got in the back seat with Mrs. Jones and Erlene, leaving Mr. Jones driving, with Eugene in the front seat beside him. There appeared to be no particular ill feeling between Leslie and his wife although he was teasing her. His actions were apparently prompted by a desire to torment her in a friendly manner. However, Eugene remonstrated with Leslie and told him to leave her alone, whereupon the two brothers ceased to be friendly and they became quite angry. They grabbed at each other between the front and back seats until Mrs. Jones became frightened at their antics and demanded that her husband stop the car and let her out. He saw the angry, determined look on Eugene's face, pulled off the highway, and stopped the car.

Mr. Jones testified that at this point both of the Barber brothers "were mad"; that they were still scuffling when he stopped the car and that Eugene had a hold of Leslie. After stopping the car Mr. Jones pulled Eugene out and Leslie, for some unaccountable reason, started to argue with Mr. Jones, who pleaded with him to avoid trouble.

There is nothing in the record to signify any reason why Leslie should start to quarrel with Mr. Jones. The two boys started to fight. Due to their intoxicated condition they were doing a lot of rolling around on the ground about 20 or 30 feet away from the automobile. Mr. and Mrs. Jones watched them for a while and then Mrs. Jones asked her husband to drive away and leave them, but Mr. Jones protested that that would not be the thing to do. The defendant Erlene interfered, apparently in an effort to avert the fight in the first instance and to stop it after it started.

It should be here mentioned that before leaving San Bernardino on the trip, Mrs. Jones had put some kitchen knives and other utensils in a paper bag on the floor of the car back of the front seat, intending that they should be used while they were camping. So far as the record shows, none of those knives were ever removed from the paper bag during the trip. Before leaving his home preparatory to the trip, Mr. Jones obtained his hunting knife and took it along. It was contained within a scabbard and was placed on the instrument panel in the front part of the automobile. At that time the knife was examined by defendant Eugene. However, before and during the fight which later ensued, nobody claimed to have seen the hunting knife removed from the instrument board, nor did anyone see any instrument used during the struggle. However, Mr. Jones testified that at Crestline, on the way back, "somebody picked the hunting knife up off the running board of the car and handed it to me as I was fixing to back the car up."

Mr. and Mrs. Jones were the only two persons who testified in reference to the fight that occurred after the car came to a stop. Their testimony may be thus summarized:

Mrs. Jones testified that she and her husband remained near the car during the entire fight; that Eugene and Leslie started fighting; that Erlene "was trying to take them apart and trying to get them to stop fighting"; that she was crying and she put her arms around Leslie and said: "Les., please don't fight; don't have trouble with your brother; he has come to see you, and you have to act like that"; that she was in between them part of the time and was pushing at both of them with both arms trying to push them away from one another; that she did not know if any blows were struck, but the men were "pushing and wrestling"; that they "would get up and fall down"; that Erlene was begging them not to fight all the time; that she (Mrs. Jones) got in the car and begged her husband to drive on; that she heard Erlene cry out; that at that time they were all up close to the car on its left-hand side; that she heard Erlene say: "Oh, my poor husband, he has been hurt"; that she then looked out of the car and saw "Les. lying on the ground", and Erlene was down on her knees trying to pick up his head; that the defendant Eugene was standing there beside them and doing nothing to help Leslie. She then testified that she went around to them and asked what had happened; that she saw Leslie was "bleeding so terribly"; that she remarked that they would have to get him to a doctor; that Mr. and Mrs. Jones and Erlene put him in the car; that defendant Eugene did not offer to help them; that Erlene sat in the back with her husband's head and shoulders in her lap and his feet across the floor; that defendant Eugene wanted to ride on the running board; that after considerable persuasion he got inside and sat on the right-hand front seat; that they proceeded toward home and stopped at a house where someone told them there was a nurse; that the nurse came to the car, made a superficial examination of Leslie, and it was then that a feminine voice was heard stating that "he was stabbed". Erlene, at that time, said to the nurse: "Look what that brother-in-law of mine did to my husband". The record indicates that the defendant Eugene was present in the front seat and made no response to the statement. Mrs. Jones then testified that they proceeded from there to the hospital in San Bernardino, at which time it was discovered that Leslie was dead.

The witness Mr. Jones testified that when he stopped the car at the scene of the injury, the two men started scuffling and all three started back down the hill about 30 feet from the car where he and his wife remained standing; that Erlene was "just in the scuffle" and that she remarked: "Stop it now, Les"; that at that time the sun was about going down but he could still see; that his wife tried to get him to leave in the car; that a short time later he looked around and Leslie was lying there on the ground bleeding, at a point about four or five feet from the car; that Erlene was stooping down holding his head and saying: "Oh, my poor husband"; that Eugene was just standing there close by; that they, Mr. and Mrs. Jones and Erlene helped put Leslie in the car; that Eugene did not assist them; that as they started back Eugene insisted on "hanging on the fender"; that Mrs. Jones inquired of Erlene as to what happened and she replied: "I don't know, Honey," what happened; that Eugene said nothing in response; that later someone picked up the hunting knife off of the "running board" or "the ground" and handed it to him; that he never saw the knife in the possession of either defendant; that on the return home Erlene was crying most of the time.

On the return trip deputy sheriffs intercepted the car and escorted it to the hospital. One deputy testified that at that time Eugene was seated in the back seat; that when they removed Leslie from the car Eugene rendered no assistance; that he was not intoxicated at that time; that Erlene was intoxicated and hysterical; that he searched the car and found the hunting knife on the left front floor board with the sheath on it; that there were no blood stains noticeable.

At the county jail the defendant Eugene was questioned at length and made a statement which was taken down in shorthand and reduced to writing. At the trial Eugene gave a detailed account of his actions up to the time they arrived at Crestline on the way to Big Bear, but testified he did not remember anything from there on until on the return trip he remembered being in the back seat with Erlene holding Leslie in their arms; that he was so intoxicated he did not remember making the detailed statement which he did make at the jail regarding the trip up the mountain.

Erlene testified that she had quite a bit to drink and did not remember anything after leaving Crestline on the trip up; that she faintly remembered having Leslie in her lap on the return trip and that he was "real cold"; that she remembered nothing further until she awakened the next morning in jail.

[1] A post-mortem was performed on the body of Leslie Barber. The autopsy surgeon testified that he was about 25 years of age and 5 ft. 10 inches tall; that an external examination of the body disclosed two wounds resembling incisions; that one was a gaping wound over the right forehead nearly an inch in length, "evidently made by a sharp instrument". One gaping wound was found on the back of the neck at the base of the skull extending in a horizontal direction, an inch in length and two or three inches in depth, which was made by some sharp-bladed thin instrument, which had severed the right vertebral artery in the spinal column which bled freely and caused his death.

Defendants now contend that the evidence is insufficient to support the verdict and judgment, and that a new trial should have been granted. It is true, as argued by defendant Eugene, that there was no evidence offered to show that the hunting knife contained any signs of blood stains. However, there is no question from the evidence that the mortal wound was caused by a sharp-bladed thin instrument. Whether it was the hunting knife which was on the instrument panel near defendant Eugene that was used is not clear. The failure to find blood on the hunting knife was not determinative of the issue here presented. Most certainly, some sharp-bladed instrument was used, and by someone of sufficient strength to inflict the wound described. Eugene testified that he was a stronger man than decedent. The demeanor of the defendant Eugene while in the car, after they got out, and during the scuffle, indicated that there was considerable hatred displayed between the two men at the time. After scuffling some 30 feet away from the automobile, the two men rolled up near the car, 4 or 5 feet from it, at a point where the hunting knife might have been available to Eugene. The jury no doubt took all of these facts into consideration and it had a right to draw the inference from all the evidence that it was the defendant Eugene who caused his brother's death.

We have carefully examined the entire record as to the evidence that would support a conviction as to the defendant Erlene Barber. We agree with the statement of the Attorney General in his brief that "there is in the record no contradiction of the testimony * * * and we think it favors her more than it tends to show any guilt on her part, and the respondent would be unreasonable in undertaking to sustain her conviction. We are guided by a record which provides us with no material which could possibly be used to sustain the verdict against Erlene Barber." It appears to us that the prosecution not only did not show that this particular defendant caused the death of her husband, but on the contrary showed that it was the two brothers who were fighting and that she was doing everything in her power to prevent the fight. Her actions, from the time of the struggle until they arrived at the hospital, were consistent with innocence.

[2] When the evidence relied upon by the prosecution is of such a character as to justify an appellate court in saying that a reasonable mind, uninfluenced by passion or prejudice, could not reach the conclusion of guilt, a question of law is presented which warrants the court in setting the verdict aside. 8 Cal.Jur. p. 591, sec. 583.

Defendant Eugene next complains of errors in reference to instructions to the jury. The court gave, at the request of the prosecution, an instruction on self-defense and justifiable homicide, wherein it was stated that the defendant "* * * would not be justified under the law in taking life unless such taking of life was really or apparently necessary to save his own, or to avoid the infliction of great bodily injury upon him." It is argued that the defendant Eugene might have been justified in protecting the life of a third party, or in avoiding bodily harm to another person. Section 197 of the Penal Code pertaining to justifiable homicide by other persons was read to the jury. The instruction, as given sufficiently covered the subject matter.

[3-5] The court refused several of defendant's instructions offered on the question of justifiable homicide and self-defense. Many of them were duplications or repetitions of the contents of the ones given on the subject. The given instructions adequately covered those claimed defenses. It is not error for a court to refuse to give a requested instruction if the subject matter thereof is substantially incorporated in the instructions given. A party is not entitled to have the jury instructed in any particular phraseology and may not complain on the ground that his requested instructions were refused if the court, on its own motion, or otherwise, correctly announced the substance of the law applicable to the case, and this is true even though the requested instructions stated the principles involved more clearly and definitely than those given. 24 Cal. Jur. p. 806, sec. 79. The defendant Eugene denied having anything to do with the fight. There was no claim by anyone that there was occasion to defend or protect the life or avoid great bodily harm to another person. At no time has he suggested any mitigation, justification, or excuse for his actions. He, at all times, denied that he had any hand in the death of Leslie Barber. He should not therefore complain of the court's failure to give his particular instruction on self-defense or justifiable homicide. It is our conclusion that he suffered no prejudice in the giving or refusing to give the instructions mentioned. People v. Wolcott, 137 Cal.App. 355, 362, 30 P.2d 601.

[6] Exception is next taken to a ruling of the trial judge involving a portion of some claimed conversation between Eugene and the deputy district attorney while that defendant was confined in the county jail. It involved the question of Eugene's memory on the night of the fatal injury, and had no particular bearing on what took place at the scene of the fracas. We fail to see any prejudice in the ruling of the trial court. There is sufficient evidence

to support the inference of guilt as to Eugene D. Barber.

The judgment and order denying a new trial as to the defendant Eugene D. Barber are affirmed. The judgment and order denying a new trial as to defendant Erlene Barber are reversed.

BARNARD, P. J., and MARKS, J., concur.

BLUME v. MacGREGOR et al.

HARTLEY et al. v. BLUME.

Civ. 12376.

District Court of Appeal, First District, Division 2, California.

Dec. 28, 1943.

Rehearing Granted Jan. 27, 1944.

1. Pleading 🔑147

In an action involving land as the subject matter, a cross-complaint affecting that land and also other land may properly be filed where the cause of action set up therein affects such other land and that described in the complaint as a unit or in such manner that one cannot be separated from the other without prejudice to the parties filing the cross-complaint.

2. Trial 🔑2

In action in ejectment, where part of defendants filed cross-complaint to quiet title, and issues raised by cross-complaint were first tried by court, the court acted properly in deciding all issues between the parties by one set of findings and one judgment, instead of signing findings and entering judgment on cross-complaint before trying legal issues raised by complaint in ejectment.

3. Trial 🔑105(4)

In action involving title to strip of land adjoining railroad right of way, where letter signed by chief engineer of railroad contained references to books and pages at which deeds were recorded, and the references corresponded to books and pages at which deeds, allegedly containing defective descriptions, were recorded, and letter was admitted by stipulation, the letter, though hearsay, was competent evidence that the railroad traced its record title to the strip involved to the deeds referred to.

4. Deeds 🔑90

Such interpretation must be given to a deed as to make it effective rather than to defeat it. Civ.Code, § 3541.

5. Deeds 🔑101

A deed indefinite in terms may be made certain by conduct of parties acting under it.

6. Deeds 🔑38(1)

An omission of part of boundaries or calls is not fatal to validity of deed, where such boundaries or calls can be supplied or the description rendered certain.

7. Deeds 🔑38(1)

If description in deed is indefinite as by omission of a line, a statement of the quantity may help to locate the boundaries.

8. Boundaries 🔑6

In order to determine what land was intended to be described in case of ambiguity in deed, the description may be read by reversing the courses.

9. Deeds 🔑38(1)

In general, if a competent surveyor can take deed and locate land or ground from description contained therein, with or without aid of extrinsic evidence, the description will be held to be sufficient.

10. Pleading 🔑126

In ejectment action wherein cross-complaint to quiet title was filed, where complaint expressly excluded, from property which plaintiff alleged that he owned in fee, any land described in certain deed, and court found that strip in issue was described in such deed, the admission, implicit in the negative pregnant, in answer, which denied that plaintiff was owner in fee of property described in complaint, was that plaintiff was owner, other than in fee, of land described in complaint expressly excluding therefrom by allegations of complaint itself any portion of the strip involved.

11. Appeal and error 🔑1073(1)

Where some of defendants occupied part of railroad right of way, recognizing that their use was subordinate to right of railroad and by its sufferance, and title of railroad was not involved, failure of court to give plaintiff judgment ejecting such defendants from the portions of the right of way occupied by them was not prejudicial to plaintiff.

12. Evidence ⚷16

Where first course in description of railroad right of way conveyed by deed read: "north 70′ east twenty (20) feet up Cordonices Creek", court could take judicial notice that it is not customary to write "70′", but if "70′" was actually intended it would be written "1° 10′".

13. Deeds ⚷115

Where first course in description of railroad right of way conveyed by deed read "north 70′ east twenty (20) up Cordonices Creek", the trial court was justified in view of all facts in treating "70′" as clerical misprision for "70°" and in construing the first course accordingly.

14. Ejectment ⚷95(1)

Evidence regarding ownership of land involved justified judgment determining action in ejectment adversely to plaintiff.

15. Quieting title ⚷10(1)

In quiet title action, a party must recover on the strength of his own title, and may not rely on the weakness of his adversary's title.

16. Adverse possession ⚷94

Redemption of land, after allowing taxes to become delinquent, is equivalent to their original payment for purpose of acquiring title by adverse possession.

17. Adverse possession ⚷20

The preparation of a block for building, at a time when party making the preparation had color of title to block as a whole by dumping loose soil on portions thereof and filling in low places to make the entire block level, was sufficient occupancy to support finding that it started period of adverse possession running in favor of such party. Code Civ.Proc. §§ 323–325.

18. Adverse possession ⚷114(3)

Evidence regarding cross-complainants' adverse possession under color of title for prescriptive period was sufficient to justify judgment quieting title in cross-complainants. Code Civ.Proc. §§ 323–325.

19. Deeds ⚷115

Where description in deed commenced on the "westerly" line of a certain avenue, but consideration of rest of description showed that "westerly" should be read "easterly", the trial court properly so treated the description.

20. Appeal and error ⚷1050(1)

Where judgment was amply supported without reference to judgment admitted in evidence, error, if any, in admitting such evidence was not prejudicial.

◆

Appeal from Superior Court, Alameda County; Andrew R. Schottky, Judge.

Action in ejectment by N. A. Blume against C. M. MacGregor and others, and Robert E. Hartley and others, wherein Robert E. Hartley and others filed a cross-complaint against N. A. Blume. From an adverse judgment, N. A. Blume appeals.

Affirmed.

Robert E. Knowlden, of Los Angeles, and Johnson & Harmon, of San Francisco, for appellant.

McKee, Tasheira & Wahrhaftig and T. P. Wittschen, all of Oakland, for respondents.

DOOLING, Justice pro tem.

Plaintiff and appellant commenced an action in ejectment against defendants and respondents. The description of the property involved in the complaint was adroitly drawn to cast doubt upon the defendants' title to a ten foot strip of land adjoining the right of way occupied by the Santa Fe Railway in the town of Albany in Alameda County, without making a frontal attack upon such title. This was done by alleging that plaintiff is the owner in fee of a parcel of land described so as to include all of said ten foot strip except a small portion thereof two one-hundredths of a foot wide and then excepting from this description any and every part of the property before described "which is described in the deed from Berkeley Development Company to C. M. MacGregor dated December 17, 1925". The real claim of plaintiff, although not in express terms alleged in the complaint, was that the description in the 1925 deed from Berkeley Development Company to MacGregor was defective because it tied in by reference as its easterly boundary to a right of way for railroad purposes granted in 1884 by Pacific Improvement Company to California and Nevada Railroad Company; and that the description in the 1884 deed was so defective that it could not be located on the ground so as to complete the description in the deed to MacGregor. The description in this deed to MacGregor had been copied verbatim into the judgment quieting MacGregor's title to this ten foot strip, which judgment was affirmed in MacGregor v. Knowlden, 102 Cal.App. 42, 282 P. 438. (The ten foot strip involved in this action is a part of parcel 3 discussed by the court in MacGregor v. Knowlden, supra, 102 Cal.App. commencing at page 49, 282 P. at page 441.) The effect of the description as pleaded in the complaint was therefore to cast doubt by the same method of indirection upon the sufficiency of the judgment in MacGregor v. Knowlden, supra, actually to describe or quiet title to any property insofar as parcel 3 of said judgment is concerned.

Fourteen sets of defendants joined in a cross-complaint to quiet title to fourteen separate lots improved with residence buildings which they had severally purchased from MacGregor. In each count of this cross-complaint it was alleged that the lot claimed by the cross-complainant was improved with a dwelling house, that the rear ten feet of each lot was involved in the ejectment action and (by amendment allowed by the court) that a portion of each dwelling house was constructed on the ten foot strip and that each dwelling house occupies almost all of said lot including the ten foot strip as an integral part thereof.

[1] This cross-complaint as amended was attacked by demurrer and motion to strike on the ground that the cross-complainants were not entitled by cross-complaint to quiet title to land not involved in the complaint. The court overruled the demurrer and denied the motion to strike. Appellant urges that this was error, relying on Pacific Palisades Ass'n v. Menninger, 219 Cal. 257, 26 P.2d 303, and similar cases, holding that the mere fact that the real property described in the complaint is a part of a larger tract claimed by a defendant does not authorize such defendant by cross-complaint to quiet title to the larger tract. We are satisfied that the allegations of this cross-complaint bring it well within the rule recently reiterated in People v. Buellton Development Co., 58 Cal.App.2d 178, at page 189, 136 P.2d 793, at page 799, in the following language: "But it is well established that in an action involving land as its subject matter, a cross-complaint affecting that land and also other land may properly be filed, where the cause of action set up therein affects such other land and that described in the complaint as a unit, or in such manner that one cannot be separated from the other without prejudice to the party filing the cross-complaint." Cf. the cases cited in support of the quoted statement on pages 189 and 190 of 58 Cal.App.2d, on page 799 of 136 P.2d.

[2] The issues raised by the cross-complaint, being equitable, were first tried by the court following settled practice. Thomson v. Thomson, 7 Cal.2d 671, 682, 62 P.2d 358, 117 A.L.R. 1. Appellant claims that the court erred in not signing findings and entering judgment on the cross-complaint before trying the legal issues raised by his complaint in ejectment. The court acted properly in deciding all the issues between the parties by one set of findings and one judgment. De Vally v. Kendall de Vally O. Co., Ltd., 220 Cal. 742, 745, 746, 32 P.2d 638; Stockton, etc., Works v. Glens Falls Ins. Co., 98 Cal. 557, 577, 33 P. 633.

The final judgment denied appellant any relief on his complaint and quieted cross-complainants' title to the several lots described in their cross-complaint. The issue as to the ten foot strip arose by reason of the fact that the description of the right of way conveyed by Pacific Improvement Company to California and Nevada Railroad Company in 1884 omitted certain courses and distances and if followed literally conveyed an irregular strip varying from approximately 14 feet at its narrowest part to over 80 feet at its widest, and would only close by drawing an arbitrary line from the end of the last course given to the point of beginning. The omission of certain courses and distances in this description may be graphically illustrated by the following table in which the northerly and southerly calls have been placed in parallel columns and dashes inserted where the southerly calls corresponding to certain northerly calls have been omitted:

Read Down			Read Up		
N. 70° E. 20 ft. along center of Cordonices Creek; thence from said center:			N. 70° E. 20 ft. to point of beginning.		
N. 20°	W.	494 ft.	S. 20°	E.	494 ft.
N. 19°	W.	99 ft.	S. 19°	E.	101 ft.
N. 17°	W.	99 ft.	S. 17°	E.	100 ft.
N. 15¼°	W.	74 ft.	S. 15¼°	E.	76 ft.
N. 14½°	W.	3425 ft.	S. 14½°	E.	3425 ft.
N. 8½°	W.	100 ft.	S. 8½°	E.	100 ft.
N. 14½°	W.	400 ft.	———		
N. 20½°	W.	100 ft.	———		
N. 14½°	W.	300 ft.	S. 14½°	E.	300 ft.
N. 15°	W.	100 ft.	S. 15°	E.	100 ft.
N. 16°	W.	100 ft.	S. 16°	E.	100 ft.
N. 17°	W.	100 ft.	S. 17°	E.	99 ft.
N. 18°	W.	100 ft.	S. 18°	E.	100 ft.
N. 19°	W.	100 ft.	———		
N. 20°	W.	101 ft.	———		
N. 21°	W.	100 ft.	———		
N. 22°	W.	100 ft.	S. 22°	E.	100 ft.
N. 23°	W.	101 ft.	S. 23°	E.	99 ft.
to center of Cerritos Creek					
S. 66½°	W.	40 ft. (along center of Cerritos Creek).			

The evidence shows that there is a railroad right of way on the ground 40 feet in width which has been continuously occupied by the Santa Fe Railway at least since 1905 or 1906, and that the Santa Fe Railway claims its title to such strip under the 1884 deed from Pacific Improvement Company to California and Nevada Railroad Company (as to an undivided two-thirds) and another deed of approximately the same date from Maria Hall to California and Nevada Railroad Company conveying an undivided one-third interest by the same description. It also appears that by taking the description in the 1884 deed and starting at a point in Cordonices Creek where the center of the right of way as actually occupied on the ground crosses said creek and tracing the courses and distances in the 1884 deed, supplying the missing southerly courses and distances by making them parallel to the corresponding courses and distances on the northerly course and of the same length, the line so traced follows substantially the boundaries of the present right of way as actually occupied by the Santa Fe on the ground. It further shows that the property conveyed by the 1884 deed was described as containing 5.73 acres and the strip so laid out contains 5.72 acres. Also by starting at the end and tracing the line backwards to the first omitted call, the calls so traced coincide with the line arrived at by supplying the missing calls.

The original monuments referred to in the 1884 deed were not found upon the ground and appellant claims that there is no evidence which would justify the court in finding that the right of way now actually occupied by the Santa Fe has any connection with the right of way conveyed to California and Nevada Railroad Company in 1884. In making this claim appellant overlooks the fact that a map with a letter attached which had been introduced into evidence in the trial of MacGregor v. Knowlden, supra, was by stipulation of appellant's counsel introduced on the trial of the present action. The map showed the present Santa Fe right of way and the letter, signed by R. B. Ball, chief engineer of the Santa Fe Railway, contained the following statement: "Our deed record shows we have a width of 40 feet, a two-thirds interest in which is covered by deed recorded in Book 282, page 223, Records of Alameda County, the original of which is filed as our secretary's number 3974, and an undivided one-third interest by deed recorded in Book 284, page 91 of said County filed as our Secretary's number 3975."

[3] The references to book and page correspond to the book and page at which the deeds from Pacific Improvement Company and Maria Hall to California and Nevada Railroad Company are respectively recorded. This letter, though hearsay, having been admitted by stipulation, is competent evidence that the Santa Fe traces its record title to the strip actually occupied through the California and Nevada Railroad Company to the two deeds referred to. Nelson v. Fernando Nelson & Sons, 5 Cal.2d 511, 518, 55 P.2d 859.

[4-9] In this state of the evidence the following rules of law concur to support the finding of the trial court that the line of the 1884 deed referred to in the 1925 deed from Berkeley Development Company to MacGregor is the line of the present Santa Fe right of way as actually fenced and occupied: Such interpretation must be given to a deed as to make it effective rather than to defeat it. Hall v. Bartlett, 158 Cal. 638, 642, 112 P. 176; 9 Cal.Jur. 258, 259; Civ.Code, sec. 3541. A deed indefinite in terms may be made certain by the conduct of the parties acting under it. Pio Pico v. Coleman, 47 Cal. 65; Schmidt v. Klotz, 130 Cal. 223, 62 P. 470; California Packing Corp. v. Grove, 51 Cal. App. 253, 257, 258, 196 P. 891; 9 Cal.Jur. 303; 18 C.J. 262, 279; 26 C.J.S., Deeds, §§ 93, 100, pp. 346, 360. An omission of part of the boundaries or calls is not fatal to the validity of a deed, where such boundaries or calls can be supplied or the description rendered certain. 26 C.J.S., Deeds, § 30, p. 220; 18 C.J. 185; Fortenberry v. Cruse, Tex.Civ.App., 199 S.W. 523; Ray v. Pease, 95 Ga. 153, 22 S.E. 190; Cornett v. Creech, Ky., 100 S.W. 1188; Myers v. Hatler, 121 Or. 332, 254 P. 355; Grisham v. Tate, Tex.Civ.App., 35 S.W.2d 264; Thompson on Real Property, Perm.Ed., Vol. 6, sec. 3275, p. 446. If the description is indefinite, as by the omission of a line, then a statement of the quantity may help to locate the boundaries. 4 Cal.Jur. 404; 9 Cal.Jur. 314, 315. In order to determine what land was intended to be described in case of ambiguity the description may be read by reversing the courses. 9 C.J. 169; 11 C.J.S., Boundaries, § 9, p. 549; Walsh v. Hill, 38 Cal. 481, 486. In general if a competent surveyor can take the deed and locate the land on the ground from the description contained therein, with or without the aid of extrinsic evidence, the description will be held to be sufficient. Best v. Wohlford, 144 Cal. 733, 738, 78 P. 293; Thompson v. McKenna, 22 Cal.App. 129, 132, 133 P. 512.

Under these applicable rules of law the finding that the land conveyed by the 1884 deed was the same as the present right of way actually occupied on the ground is not only amply supported by the record, but it is at least doubtful if a contrary finding would find support therein.

[10] Appellant relies on a negative pregnant in the answer to support his claim of title to the portion of the ten foot strip claimed by him. This claim is based upon the fact that respondents denied that plaintiff "is the owner in fee" of the property described in his complaint. The ephemeral character of this contention is disclosed when the allegation of the complaint is compared with the finding of the court. The allegation of the complaint expressly excluded from the property which appellant alleged that he owned in fee any land which is described in the 1925 deed from Berkeley Development Company to MacGregor. The court found that the ten foot strip in issue was described in the 1925 deed to MacGregor and hence was expressly excluded from the land claimed by appellant. The admission, implicit in the negative pregnant, is therefore that plaintiff is the owner, other than in fee, of the land described in his complaint expressly excluding therefrom by the allegation of the complaint itself any portion of the ten foot strip.

[11] The evidence showed that the cross-complainants by tacit sufferance of the Santa Fe Railway raised some flowers and vegetables, and in some cases had some small greenhouses at the rear of their respective lots and inside of the railroad right of way. Appellant claims that the court erred in not giving him a judgment ejecting such respondents from the portions of the right of way so occupied. If we concede that this was error, as claimed, it was trifling and not prejudicial. The evidence clearly shows that the entire right of way has been continuously fenced and occupied for railroad purposes by the Santa Fe, not a party to the present action, for at least a period of over thirty-five years, and that the cross-complainants claim no right or title to any part there-

of, but recognize that the use they are making of small portions thereof is subordinate to the rights of the Santa Fe and by its sufferance. Their casual occupancy makes them no more than implied licensees of the Santa Fe at most. So long as the Santa Fe's title is not attacked by suit against it appellant could gain no substantial rights by a judgment ejecting any of the respondents from any portion of the right of way and have suffered no prejudice in that respect which would justify a reversal.

[12, 13] The first course in the description of the right of way conveyed by the 1884 deed reads "north 70′ east twenty (20) feet up Cordonices Creek." The closing course reads "north 70° east twenty (20) feet to the point of beginning." A witness testified that it is not customary to write "70′", but if 70′ was actually intended it would be written "1° 10′". Without such evidence the court could take judicial notice that this is so. The trial court was justified in view of all the facts in treating "70′" as a patent clerical misprision for "70°" and construing the first course accordingly. 9 Cal.Jur. 301.

[14] What has been said sufficiently disposes of the appeal insofar as the judgment determines the plaintiff's action in ejectment adversely to him. Other points urged must be considered in connection with that portion of the judgment which granted affirmative relief to cross-complainants on their cross-complaints by quieting their title to the respective lots occupied by them.

[15] In attacking the judgment quieting title in cross-complainants, appellant relies on the settled rule that in a quiet title action a party must recover on the strength of his own title and may not rely on the weakness of his adversary's. In addition to their reliance upon a record title, which appellant argues with considerable force was not sufficiently established, cross-complainants also relied upon adverse possession under color of title for the prescriptive period and the trial court found that they had acquired title by adverse possession to their respective lots. If this finding is supported by the evidence it sufficiently supports the judgment, and appellant's attacks on the findings of good record title may be disregarded.

[16] That cross-complainants and MacGregor were claiming under color of title was amply proved by the introduction of deeds to MacGregor covering a larger tract which included the lots in question, and of deeds from MacGregor to cross-complainants of the several lots claimed by them. Appellant's claim that as to the ten foot strip along the Santa Fe right of way there was no color of title because of the alleged defective description in the 1925 deed to MacGregor has already been disposed of. Payment of taxes on the property in question by MacGregor and cross-complainants for the prescriptive period was proved. Redemption of the land after allowing the taxes to become delinquent, proved in some instances, is equivalent to their original payment. Gray v. Walker, 157 Cal. 381, 386, 108 P. 278.

As to occupancy during the prescriptive period, the evidence showed that the lots here in question were part of a vacant block fronting on Masonic Avenue and that prior to the improvement and sale of said lots to the cross-complainants MacGregor had color of title to the entire block. Commencing at a time more than five years before the complaint in this action was filed MacGregor had loose dirt from time to time hauled to and dumped on the tract, which dirt was afterwards spread out to fill the low places on the tract and allowed to settle. This was done to prepare the block for the construction of residences thereon. Thereafter, within less than five years as to all but five lots, excavations for building foundations were made, the foundations laid, buildings constructed and the property sold by MacGregor to the respective cross-complainants and occupied by them. The distinction between the character of possession necessary to constitute adverse possession where the entry is under color of title and without color of title is fixed by code provision and well settled in law. Code Civ. Proc. secs. 323, 324, 325; 1 Cal.Jur. 580–583.

[17] The preparation of the block for building by MacGregor at a time when MacGregor had color of title to the block as a whole, by dumping loose soil on portions thereof and filling in the low places so as to make the entire block level, was a sufficient occupancy to support a finding that it started the period of adverse possession running in his favor. The case in this respect is quite similar to Goodrich v. Mortimer, 44 Cal.App. 576, 186 P. 844. In that case under color of title furnished by

a defective tax deed the purchaser entered on the lot, removed some sage brush from a portion thereof and hauled some bricks to the lot preparatory to constructing a building thereon. The plan to construct the building was abandoned and some of the bricks piled thereon were later removed. The court said, at page 580 of 44 Cal.App., at page 845 of 186 P.: "Mrs. Rutledge always claimed to own as good title to the property as could be secured by a tax deed. It was purchased by her as a site for buildings to be erected thereon, which was undoubtedly the ordinary and eventual use to which the lot would be put. Her entry thereon was in good faith and for the purpose of carrying out her building plans. Her abandonment of her intention in that regard did not have the result of destroying her possession of and claim to the property, which was asserted in the manner before recited. Montgomery & Mullen Lumber Co. v. Quimby, 164 Cal. 250–253, 128 P. 402. To constitute actual possession, the inclosure of the lot by a fence or other structure was not necessary; the entry being under color of title. Hicks v. Coleman, 25 Cal. 122, 133, 85 Am.Dec. 103."

[18] The facts in the case before us are more favorable to cross-complainants, since MacGregor, after dumping and spreading the soil on the block preparatory to building thereon, did not abandon his intention to build, but instead proceeded to carry it out. The filling of the land was but the first step in a continuous occupancy which by progressive steps with no undue delay culminated in the construction and occupation of the dwelling houses thereon.

[19] The descriptions in certain of the deeds from MacGregor to some of the cross-complainants commenced on the "westerly" line of Masonic Avenue. This was a clerical error obvious on their face from the consideration of the rest of the descriptions which necessarily showed that "westerly" should be read "easterly". The trial court properly so concluded. 9 Cal. Jur. 301.

[20] It is unnecessary to consider other points argued by appellant, since they could not affect the validity of the judgment in view of the conclusions above set forth. A great part of the briefs concern themselves with the propriety of the trial court's action in admitting into evidence the judgment in MacGregor v. Knowlden, supra, and the opinion of this court in the same case. Since we have concluded that the judgment in this case is amply supported without reference to MacGregor v. Knowlden, the error, if any, in admitting such evidence was not prejudicial.

The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

62 Cal.App.2d 182

PARMELEE v. BRAINARD.

Civ. 14002.

District Court of Appeal, Second District,
Division 3, California.
Jan. 4, 1944.

1. Partition 🔑71

In suit for partition of realty between parties as tenants in common, where trial court found that plaintiff's and defendant's net cash contributions to common project were $2,265.19 and $4,578.25, respectively, judgment fixing amounts of their respective interests as $3,115.19 and $3,193.75 and ordering distribution of proceeds of sale of property in proportions of such amounts to money received was erroneous as not supported by court's findings.

2. Partition 🔑91

A partition judgment, appointing single referee to sell property and distribute proceeds, was erroneous as violating statute requiring appointment of three referees, in absence of parties' consent to appointment of single referee. Code Civ.Proc. § 763.

3. Partition 🔑88

A partition judgment, failing to provide for accounting or payment of encumbrances on property involved by a single referee appointed by court, was erroneous, in absence of showing that statutory provisions relating to lienholders were complied with or waived. Code Civ.Proc. §§ 761–763.

4. Partnership 🔑68(1)

The fact that individuals take title to land as tenants in common does not necessarily preclude existence of partnership between them as to such property.

5. Partnership ⚿122

In suit to partition realty between parties as tenants in common, where defendant, in answer and cross-complaint, alleged partnership between parties in regard to property and plaintiff and cross-defendant denied existence of partnership, court erred in failing to make specific findings on such issue and effectively dispose thereof by judgment.

◆

Appeal from Superior Court, Los Angeles County; Charles B. MacCoy, Judge.

Suit for partition by Dora C. Parmelee, an incompetent, by her guradian, Vivienne Parmelee, against Maurice W. Brainard, who filed a cross-complaint alleging a partnership between the parties in regard to the property involved. From the judgment rendered, defendant appeals.

Reversed.

A. Maxson Smith, of Los Angeles, for appellant.

Lester E. Hardy, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

This is an appeal by defendant from a judgment rendered in a suit for partition in which the court decreed that Dora C. Parmelee and Maurice W. Brainard are tenants in common of two parcels of real estate in Hollywood and appointed a referee to sell the property at public auction, the proceeds after payment of the referee's fees and expenses to be distributed to the parties "in the proportion their respective interests, as herein set forth, bear to the money received from the sale." The "interests, as herein set forth" are fixed at the sum of $3,115.19 for Dora C. Parmelee and $3,193.75 of Maurice W. Brainard.

As one ground for his appeal, the appellant contends that the "conclusions of law and said judgment, as to both and each, are not supported by, do not follow, are not based upon and can not be deduced from said findings of fact made in said cause," calling attention to the fact that although the court found the net cash contribution to the project was $2,265.19 on the part of Mrs. Parmelee and $4,578.25 on the part of Mr. Brainard, including an allowance in his favor of $194.50 for time spent in the care and maintenance of the properties, the conclusion was reached that the interest of Mrs. Parmelee in the properties was $3,115.19 and the interest of Mr. Brainard was $3,193.75. The judgment fixed the same amounts as representing the interests of the respective parties and ordered distribution, after payment of expenses of the sale that was contemplated, in the proportions that $3,115.19 and $3,193.75 "bear to the money received from the sale of said property." One might suppose that the court intended that each party should share in the proceeds of sales in the proportion which his contribution bore to the amount of the combined contributions, but the conflicting findings as to the amount so contributed and the provision just quoted from the judgment leave the matter in obscurity. Counsel for appellant also refers to the statement in the judgment that "all parties have agreed to the appointment of a single referee for the purpose of making a sale in partition," saying that the recital to that effect is not supported by the findings of fact, and that defendant and cross-complainant made no agreement whatsoever concerning the drafting of said judgment or concerning the matter of a referee or referees to sell said property. As to this we find the following comment in respondent's brief: "As to appellant's contention that he objected to the judgment of the trial court regarding the appointment of a single referee, respondent can only state that no attempt was made to sell the property by a single referee, but that as soon as counsel for respondent was advised by counsel for appellant that he had been mistaken in his understanding of the conversation that took place between counsel, no further proceedings were had in the matter."

[1-5] We believe that appellant's contention that the judgment is not supported by the findings must be sustained on the facts already stated and that a reversal is in order for the additional reason that the law requires the appointment of three referees unless the parties consent to the appointment of a single referee (Sec. 763, C.C.P.). Other reasons for reversal arise from the failure of the judgment to provide for an accounting from June 30, 1942, to the time of disposal of the property, and failure to make any provision for payment of encumbrances attaching to the parcels involved, or for a sale subject to them. See Wernse v. Dorsey, 1935, 2 Cal.2d 513, 41 P.2d 935. Although encumbrances of $2,106.65 and $1,666.80 against the respective par-

cels as of June 30, 1942, are noted in the findings, there is no order in the judgment that the single referee therein named by the court pay said encumbrances or any portion of them. Nor can we find in the record any indication that the provisions of sections 761 and 762 of the Code of Civil Procedure, relating to lienholders, were complied with or waived. We note also that neither the findings nor judgment makes any reference whatever to the claim of the defendant, set up in his answer and also in the form of a cross-complaint, that a partnership existed in regard to the property. The fact that individuals take title to land as tenants in common does not necessarily preclude the existence of a partnership between them as to that property. McNab v. Mills, 1926, 199 Cal. 231, 248 P. 657, cited in Perelli-Minetti v. Lawson, 1928, 205 Cal. 642, 272 P. 573. The plaintiff, as cross-defendant, denied the existence of the partnership and upon the issue joined by the parties we believe the court should make a specific finding and effectively dispose of it by its judgment.

Judgment reversed.

SHINN, J., and BISHOP, J. pro tem., concur.

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62 Cal.App.2d 146

HOUGH et al. v. ORLEANS ELEMENTARY SCHOOL DIST. OF HUMBOLDT COUNTY.

Civ. No. 6925.

District Court of Appeal, Third District, California.

Dec. 30, 1943.

1. Schools and school districts 🔑120

In action against school district for injuries sustained by pupil by alleged negligence in maintaining a flagpole and braces with a bolt protruding, it was necessary for plaintiff to allege and prove knowledge, either actual or constructive, by district of the defective condition, and failure to remedy the condition. Gen.Laws 1937, Act 5619, § 2; School Code § 2.801, as amended by St.1937, p. 414.

2. Schools and school districts 🔑121

In action against school district for injuries sustained by pupil due to alleged negligence in maintaining a flagpole and braces with a bolt protruding, it was incumbent on plaintiff to produce some evidence as to the proper workmanlike and usual method of using and maintaining flagpole and bolts, if such condition was in fact defective. Gen.Laws 1937, Act 5619, § 2.

3. Schools and school districts 🔑89

School authorities are required to use only ordinary care in maintaining school property, and a school district is not required to anticipate that children might run into so conspicuous an object as a flagpole. Gen.Laws 1937, Act 5619, § 2.

4. Schools and school districts 🔑121

In action against school district for injuries sustained by pupil in running into a flagpole and brace from which a bolt protruded, evidence failed to establish knowledge on part of school district, either actual or constructive, of defective condition of flagpole brace. Gen.Laws 1937, Act 5619, § 2.

5. Schools and school districts 🔑121

Evidence failed to establish that condition of flagpole and braces from which bolt protruded about two inches was either dangerous or defective, so as to render school district liable for injuries to pupil who ran into flagpole. Gen.Laws 1937, Act 5619, § 2.

6. Schools and school districts 🔑89

Failure of school district to place a guard or shield over the end of a bolt, which extended out about two inches from a brace on flagpole, could not be regarded as negligence causing injury to pupil who ran into flagpole, where even with the bolt so protected the injury could have been more or less. Gen.Laws 1937, Act 5619, § 2.

7. Schools and school districts 🔑89

An 11 year old school boy who was aware of flagpole on school grounds and ran into it while throwing a football about was guilty of contributory negligence barring recovery against school district for injuries sustained. Gen.Laws 1937, Act 5619, § 2.

◆

Appeal from Superior Court, Humboldt County; Harry W. Falk, Judge.

Action by Vernon Martin Hough, by his guardian ad litem, Vernon Hough, and another against Orleans Elementary School District of the County of Humboldt, State of California, for injuries sustained by minor on school playground. From a judgment for plaintiffs, defendant appeals.

Reversed.

Jeremiah R. Scott, Dist. Atty., and Delos A. Mace, Deputy Dist. Atty., both of Eureka, for appellant.

Irwin T. Quinn, of Eureka, for respondents.

ADAMS, Presiding Justice.

Vernon Martin Hough, a minor, through his father, Vernon Hough, acting as guardian ad litem, and said Vernon Hough acting for himself, brought this action against defendant School District for damages for injuries alleged to have been sustained by said minor, and for expenses incurred by his father by reason of the child's injuries.

The complaint alleges that the minor, on December 6, 1939, was a pupil at defendant school; that on the school grounds there was a flag pole at the base of which, on two sides, were braces or supports about three feet high which were attached to the flag pole by a bolt extending through the braces and the pole at a point about thirty-four inches above the ground; that at one end of the bolt there was a washer and a nut, and that the end of the bolt and the nut extended about two and one-half inches out on the side of the brace; that said bolt head did not have any covering or guard "to make same reasonably safe against injury to persons and particularly to pupils playing on the school yard"; and that on the said December 6, 1939, while engaged in a running game the minor plaintiff collided with said protruding bolt and in said collision suffered the injuries set forth. It was further alleged "That said plaintiff received and suffered said injuries by reason of and through the negligence of said School District and said Trustees in carelessly and negligently maintaining said flag pole and braces or supports thereto with said bolts and nuts thereon protruding out from the sides two and one-half inches without having same counter sunk and without any guard or protection of any kind and maintained same in said dangerous manner."

The answer of defendant denied the allegations of the complaint as to negligence, and also denied that the minor plaintiff was at the time of his injuries lawfully playing in the school yard; it also alleged contributory negligence on the part of said minor plaintiff.

After trial by the court, sitting without a jury, said court made and filed findings that the allegations of the complaint were true except as to the amount of damages suffered, and that the denials and allegations of the answer were not true. Judgment for the minor plaintiff in the sum of $250, and for his father in the sum of $179, followed. A motion for a new trial, made by defendant, was denied.

On this appeal defendant contends that where, as here, the negligence relied upon relates to the alleged dangerous or defective condition of school property, the law gives no right of action unless it is alleged and shown that the dangerous or defective condition was known by the proper school authorities and they failed to remedy same within a reasonable time; that in this case plaintiff failed either to plead or to prove knowledge or notice; that there is no evidence from which it can be deduced that defendant was negligent in the construction of the flag pole or its supports, and no evidence that the flag pole as constructed was defective or dangerous; also that the minor plaintiff was guilty of contributory negligence as matter of law. There is a further contention that the trial court erred in its award of damages to the father in that certain claimed items of expense were not properly allowable.

Respondents, replying, make some attempt to show that there was actual notice to the school district of the condition of the flag pole, but argue that even if actual notice was not proven, the law places a duty upon a school district to know the condition of properties over which it has control; they argue that they have made out a case under section 2.801 of the School Code, as amended by St.1937, p. 414, which provides: "Boards of school trustees, high school boards, junior college boards and boards of education are liable as such in the name of the district for any judgment against the district on account of injury to person or property arising because of the negligence of the district, or its officers or employees; provided, however, that a verified claim for damages shall have been presented in writing and filed with the secretary or clerk of the school district within ninety (90) days after such accident has occurred."

Appellant contends that plaintiffs' cause of action may be maintained only under and by virtue of the provisions of Act 5619, Deering's General Laws, 1937, p. 2630, which provides in section 2 thereof: "Counties, municipalities and *school districts* shall be liable for injuries to *persons and property* resulting from the dangerous or defective condition of public streets, highways, buildings, grounds, works and property in all cases where the governing or managing board of such county, municipality, *school district,* or other board, officer or person having authority to remedy such condition, *had knowledge or notice of the defective or dangerous condition* of any such street, highway, building, grounds, works or property *and failed or neglected, for a reasonable time after acquiring such knowledge or receiving such notice, to remedy such condition or failed and neglected for a reasonable time after acquiring such knowledge or receiving such notice to take such action as may be reasonably necessary to protect the public against such dangerous or defective condition."* (Italics ours.)

Appellant relies particularly upon Boughn v. Los Angeles City School District, 7 Cal.App.2d 347, 46 P.2d 223, 224. In that case a pupil aged eleven years, while playing tag in the school lavatory, incurred injuries when she ran into a faucet which extended two and one-half or three inches from the wall. The court held that there was no negligence on the part of the school district in maintaining the faucet extending out from the wall, and said that if it had had a guard or shield the injury might have been more or less. Act 5619, ante, was recited, and the court said that the evidence did not sustain the finding of the trial court that defendants "negligently and carelessly maintained and operated the premises * * * and particularly the * * * girls' lavatory thereof, in a dangerous and defective manner. * * *" It also said, page 350 of 7 Cal.App.2d, page 225 of 46 P.2d: "We have been cited to no case which holds on similar or analogous facts that the maintenance of a faucet which protrudes from two and one-half to three inches from the wall is negligence, and we know of none. Common sense suggests that to hold a school district negligent under such circumstances is to say that the school district must so build and maintain its premises as to preclude possibility of injury. Under such a rule, if a kindergarten pupil, who it is fair to assume could not under any circumstances be charged with contributory negligence, ran into a doorknob, the school district would be responsible."

Respondents rely particularly upon Bridge v. Board of Education, 2 Cal.App.2d 398, 38 P.2d 199; Ahern v. Livermore Union High School District, 208 Cal. 770, 284 P. 1105; Dawson v. Tulare Union High School, 98 Cal.App. 138, 276 P. 424, and Maede v. Oakland High School District, 212 Cal. 419, 298 P. 987.

In the Bridge case a ten year old pupil while playing on the school grounds was injured by tripping over a cement sprinkler box which extended above the surface of the school grounds. The complaint alleged that the proximate cause of plaintiff's injuries was the negligence of the Board of Education and its officers and agents in maintaining the box in that condition. After judgment for plaintiff reversal was urged on the ground that the action was maintainable only under the provisions of Act 5619, and that under that act the fact of the existence of the dangerous condition of the property was not the gist of the right of action, but rather the failure to remedy an existing defect, or remove a dangerous condition within a reasonable time after the school authorities had notice that it existed—that an essential element of such right of action is the notice to the proper school authorities and the subsequent failure to remedy the defect.

The court, quoting from the Ahern case, said that Act 5619 was a general act defining the liability of public bodies named therein, to the *general public* and specifying the conditions under which said liability might attach, while the amendment to section 1623 of the Political Code (now section 2.801 of the School Code) was a special act and purported to deal only with the liability of school districts *to the children of the district,* for the negligence of the district or its officers or employees, and that in such a case the provisions of the latter act prevailed over the terms of the general statute. However, the court said that the complaint sufficiently pleaded a case under the Act of 1923 (Act No. 5619) and that there was sufficient evidence to support the findings of the court that there was constructive notice to the school district of the existence of the concrete box; that the knowledge of the school principal of the existence for several years of the condition complained of was sufficient to establish constructive notice.

In that case the accident occurred in 1930 when section 2.801 of the School Code provided that a school district was liable for any judgment against it on account of injury *"to any pupil"* arising because of the negligence of the district or its officers or employees; but in 1931 it was amended, and the words "on account of injury to any pupil" were superseded by the words "on account of injury to person or property." Stats.1931, ch. 1178, p. 2487. It is, therefore, no longer a statute designed especially for the protection of pupils, but makes a school district equally liable to the general public; and this change makes particularly pertinent the concurring opinion of Presiding Justice Conrey who said, page 403 of 2 Cal.App. 2d, page 202 of 38 P.2d: "Notwithstanding the decision of the Supreme Court in Ahern v. Livermore Union High School District, 208 Cal. 770, 284 P. 1105, 1111, and unless that decision is the final word on the subject, I am of the opinion that, where the negligence relied upon relates to the dangerous or defective condition of public property, there can be no cause of action without the notice or knowledge required under the terms provided in Act No. 5619. It seems to me that the dissenting opinion by Mr. Justice Preston (concurred in by Justices Richards and Shenk) correctly stated the law when he said that 'a substantive right of action in such case is controlled by Act No. 5619 of the General Law.' But let it be conceded that a right of action for injuries caused to a pupil by reason of negligence in maintaining a defective or otherwise dangerous condition of school property, as well as injuries resulting from other descriptions of negligence, was authorized by section 1623 of the Political Code and is now authorized by section 2.801 of the School Code. Yet I see no reason why the Legislature might not concurrently provide, as it did, that, where the injury arises out of a dangerous or defective condition of public property (*any* public property), the right of action shall be limited to cases where there was knowledge or notice such as the Act No. 5619 requires. To hold otherwise results in giving a preference to one class of litigants. Thereby other litigants, seeking the same relief and for the identical description of injury, are deprived of 'the equal protection of the laws.'"

In the Ahern case, decided prior to the aforesaid amendment of section 2.801, plaintiff, a student in the manual training department of defendant District, while using a school saw to cut a piece of lumber, suffered the loss of two fingers on his right hand. Upon the assumption that the district was negligent in permitting the pupil to use the saw under the conditions shown by the evidence, and that the pupil was not guilty of contributory negligence, a recovery was had. The court there held that section 1623 of the Political Code, in effect when the injury occurred, gave a right of action *to a pupil* who was injured as a result of the negligence of the district or its officers or employees, and that in order to recover it was not necessary for such pupil to meet the requirements of Act 5619, supra. But we do not read that decision as holding that, in the absence of knowledge or notice of the defective or dangerous condition of school property, a school district may be held liable for maintaining a dangerous or defective condition of the school building or grounds. Furthermore, much of the reasoning therein is made inapplicable to the case before us, by reason of the subsequent amendment of section 2.801. Also see ch. 1167 and ch. 1168, pp. 2475, 2476, Stats.1931, providing for insurance and both providing that person includes pupil attending public school.

As for the Dawson case the facts are not comparable. A school piano, which was moved from one room to another as needed, was and had been for more than a year, with knowledge of the district superintendent, kept upon a dolly for convenience in moving. In its position it was unsteady and when used by the pupils would tip; and while plaintiff and other pupils of the school were playing a game as part of their instruction in physical education, the piano fell over backwards crushing plaintiff's ankle. The decision of this court that the district was liable was based on constructive notice by the district of a condition which admittedly had existed for more than a year to the knowledge of the superintendent of the school district; and the case was decided under the provision of the general liability act (Act 5619, ante).

In the Maede case a pupil received injuries to his eyes by reason of the explosion of a pressure gauge in the school laboratory where he was engaged in the performance of an experiment in a vocational training course, and the facts are in nowise comparable to those in the instant case. Also it was decided upon the statute as it read before the amendment of 1931 above mentioned.

In Goodman v. Pasadena City H. S. District, 4 Cal.App.2d 65, 40 P.2d 854, a minor student in the mechanics shop was injured when a fragment of metal entered his eye while he was watching other students pounding metal. A judgment for plaintiff was reversed. The complaint alleged that defendants negligently maintained and supervised the machine shop, and negligently allowed said minor to work in and about said shop without providing a safe place to work in, and failed to protect him from injury at the hands of his co-students who were working there, etc. While the court said that the action was based on section 2.801 of the School Code (reciting it as amended), it also said, pages 67, 68 of 4 Cal.App.2d, page 855 of 40 P.2d: "In the instant case plaintiffs could recover by proving either that there existed in the machine shop *a danger that was known to the authorities,* who neglected to guard the pupils against it, or that there was an unknown peril which by the exercise of reasonable care under the same circumstances a reasonably prudent person would have discovered. The negligence suggested by plaintiffs was the failure to require the pupils to wear goggles in the presence of the possible injury from flying particles of hammered metal. However, the record discloses no substantial evidence that there existed such danger which was known, or ought to have been known, to the authorities. 'The law does not make school districts insurers of the safety of the pupils at play or elsewhere, and no liability is imposed upon a district under the abovementioned section, in the absence of negligence on the part of the district, its officers or employees.' Underhill v. Alameda Elementary School District, 133 Cal.App. 733, 24 P.2d 849, 851; Ellis v. Burns Valley School District, 128 Cal.App. 550, 18 P.2d 79." (Italics ours.)

In Ellis v. Burns Valley School District, above cited, plaintiff was injured when, during a game on the school grounds, which game was under the supervision of the school, he collided with a larger and heavier pupil. This court held that no cause of action was made out, and said (page 555 of 128 Cal.App., page 81 of 18 P.2d) that "One may not be held responsible for those consequences following from an act which could not have been anticipated by a reasonably prudent person."

In Hack v. Sacramento City Junior College District, 131 Cal.App. 444, 21 P.2d 477, plaintiff, a pupil aged seventeen years, was injured when two other pupils, who, acting under instructions from their teacher of stagecraft, were attempting to move wooden frames covered with canvas from a stack, allowed them to fall striking the girl. Judgment for plaintiff was reversed, the court saying that the findings of negligence were not supported by the evidence. The opinion states, pages 446, 447 of 131 Cal. App., page 478 of 21 P.2d:

"As recited above, the trial court found that the stack of flats was not secured to the wall by means of a rope or otherwise. *There was neither allegation nor proof that in the exercise of proper care such flats should be stored in any particular manner or that the stacks should be secured with a rope or otherwise.* Manwell v. Durst, 178 Cal. 752, 174 P. 881, 1 A.L.R. 669. However, there was no evidence to the effect that, however the flats were stacked or piled, they fell before being pulled down by Hunt and Thorne [the pupils].

"The trial court also found that Hunt and Thorne were physically incapable of, and inexperienced in, handling said flats. There was no evidence that either Hunt or Thorne, acting alone, could not lift or carry a flat weighing twenty-five pounds. There was no evidence that either Hunt or Thorne was inexperienced in handling said flats or that any experience was necessary. Again, there was no evidence that there was any danger in handling flats, and, if so, that the instructor knew of such fact or that Hunt and Thorne did not know such fact. Manwell v. Durst, supra." (Italics ours).

The conclusion was that there was no evidence of negligence on the part of any officer or employee of defendant.

[1, 2] In the instant case, the allegations of the complaint and the finding of the court are that plaintiff received his injuries by reason of the negligence of the district in carelessly and negligently maintaining the flag pole and braces with said bolts and nuts protruding without having same countersunk and without a guard or protection of any kind. The case as stated

is brought under the provisions of Act 5619, to wit: for injuries sustained due to the defective or dangerous condition of school property; and we are of the opinion that it was necessary for plaintiffs to allege and prove knowledge on the part of the district—either actual or constructive—and failure to remedy the condition. Also we think it was incumbent upon plaintiff to show that the condition complained of was actually a defective or dangerous one. The mere fact that the minor plaintiff ran into the flag pole and was injured is not evidence that it was dangerous. Obviously it was not intended as something to be run into. Also it was incumbent upon plaintiff to produce some evidence as to the proper, workmanlike and usual method of using and maintaining a flag pole and bolts for the purpose for which they were here used if the condition complained of was in fact defective.

[3] School authorities are required to use only ordinary care; and it can not be said that the district here reasonably should have anticipated that children might run into so conspicuous an object as the flag pole. It is said that use of defective property only in its ordinary, usual and customary use, and not from unusual and unauthorized use casts liability. Woodman v. Hemet Union High School District, 136 Cal.App. 544, 553, 29 P.2d 257. Also the district was not under obligation to anticipate what was unlikely to happen. No accidents involving the flag pole had previously happened.

The opinion of the trial court states that passive negligence of the district was relied upon, and not any overt act of defendant. It recites that a faucet in the lavatory, a protruding door knob, a rain washed hole or a drinking fountain are not defective conditions; but that if a rain washed hole had been created by some act of the district, *or if the district had knowledge and failed to correct it,* it would create a dangerous condition, etc. But the court did not say or find that the protruding bolt was a defective or dangerous condition or that the district had knowledge of its condition.

[4, 5] Respondents attempt in their brief to show that there was actual knowledge. They rely upon testimony showing that some time in the summer or fall of 1939, and prior to the accident, one Salstrom was employed to put a new rope on the flag pole, and that he then saw the protruding bolts, and then tightened them. But Salstrom said that he said nothing about them to the trustees. Reliance is also placed by respondents upon the testimony of the teacher of the school, contending that she had had exact knowledge of the condition of the flag pole for three years. But counsel for respondents draws an unwarranted conclusion from the testimony of this witness. She said only, when shown pictures of the pole, that she "supposed" she had seen the protruding bolt before the accident (which was in December, 1939); that she was then (at the time of the trial, November 12, 1942) teaching her third year in the school, and that the bolts had not been changed to her knowledge. Her testimony showed neither exact knowledge of the protruding bolt, nor that it had been in the same condition for three years prior to the accident. The foregoing evidence shows neither actual nor constructive notice on the part of the district that the bolt protruded or that it was dangerous; and, as hereinbefore stated, there was neither allegation nor finding of knowledge by the district. Furthermore, the evidence fails to show that the condition of the flag pole was a dangerous or defective one. The photographs of the flag pole introduced by plaintiffs show that what are referred to by respondents as braces for same were, in fact, not braces, but two timbers set in the ground, between which the pole itself was slung, the two bolts through the timbers and the pole holding the pole in place, and permitting it to be raised and lowered when necessary.

[6] Plaintiffs offered no evidence to show that such construction was improper or defective or that the countersinking of the ends of such bolts was the usual, customary or practicable way to use them. And as to the allegation of plaintiffs that the ends of the bolts did not have any covering or other device to guard them, it may be said, as was said in the Boughn case, supra, regarding the faucet there complained of, that if it had "had a guard or shield, the injury might have been more or less, depending on the nature of the guard or shield and the manner in which contact with the same occurred."

[7] Since we have concluded that for the reasons above stated the judgment of the trial court must be reversed, it is unnecessary to pass upon the question of whether or not there was contributory neg-

ligence on the part of the minor plaintiff. However, his own testimony that while he and another boy were throwing a foot ball about, after he had been dismissed from school for the day, he ran into the flag pole, that he knew it was there and that he "kind of seen" it when he ran for the ball, but did not think he was going to hit it, so kept on going, would have justified a finding of contributory negligence on his part. He was nearly eleven years old and a child above the average in intelligence.

The judgment is reversed.

THOMPSON, J., concurs.

HOUSE v. LOS ANGELES COUNTY FLOOD CONTROL DIST.

Civ. 14183.

District Court of Appeal, Second District, Division 2, California.

Dec. 22, 1943.

Hearing Granted Feb. 17, 1944.

1. Eminent domain 🔑2(1)

Damages to private property, caused by exercise of police power, are compensable under constitutional provision that private property shall not be taken or damaged for public use without just compensation to owner only when structure causing damage is not so essential to public health, safety or morals as to be justified under police power. Const. art. 1, § 14.

2. Eminent domain 🔑2(10)

An owner of land, damaged by flood waters overflowing river banks because of county flood control district's negligence in constructing improvements in river channel for purpose of controlling such waters, is not entitled to compensation under constitutional provision that private property shall not be taken or damaged for public use without just compensation to owner, as construction of such improvements is so essential to public health and safety as to be justified under "police power". Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

3. Eminent domain 🔑2(10)

Public improvements, made in channel of stream for general welfare, do not give rise to cause of action by riparian land owner for damages in consequence thereof.

4. Levees and flood control 🔑36

The state, in undertaking to reduce menace to land from flood waters by changing river channel, does not guarantee complete success of such undertaking, and its failure to do so creates no liability to riparian land owner for resulting damages.

5. Eminent domain 🔑2(10)

Injuries to riparian lands, caused by public improvements in channel of stream for general welfare, do not constitute damage to or taking of owner's property within constitutional provision for payment of just compensation therefor, even if government's action is wrongful. Const. art. 1, § 14.

6. States 🔑112

The state is not "insurer" of success of every project attempted by it in exercise of its police power.

See Words and Phrases, Permanent Edition, for all other definitions of "Insurer".

7. Waters and water courses 🔑52

The principle that riparian proprietors are protected from undue interference, created by obstructions to flow of stream, is subject to limitation that individual riparian owners may erect such works as will protect them from consequences of flood and other riparian owners are not entitled to complain of such action on ground of injury inflicted thereby.

8. Levees and flood control 🔑36

In action for damage to land by flood waters overflowing river banks as alleged result of county flood control district's negligent construction of certain improvements in river channel pursuant to federal statute declaring such improvements a public necessity to abate danger of destructive floods, court cannot consider question of necessity for such work.

9. Evidence 🔑48, 52

In action for damage to land by flood waters overflowing river banks as alleged result of county flood control district's negligence in constructing improvements in river channel pursuant to federal statute, allegation of complaint that previous flood, which land withstood without damage, was greater than that which caused damage sued for, so that improvements were unnecessary, must be disregarded, in view of federal Interior Department's reports to Congress showing that later flood was much greater than previous flood of which judicial notice would be taken. Code Civ.Proc. § 1875, subd. 3.

10. Evidence ⚷48

The District Court of Appeal has notice that structures in channel of Los Angeles River after December 1, 1935, were installed by Secretary of War, pursuant to federal statute declaring that destructive floods on that and other rivers of United States constitute a menace to national welfare and that improvements of rivers for flood control purposes are in interest of general welfare. Act Cong. June 22, 1936, § 1, 33 U.S.C.A. § 701a; § 5, 49 Stat. 1589.

11. Levees and flood control ⚷3

The state, in exercise of "police power", had right to commence construction of improvements authorized by Congress, to avoid perils from frequent shifting of channel and overflow of banks of Los Angeles river, without waiting until watersheds had been eroded and river and its tributaries swollen by floods. Act Cong. June 22, 1936, § 1, 33 U.S.C.A. § 701a; § 5, 49 Stat. 1589.

12. Levees and flood control ⚷36

A county flood control district is not liable for damage to land by flood waters overflowing river banks on ground of district's negligence in constructing improvements authorized by federal statute in river channel under police power. Act Cong. June 22, 1936, § 1, 33 U.S.C.A. § 701a.

13. Levees and flood control ⚷36

The state and its agencies, making improvements under police power in river channel for purpose of controlling flood waters, is not liable to riparian land owners for damages resulting from errors in concept or calculations.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Lillian Candace House against the Los Angeles County Flood Control District for damage to plaintiff's land by flood waters overflowing a river's banks. From a judgment of dismissal, plaintiff appeals.

Affirmed.

Henry M. Lee, of Los Angeles, for appellant.

J. H. O'Connor, County Counsel, and S. V. O. Prichard, Asst. County Counsel, both of Los Angeles, for respondent.

MOORE, Presiding Justice.

From a judgment of dismissal after demurrer had been sustained to the first amended complaint without leave to amend, plaintiff appeals. The action is a companion to that of O'Hara, O'Hara v. Los Angeles County Flood Control Dist., 19 Cal.2d 61, 119 P.2d 23, wherein a similar judgment was affirmed. Because of certain allegations made by Mrs. House not found in the O'Hara complaint it is now contended that the O'Hara decision is not controlling in the instant action and that the court erred in its ruling.

The gist of the pleading is:

By reason of the negligence of defendant in the construction of certain improvements in the channel of the Los Angeles River it was caused to overflow its banks in time of storm, to flow upon the land of plaintiff, to denude it of its soil and to destroy the improvements situate thereon to the plaintiff's damage in the sum of $30,663. The negligence lay in the facts that by reason of certain permeable dikes along the channel of the river prior to the construction complained of the augmented volume in flood season was allowed to spread over an extensive overflow area which served to maintain a low hydraulic radius; during the same times the riparian vegetation aided by groins constructed transversely to the overflow areas reduced the velocity of the waters and maintained a high rugosity coefficient. This resulted in the deposition of silt on the overflowed lands. Commencing about December, 1935, and continuing until the early spring of 1938, defendant negligently planned and installed in the bed of the river near, and in the vicinity of, plaintiff's property certain structures which completely changed the regimen of the stream. It removed the dikes, groins, and other structures in the river in the vicinity of plaintiff's property as well as the vegetation, posts, wires and other support theretofore in place along the banks of the river and negligently installed structures which prevented the spread of the overflow waters at flood time. As a result of such improvements the channel became a stream of high velocity, and of a low rugosity coefficient. The channel's capacity was reduced, the levees no longer permitted the flow of the waters into the overflow area, and the banks and levees were so inadequately constructed as to cause the escaping storm waters from the channel to accumulate behind the levees and in turn to cause their overflow and destruction. As a result of such negligence of defendant the land of plaintiff was denuded to a depth of from 6 to 10 feet and all of her improvements were washed away. The negligence of defendant was accentuated by its removal of the adequate protective agencies and by substituting therefor defective structures which the storm waters of March 2, 3, and 4, 1938, burst through with great violence onto and upon plaintiff's land. The installation of such improvements was not rendered necessary by any immediate emergency or in an effort to safeguard the general public welfare, health or morals. On the contrary, plaintiff's land had withstood a greater flood in January, 1934, without damage. There was no immediate peril in 1935, 1936, and 1937 but, during all of the time of the construction of such works, defendant had ample time to take proper measures to safeguard plaintiff's property from the danger to accrue from its negligent works which became a menace and a source of danger and which were contrary to good engineering practices.

[1, 2] Plaintiff contends that upon the facts alleged and above recited she is entitled to compensation under section 14, Article I, of the Constitution, which provides that private property shall not be taken or damaged for public use without just compensation to the owner. She maintains that her case is distinguished from that of O'Hara by reason of her allegation that there was no great or immediate necessity such as would justify invoking the police power and by reason of the allegation of negligence in the absence of which defendant could have foreseen and avoided the calamitous destruction of plaintiff's land and improvements by the flood waters of the river. But the principle enunciated in the O'Hara decision does apply with equal force here: damages to private property caused by the exercise of police power are compensable under section 14, Article I, only when the structure causing the damage is not so essential to the public health, safety or morals as to be justified under the police power. The construction of improvements along a stream for the purposes of effecting control is no less essential to the public health and safety than the grading of streets.

[3, 4] The Archer decision, Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1, is even a more detailed discussion of the principles involved. It is there declared that a lower riparian owner has no right of redress for injury to his land caused by improvements made in the stream for the purpose of protecting the land above even though the channel is inadequate to accomodate the increased flow of water resulting from the improvements; that an improvement for the purpose of protecting lands above gives no right of action to the lower riparian owner merely because such improvement increases the volume of water below; that the upper riparian owner is not to be deemed negligent for doing what he had the right to do even though a different plan might have avoided the damage; that straightening, widening, or deepening the channel of a stream to improve the drainage entails no diversion of its waters and gives rise to no cause of action in favor of the owner downstream. From such reasoning it must follow that public improvements made in the channel of a stream for the general welfare do not give rise to a cause of action for damages consequential thereto. Although the state may undertake to reduce the menace to land by changing the channel of a river it does not guarantee the complete success of the undertaking and its failure to do so creates no liability. Janssen v. Los Angeles County, 50 Cal.App.2d 45, 56, 123 P.2d 122.

[5] Injuries to the lands of a riparian owner caused by improvements upon the channel of the streams for the general welfare is not damage to or a taking of the owner's property in the constitutional sense even though the government's actions were wrongful. Jackson v. United States, 230 U.S. 1, 33 S.Ct. 1011, 57 L.Ed. 1363. The basis of the claim in the Jackson case was that the property of the claimants had been destroyed after levees

had been constructed for the purpose of confining the waters of the Mississippi River between the lines of embankment so as to give increased elevation, velocity and force to the current in order to scour and deepen the channel. Although the case of United States v. Sponenbarger, 308 U.S. 256, 60 S.Ct. 225, 84 L.Ed. 230, was decided against the claimant because she had suffered no detriment as a result of flood waters, the court observed that by undertaking to safeguard a large area from existing flood hazards the government does not owe compensation under the Fifth Amendment to every landowner whom it fails to or cannot protect. Neither does the Fifth Amendment make the government an insurer that the evil of floods will be stamped out universally before the evil can be attacked at all.

[6, 7] It is thus seen that the state is not an insurer of the success of every project attempted in the exercise of its police power. The principle which obtained under Roman law and under all other systems derived therefrom that respective riparian proprietors are protected from undue interference created by the obstructions to the flow of the stream has always been attended by the limitation that individual riparian owners may erect such works as will protect them from the consequences of the flood by restraining them; and other riparian owners are not entitled to complain of such action upon the ground of injury inflicted thereby. Cubbins v. Mississippi River Commission, 241 U.S. 351, 36 S.Ct. 671, 60 L.Ed. 1041. In the Cubbins case Congress had devised the Eads plan whereby on both banks of the Mississippi River, except at certain places, a line of levees would be built which, in flood season, would hold the waters relatively within the lines of the low-water banks, deepen the bed, improve navigation, and save the back country from inundation

[8] The allegation especially emphasized in appellant's brief is that the improvement undertaken by the defendant was not occasioned by any great or immediate necessity or emergency; neither was it done to safeguard the general welfare; but on the contrary, it is declared to be a fact that on the 1st of January, 1934, the vicinity of Los Angeles County and particularly that area near plaintiff's property was visited by an unprecedented torrential downpour of greater intensity and larger precipitation in a shorter period of time than that which occurred in the early days of March, 1938. By virtue of this allegation it is contended that the rule of noncompensable damage does not apply; that the improvements installed were not essential and that there was no great or immediate necessity therefor. In the first place the construction of such a vast improvement as that which appears to have been undertaken along the Los Angeles River during the three years preceding March, 1938, was done pursuant to the finding and Act of Congress. It had theretofore been made to appear that the peril of destructive floods of the many rivers of the United States including the Los Angeles River and its tributaries was so great as to be of national concern, pursuant to which finding the Congress resolved, and the federal government undertook, to execute such improvements as would abate the danger. It is the consequences of such structures installed to meet a public necessity which constitute the basis of the complaint. In view of the finding of Congress and of the action taken pursuant thereto it would be a vain and illogical undertaking for the courts to open for investigation the subject as to whether there was a necessity for the works.

[9-11] Moreover, there is good reason why the allegation that the flood of January, 1934, was of greater intensity and precipitation than the flood of March, 1938, will not be considered. The records of the Department of Interior show that in the storm of 1938 the flood in the Los Angeles River near plaintiff's land was more than three times that during the storm of January, 1934. Such records are reports of the Department of the Interior to Congress, entitled "Surface Water Supply of the United States; Geological Survey Water Supply Paper," numbered 766 and 861 for the years 1934 and 1938, respectively. Since the knowledge contained in such records is contrary to that alleged, the allegation comparing the floods of the two years mentioned must be disregarded. Sec. 1875, Code Civ.Proc., subd. 3; Hammell v. Britton, 19 Cal.2d 72, 119 P.2d 333; Young v. Boy Scouts of America, 9 Cal.App.2d 760, 51 P.2d 191; French v. Senate, 146 Cal. 604, 80 P. 1031, 69 L.R.A. 556, 2 Ann.Cas. 756; Livermore v. Beal, 18 Cal.App.2d 535, 64 P.2d 987; Parker v. James Granger Inc., 4 Cal.2d

668, 52 P.2d 226; Southern Pacific Co. v. Meserve, 186 Cal. 157, 198 P. 1055. In reliance upon the same authorities we have notice that the structures in the channel of the river subsequent to December 1, 1935, were installed by order of the Secretary of War, pursuant to the very Act of Congress which declared that the destructive floods upon the rivers of the United States (specifically designating the Los Angeles River) "constitute a menace to national welfare; * * * that improvements of rivers and other waterways, including watersheds thereof, for flood-control purposes are in the interest of the general welfare." Act Cong. June 22, 1936, § 1, 33 U.S.C.A. § 701a. By the same Act Congress appropriated $70,000,000 for improvements upon the Los Angeles and San Gabriel rivers. Section 5, 49 Stat. 1589. It is apparent to the least thoughtful that the works contemplated by the Congress were of such magnitude as would require a period of many months for their completion, and that the undertaking of such a program cannot wait until watersheds have been eroded and until the river and its tributaries are swollen by floods before the state may in the exercise of its police power commence the construction of improvements designed to avoid the perils of a stream whose channel has frequently shifted or has overflowed vast riparian areas. Such knowledge is an additional reason why we have determined that the complaint herein does not present a justiciable issue.

[12, 13] The contention that liability attaches because of the negligence alleged cannot prevail. The only available agency for the execution of works designed to be done under police power is the genus homo who has not and will not acquire that degree of perfection whereby errors in execution or of plan may be wholly avoided. If under the police power improvements may be made it must follow that neither the state nor its agencies may be liable for errors in the concept or in the calculation of man. But since this contention proved to be ill-fated in the Archer and O'Hara cases, further comment were superfluous.

The judgment is affirmed.

McCOMB, J., concurs.

W. J. WOOD, J., concurs in the judgment.

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62 Cal.App.2d 157

PEOPLE v. VITOS.

Cr. No. 2282.

District Court of Appeal, First District, Division 2, California.

Jan. 3, 1944.

1. Burglary 🔑41(1)

Evidence sustained conviction of burglary. Pen.Code, § 459.

2. Criminal law 🔑348

Evidence that defendant when he stole coat from store was wearing overcoat with extra large secret pocket, though he did not put stolen coat in it, was admissible to show that he was a professional shoplifter. Pen. Code, § 459.

3. Criminal law 🔑383

It is not necessary that every piece of evidence admitted should be sufficient by itself to prove crime, since evidence which might be colorless, if it stands alone, may get a new complexion from other facts which are proved and in turn may corroborate conclusion which would be drawn from other facts.

Appeal from Superior Court, City and County of San Francisco; Peter J. Mullins, Judge.

Anthony Vitos was convicted of burglary, and he appeals

Affirmed.

Walter Duane, of San Francisco, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

STURTEVANT, Justice.

The defendant was convicted on a charge of burglary. From the judgment he has appealed. He claims that the evidence was insufficient. A determination of the merits of that claim requires a statement of the evidence.

On the trial the prosecution called two witnesses, Bert Keane, a salesman, and Charles A. Gallivan. The former was at the time of the offense a salesman in the clothing department of the White House, a prominent department store in San Francisco. Mr. Gallivan was at said time an inspector of the San Francisco Police Department assigned to the shopping detail. The prosecution called no other witness. The defendant did not take the stand as a witness in his own behalf, nor did he call any witness in his defense.

An inspection of the evidence discloses that on the 8th day of January, 1943, at about four o'clock in the afternoon, Mr. Keane was near the clothing department standing on a balcony overlooking that department. He saw the defendant enter the store and walk in the direction of the shoe department. However, as the defendant passed a table in the clothing department he paused and commenced to examine an overcoat that was lying on the table. He picked up the garment and dropped it. He repeated those movements two or three times and then unbuttoned his own overcoat, pulled the coat from the table, stuffed it inside of his trousers, buttoned up his overcoat and went directly out of the store. From the time he entered until he left he did not transact any business with any of the attachés of the store. From the time he entered until he left he was in the store approximately ten minutes. As the defendant went out onto the street Mr. Keane followed him and overtook him on the sidewalk. There he took hold of the defendant and stated to him that he had taken a coat. The defendant attempted to free himself from Mr. Keane's grasp but about that time some of the other attachés of the store came to his assistance and the defendant was taken inside the store and held there until a police officer could be summoned.

The overcoat which the defendant took from the table in the White House was produced by the prosecution and introduced in evidence without objection. The overcoat which the defendant was wearing was also produced by the prosecution and was also introduced in evidence without objection. The record discloses that the latter garment had a pocket about twelve inches wide and twelve inches deep. The exhibits have been brought up and are before us. When Mr. Gallivan appeared at the White House the defendant had been taken into custody by Mr. Keane and his associates. He talked to the defendant, and the latter freely admitted taking the coat from the table in the White House and wanted to compensate the White House therefor. Mr. Gallivan searched the defendant for weapons. In doing so he noticed the twelve-inch pocket in the overcoat which the defendant was wearing, but he found nothing contained in that pocket.

[1, 2] After quoting from the record the defendant contends there was no evidence that he entered the White House with intent to commit grand or petit larceny after he had made the entrance. Continuing the defendant asserts that such proof was essential to support the judgment. Penal Code sec. 459; People v. Barry, 94 Cal. 481, 29 P. 1026. The respondent does not question either authority. On the other hand it contends that the prosecution was entitled to prove, and did prove, a burglarious intent by the circumstances hereinabove noted. People v. Westwood, 88 Cal.App. 505, 263 P. 856; People v. Blair, 122 Cal.App. 455, 10 P.2d 196. That claim we think is clearly sustained. There is not a particle of evidence that the defendant entered the White House on the said 8th day of January, 1943, for any other purpose than to commit, and that he did commit, a burglary. That his intention on entering was burglarious was shown by the circumstances that he did in fact then and there commit a theft; that he did not attempt to transact any legitimate business; that he was in said store only about ten minutes; that he freely admitted taking the overcoat and attempted to pay therefor; and that on the trial he did not attempt to explain any of said acts. Moreover, the coat which the defendant was wearing would tend to indicate that he was a professional shoplifter. Commonwealth of Massachusetts v. Coyne, 228 Mass. 269, 117 N.E. 337, 3 A.L.R. 1209, at page 1220 et seq., and cases there cited.

[3] The defendant asserts, however, that there was no evidence the stolen overcoat was put in the pocket of the overcoat he was wearing and therefore that the circumstance existed that the latter coat had an extra large pocket was immaterial. With that assertion we do not agree. The piece of evidence we are now considering might be colorless if it stood alone, however, when it is considered together with the other facts which we have enumerated, it has a very different meaning. Commonwealth v. Mulrey, 170 Mass. 103, 49 N.E. 91, 94. In that case Mr. Justice Holmes said: "It is not necessary that every piece of evidence admitted should be sufficient by itself to prove the crime. Evidence which would be colorless if it stood alone may get

a new complexion from other facts which are proved, and, in turn, may corroborate the conclusion which would be drawn from the other facts." Again the defendant asserts there was no evidence that the pocket in said overcoat had been enlarged or that it was not as made by the manufacturer. The record does not support that contention. The overcoat was introduced in evidence. We have examined it. It may be that the jury reached the conclusion that said pocket had been improvised by the defendant or on his order.

The judgment and order appealed from are affirmed.

NOURSE, P. J., and SPENCE, J., concur.

WEST KEY NUMBER SYSTEM

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62 Cal.App.2d 233

LAY v. PACIFIC PERFORATING CO., Limited, et al.

Civ. 3121.

District Court of Appeal, Fourth District, California.

Jan. 8, 1944.

Rehearing Denied Feb. 4, 1944.

Hearing Denied March 6, 1944.

Writ of Supersedeas Denied March 23, 1944.

1. Municipal corporations 🔑819(1)

In action by pedestrian for injuries sustained when she allegedly fell because of oil on sidewalk in front of defendants' premises, evidence established that defendants were under duty to refrain from doing any affirmative act that would render sidewalk dangerous for public travel.

2. Municipal corporations 🔑819(1)

In action by pedestrian for injuries sustained when she allegedly fell because of oil on sidewalk in front of defendants' premises, evidence established that defendants' act in permitting oil to run from defendants' premises to sidewalk and in not keeping sidewalk free from such oil after knowledge of condition was the doing of an affirmative act which rendered the sidewalk dangerous to pedestrian.

3. Municipal corporations 🔑806(2)

Pedestrians had right to assume that public sidewalk was free of all such dangerous conditions which might interfere with their safe passage thereon.

4. Municipal corporations 🔑808(1)

Where abutting property owner by positive action creates a condition on public sidewalk which is likely to cause harm to persons lawfully using the sidewalk and a person is injured as a proximate result thereof, the property owner is liable.

5. Municipal corporations 🔑808(1)

Where defendants' acts, in permitting oil to run from their premises to public sidewalk and in not keeping sidewalk free from such oil after knowledge of the condition, rendered sidewalk dangerous to pedestrian and pedestrian using sidewalk stepped in oil and fell, defendants were liable for resulting injury.

6. Negligence 🔑65

Generally, a plaintiff is held to exercise only that amount of care which would be exercised by a person of ordinary prudence in the same circumstances.

7. Negligence 🔑136(26)

Ordinarily, it is a question for jury whether plaintiff has been guilty of contributory negligence.

8. Negligence 🔑66(1)

To forget a known danger is not negligence, unless it shows a want of ordinary care.

9. Negligence 🔑136(27)

Mere abstraction on part of injured person does not constitute contributory negligence as a matter of law.

10. Municipal corporations 🔑821(23)

Where pedestrian while passing defendants' premises on way to restaurant noticed oil on sidewalk and about a half hour later passed in front of defendants' premises on way home, looked through wire fence at plant maintained by defendant, and fell because of pool of oil on sidewalk, whether information possessed by pedestrian was sufficient to impress on her mind danger incident to customary use of sidewalk, and whether she was contributorily negligent were questions for jury.

11. Appeal and error 🔑1004(1)

The question of excessive damages is primarily directed to trial court.

12. Appeal and error 🔑1004(1)

The power of appellate courts to reverse a judgment because of excessive damages exists only when facts are such as to suggest that verdict was result of passion, prejudice, or corruption on part of jury.

13. Damages ⚿132(2)

$4,500 judgment was not excessive, where evidence disclosed substantial injuries, including injury to coccyx and considerable pain and suffering which might be permanent.

Appeal from Superior Court, Kern County; Robert B. Lambert, Judge.

Personal injury action by Willetta Lay against Pacific Perforating Company, Limited, and another. Judgment for plaintiff, and defendants appeal.

Affirmed.

Sidney A. Moss, of Los Angeles, for appellants.

Claflin & Chain, of Bakersfield, for respondent.

GRIFFIN, Justice.

On February 16, 1943, plaintiff and respondent Mrs. Lay, accompanied by her husband and a four-year old boy, left their residence in Bakersfield at about 2:30 p.m. to go to a lunch room about five blocks away. They proceeded on the sidewalk, which was about three feet wide and ran immediately in front of the plant of the defendant company. As they were about to pass those premises, about fifteen feet ahead of them they saw a small pool of oil on the sidewalk, which had been allowed to escape from the premises of the defendant company. In this respect Mr. Lay testified that just ahead of them he noticed "a considerable amount of shavings" and "there was some oil, just how much, I didn't pay any attention"; that as to whether the oil he then noticed was at the "same place that the oil was that your wife fell in", he answered: "I am not sure that it was". On this subject Mrs. Lay testified that on the way over to the restaurant while passing defendants' premises, she noticed some oil on the sidewalk. She did not testify that she observed the exact character of the oil spot or the extent of its coverage at that time. Defendant Guerin testified that at the spot where plaintiff fell he found "loose oil", "dirt" and a few "steel shavings". He was asked if a person walked on those steel shavings saturated with oil whether it would be slippery, and he replied: "No, it would be just like walking on a cinder path." Instead of passing through the escaping oil, plaintiff and her husband crossed the street to the lunch room, which was a more direct route. About a half hour later, they returned to the sidewalk, and passed in front of defendants' premises on their way home. Mr. and Mrs. Lay were conversing about the type of work being conducted and maintained by defendant company in its yard. They were looking through a wire fence at the plant maintained by it. As they thus proceeded, Mrs. Lay's foot slipped from under her in a pool of oil, which was about 12 inches wide and 18 inches in length. She fell directly upon her hip and received an injury to her coccyx. She was taken to the hospital. The following day she was released and was later treated by the company doctor for a period of over one and a half months. At the time of the trial she was still undergoing treatment for traumatic arthritis claimed to have been caused by the injury.

Defendants defended the action, denied negligence on their part, and pleaded contributory negligence on the part of the plaintiff. A trial by jury resulted in a verdict for plaintiff for $7,500 which, on a motion for new trial, was conditionally reduced to $4,500 by the trial court. Defendant company and defendant Guerin, as supervisor of the company's plant, appealed from the judgment in the lesser amount.

Defendants first claim that there was no act of negligence on their part established by the evidence. They concede that the evidence sufficiently establishes that "the oil came in some manner from the premises of the defendant company", but contend that there was no evidence from which the jury could conclude that the defendants themselves actually placed the oil on the sidewalk or that they engaged in any activity by which it accumulated there with their knowledge. In other words, it is claimed that where the plaintiff cannot show that the defendants' activity is responsible for placing the obstruction or foreign substance on the sidewalk the plaintiff has a definite burden of proof of showing (1) that the accident was occasioned by a condition which was actually known to the defendant, or (2) that the oil in question had remained on the sidewalk for so long a time before the occurrence of the accident that it would have charged the defendants, in the exercise of reasonable care, with notice of its existence, citing such cases as Crawford v. Pacific States Savings & Loan Co., 22 Cal.App.2d 448, 71 P.2d 333; Matherne v. Los Feliz Theatre, 53 Cal.App.2d 660, 128 P.2d 59; and Mona v. Erion, 223 App.Div. 526, 228 N.Y.S. 533.

[1-3] The evidence clearly shows that the defendants were in the habit of keeping large quantities of the same character of oil on their premises and that such oil was used in the perforation of pipe, and that there was a quantity of that character of oil on the premises on the day in question; that the premises of defendant company which abutted the sidewalk were approximately one foot higher than the elevation of the sidewalk; that oil similar to the oil on the sidewalk was, on the day of the injury, traced back from the pool on the sidewalk into the bank on defendants' property; that defendants maintained an oil sump on the premises in connection with their work; that on the day of the injury the soil on defendants' premises was "saturated in oil" and "filled with shavings cut from pipe"; that defendants had knowledge that such oil and pipe shavings had accumulated on the sidewalk near the same area in the past; that defendants had on occasions prior to February 16, 1943, steam-cleaned oil, oil marks and pipe shavings from the sidewalks; that the last occasion of cleaning occurred about February 13, 1943; and that the sidewalk was inspected by defendants once each week to determine the necessity of steam-cleaning the oil from it; that defendant Guerin told plaintiff's husband, right after the fall, that they "had had some trouble with that oil overflowing through the rain" and he also said "the city had said something to them more than once before and he had had some men to work on it that morning, but they had not gotten to cleaning off the sidewalk yet". Guerin denied such a conversation. However, the constable who served defendant Guerin testified that after Guerin read the complaint he remarked: "That is one thing they told the truth on was the small amount of oil running out of the yard onto the sidewalk". The evidence clearly establishes that the defendants were under a duty to refrain from doing any affirmative act that would render the sidewalk dangerous for public travel and that defendants' act in permitting oil to run from defendants' premises to the sidewalk and in not keeping the sidewalk free and clear from such oil after knowledge of the conditions, was the doing of an affirmative act that rendered the sidewalk dangerous to pedestrians who had the lawful right to use the walk and the right to assume that it was free and clear of any and all such dangerous conditions which might interfere with their safe passage thereon.

[4, 5] The facts of this case come clearly within the rule announced in Barton v. Capitol Market, 57 Cal.App.2d 516, 134 P.2d 847, which was an action for personal injuries sustained through a fall on a slippery sidewalk bordering defendants' place of business. There defendants' employees used some substance to spray the corner of their building. When so sprayed a stain ran down from the building across the sidewalk. When wet, the stain became yellow, greasy and slippery. Under such circumstances it was there held that in the absence of statute, there is no affirmative obligation on an abutting property owner to keep a sidewalk in a safe condition, but if the abutting owner by positive action creates a condition which is likely to cause harm to persons lawfully using the sidewalk and a person is injured as a proximate result thereof, the property owner is liable.

Defendants' main argument is directed to their contention that the undisputed evidence shows that the plaintiff was aware of the dangerous condition, and the dangerous condition itself being plainly observable to anyone who cared to observe it, she was guilty of contributory negligence as a matter of law. They cite many cases beginning with Davis v. California St. C. R. Co., 105 Cal. 131, 38 P. 647, and such cases as Dunn v. Wagner, 22 Cal.App.2d 51, 70 P.2d 498; and Blodgett v. B. H. Dyas Co., 4 Cal.2d 511, 50 P.2d 801, which in effect hold that where the uncontradicted testimony shows that the injured party had notice of a known danger and negligently walked into it without looking and without using ordinary care for his own personal safety, he cannot recover on account of any resulting injury. The question here presented under the evidence is by far the closest question presented on this appeal.

[6, 7] It is a general rule that a plaintiff, like a defendant, is held to exercise only that amount of care which would be exercised by a person of ordinary prudence in the same circumstances. It is ordinarily a question for the jury whether or not a

plaintiff has been guilty of contributory negligence. Jamison v. San Jose & S. C. R. Co., 55 Cal. 593.

[8] The rule with reference to forgetfulness of a known danger has been declared by our Supreme Court in Giraudi v. Electric Imp. Co., 107 Cal. 120, 125, 126, 40 P. 108, 110, 28 L.R.A. 596, 48 Am.St. Rep. 114, as follows: "It is said that, if one was aware of a fact which should have put him upon his guard, he cannot rebut the presumption of contributory negligence by showing that he momentarily forget it. This is true as a general proposition, but, like all other rules upon this subject, it must have a reasonable construction. To forget is not negligence, unless it shows a want of ordinary care, and it is a question for the jury."

[9] This rule was cited in Meindersee v. Meyers, 188 Cal. 498, 205 P. 1078, 1080, where plaintiff fell in an open ditch during the night time, having had knowledge of its condition the preceding day. There the court said: "Whether or not the information possessed by the plaintiffs was sufficient to impress upon their minds the danger incident to a use of the accustomed pathway in the dark, was a question for it to decide. We are unable to say, as a matter of law, and against the testimony of the plaintiffs, that they had such notice, and did appreciate such danger. Even assuming that their observation of the work done was more or less extensive during the day it was for the jury to say whether it was a want of ordinary care for Mrs. Meindersee not to have the open excavation in mind when she returned home at 11 o'clock that night, for it has been repeatedly held that, even with full knowledge of such danger, one may be injured and yet be in the exercise of due care." To the same effect are Hall v. Barber Door Co., 218 Cal. 412, 23 P.2d 279; Christy v. Ulrich, 113 Cal.App. 338, 298 P. 135; and McStay v. Citizens' National T. & S. Bank, 5 Cal.App.2d 595, 43 P.2d 560, in which latter case plaintiff walked down several steps, where no hand rails were constructed, to enter the foyer of a hotel. The foyer was unlighted and in darkness. After standing there a while she retraced her steps and misstepped from a platform which she apparently had just previously crossed. In considering the question of her contributory negligence as a matter of law, based upon her previous knowledge of the condition of the steps the court said, at page 600 of 5 Cal.App.2d, at page 562 of 43 P.2d: "* * * it is clear that whether or not the information possessed by Mrs. McStay was sufficient to impress upon her mind the danger incident to the use of the platform and steps in question was for the jury to decide as an issue of fact. * * * Even forgetfulness of a known danger will not always operate to prevent a recovery, for to forget is not negligence unless it shows a want of ordinary care. * * * And it has been repeatedly held that mere abstraction on the part of the injured person does not constitute contributory negligence as a matter of law. * * * The question of contributory negligence was, therefore, properly submitted to the jury." (Citing cases.) To the same effect are Wise v. Maxwell Hardware Co., 94 Cal.App. 765, 271 P. 918; Du Val v. Boos Bros. Cafeteria Co., 45 Cal.App. 377, 187 P. 767; Perkins v. Sunset Tel. & Tel. Co., 155 Cal. 712, 103 P. 190; Felker v. Redlands West Coast Corp., 17 Cal.App.2d 551, 62 P.2d 406; Hechler v. McDonnell, 42 Cal.App.2d 515, 109 P.2d 426; Jacobson v. Oakland Meat, etc., Co., 161 Cal. 425, 119 P. 653, Ann.Cas.1913B, 1194.

One of the latest expressions of the amount of knowledge of a known danger necessary to render a person negligent as a matter of law may be found in Ridge et al. v. Boulder Creek Union Junior-Senior H. S. Dist., etc., 60 Cal.App.2d 453, 140 P. 2d 990, 993. In that case a high school boy was operating a power saw without a guard or a fence around it. The evidence showed that guards were ordinarily used to prevent injury but others in the class used the saws without safety devices. The question of the boy's previous knowledge of the purpose and use of the safety devices and his use of the saw without them was set up as a claim of contributory negligence as a matter of law. In discussing this subject the court said: "Knowledge that danger exists is not knowledge of the amount of danger necessary to charge a person with negligence in assuming the risk caused by such danger. The doing of an act with appreciation of the amount of danger in addition to mere appreciation of the danger is necessary in order to say as a matter of law that a person is negligent."

[10] So it may be said in the instant case. Plaintiff's casual observation of the substance which she took to be oil on the sidewalk on her first approach to it without walking through it, may not have been

sufficient knowledge that a danger actually existed or may not have been sufficient knowledge to charge her with negligence in assuming the risk caused by such danger. While no particularly glaring conflicts are present, different conclusions as to the knowledge and conduct of the plaintiff may be reasonably drawn by different minds from the same evidence, and whether or not the information possessed by plaintiff was sufficient to impress upon her mind the danger incident to a customary use of the sidewalk was a question for the jury. We are unable to say, as a matter of law, that plaintiff had such notice and did appreciate such danger.

[11-13] Defendants next claim that the sum of $4,500 as damages is excessive. In addition to the evidence above recited, the evidence discloses that at the time of the fall plaintiff's lower limbs were momentarily paralyzed. She was taken on a stretcher, placed in an ambulance, and taken to the hospital. On her release from the hospital she was taken home. She was treated from that time on by the company's doctor at his office up until the time of the trial of this action which was on May 12, 1943. She testified that she suffered severe pains in the area of her back in the immediate vicinity of her coccyx, and also suffered severe headaches; that she experienced pains while sitting and reclining, both day and night; that it pained her to stoop and that her injuries were of such a permanent nature that she, according to the statement of the company doctor, might expect to experience them for the next ten or twelve years or "probably for life". Mrs. Lay was, at the time of trial, 20 years of age. The question of excessive damages is primarily directed to the trial court. The power of the appellate courts to reverse a judgment because of excessive damages exists only when the facts are such as to suggest that the verdict was the result of passion, prejudice or corruption on the part of the jury. We have found nothing in the record which suggests such to us. The evidence discloses substantial injuries, and considerable pain and suffering which may be permanent. Burke v. John E. Marshall, Inc., 42 Cal.App.2d 195, 108 P.2d 738. The judgment in the reduced amount cannot be held to be excessive. Hamelin v. Foulkes, 105 Cal.App. 458, 287 P. 526.

Judgment affirmed.

BARNARD, P. J., and MARKS, J., concur.

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62 Cal.App.2d 140

COHN v. ROSENBERG et al.

No. 12452.

District Court of Appeal, First District,
Division 1, California.
Dec. 30, 1943.

1. Dismissal and nonsuit 🔑45

The purpose of statute providing for a dismissal of action for want of prosecution is to fix minimum period within which mere delay in bringing action to trial is not deemed sufficient cause for dismissal, and immediately ensuing interval of three years, during which court, in its discretion, may adjudge such delay sufficient, and maximum period of five years, upon expiration of which such delay is sufficient as matter of law and dismissal is mandatory. Code Civ.Proc. § 583.

2. Appeal and error 🔑973

Trial court's exercise of its discretionary power to dismiss an action for lack of prosecution will not be disturbed on appeal unless it is made to appear that there has been a gross abuse in the exercise of power. Code Civ.Proc. § 583.

3. Dismissal and nonsuit 🔑60(2)

Where plaintiff did nothing for more than seven years after submission was set aside to bring case to a final termination, trial court's dismissal of the action for lack of prosecution was not an abuse of discretion. Code Civ.Proc. § 583.

4. Dismissal and nonsuit 🔑51, 60(1)

The trial court has inherent power, existing without aid of statutory authority, to dismiss action for plaintiff's failure to prosecute it diligently, and statutory provisions concerning dismissal of action for want of prosecution must be read in light of existence of such inherent power. Code Civ.Proc. § 583.

5. Dismissal and nonsuit 🔑51

The only limitation placed upon trial court's inherent power to dismiss action for plaintiff's failure to prosecute it diligently by statute is that the power may not be exercised until two years have elapsed after the action has been commenced, and that the power shall not be abused. Code Civ.Proc. § 583.

6. Dismissal and nonsuit 🔑60(2)

The duty rests upon plaintiff at every stage of the proceedings to use due diligence to expedite his case to a final determination that there may be an end to litigation.

7. Dismissal and nonsuit ⟹60(2)

Even if plaintiff was not called upon to take any steps to reinstate case on trial calendar for further proceedings during 3½ years that elapsed between entry of order setting aside the submission, on trial judge's own motion, and date of the judge's retirement, plaintiff's failure to have cause restored to trial calendar during additional 3½ years following date of judge's retirement authorized trial court's dismissal of the action for lack of prosecution. Code Civ.Proc. § 583.

8. Dismissal and nonsuit ⟹81(6)

Fact that plaintiff's attorney could no longer act for him after January, 1939, would not serve as a ground for setting aside trial court's dismissal of the action for lack of prosecution, where plaintiff waited three years thereafter before he secured services of another attorney. Code Civ.Proc. § 583.

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Appeal from Superior Court, City and County of San Francisco; George W. Schonfeld, Judge.

Action by Albert Cohn against Sam Rosenberg and another, individually and as copartners doing business under the firm name and style of the California Sanitary Rag Company, and others, to recover moneys allegedly due as rental for the use and occupation of real property and for the sale and delivery of machinery. From a judgment dismissing the action for failure to use reasonable diligence in the prosecution thereof, the plaintiff appeals.

Affirmed.

McGuire & Lahanier, of San Francisco, for appellant.

Morris Oppenheim, of San Francisco, for respondents.

KNIGHT, Justice.

Plaintiff appeals from a judgment dismissing the above entitled action for failure to use reasonable diligence in the prosecution thereof.

The action was pending in the Superior Court in and for the City and County of San Francisco, and was for the recovery of moneys alleged to be due as rental for the use and occupation of real property and for the sale and delivery of machinery. The complaint was filed on February 29, 1932, and the answer on July 11, 1932. On March 9, 1933, plaintiff moved to set the cause for trial, and on July 31, 1933, after several continuances ordered by the court, it came on for trial in Department 14. The respective parties introduced their evidence and rested their cases, following which rebuttal and surrebuttal evidence was offered and received. Thereupon the court ordered the cause continued until August 2, 1933, and on that date additional oral and documentary evidence was introduced and counsel were directed to file briefs. On November 2, 1933, the cause was ordered submitted for decision; but nearly a year later and on September 4, 1934, a minute order was entered setting aside the submission "for further proceedings," and three and a half years thereafter, to-wit, on May 16, 1938, the judge presiding in Department 14, before whom the cause had been tried, terminated his services as a judge of said court pursuant to the judges' retirement act. The following January plaintiff's attorney became a member of the municipal bench, and approximately three years thereafter, to-wit, in December, 1941, plaintiff's present counsel was substituted, and on December 22, 1941, he filed a motion to reset the cause for trial; whereupon and on January 9, 1942, one of the defendants served and filed notice of motion supported by affidavit to dismiss the action for want of diligence in the prosecution thereof. During the seven years that elapsed between the date of the order setting aside the submission and the filing of the request to reset the cause for trial, no proceedings of any kind were had in the case; and one of the averments of the affidavit filed in support of the motion to dismiss was that the seven years delay had operated to the prejudice of the moving defendant and that he would suffer additional prejudice if his motion for dismissal was not granted. Counter affidavits were filed by plaintiff, but the above averments of prejudice were not denied, and the trial court's judgment of dismissal is based on findings that plaintiff was guilty of laches in failing to take any proceedings in the case within the seven year period following the entry of the order setting aside the submission, and that his failure so to do had operated to the prejudice of the moving defendant and that he would suffer additional prejudice if the motion to dismiss was denied.

The theory upon which plaintiff seeks to reverse the judgment is based largely on section 583 of the Code of Civil Procedure, the pertinent provisions of which declare: "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant * * * whenever plaintiff has failed for two years after action is filed to bring such action to trial. Any action heretofore or hereafter commenced shall be dismissed * * * unless such action is brought to trial within five years after the plaintiff has filed his action, except where the parties have stipulated in writing that the time may be extended." In this connection plaintiff contends that the above section "was designed to regulate the dismissal of actions only in cases where the action * * * has not been brought to trial within five years after filing of the action"; and that since the action herein was partially tried within a year and a half after the filing of the complaint the requirements of the section were satisfied, and that under such circumstances the dismissal constituted an abuse of the discretionary power vested in the trial court. This contention is not sustainable.

[1-3] As said in Romero v. Snyder, 167 Cal. 216, 138 P. 1002, 1003, the purpose of the section was "to fix: (1) A minimum period within which mere delay is not to be deemed sufficient cause; (2) an immediately ensuing interval of three years, during which the court, in its discretion, may adjudge it sufficient; and (3) a maximum period of five years, upon the expiration of which, the delay is declared to be sufficient as a matter of law and the dismissal is made mandatory." See, also, Hibernia Sav. & Loan Soc. v. Lauffer, 41 Cal.App.2d 725, 107 P.2d 494. Thus it will be seen that, as so construed, the section permits a dismissal in the discretion of the court at any time subsequent to the expiration of the two year minimum period provided for therein, and it is well established that where a court in the exercise of such discretionary power has dismissed an action for lack of diligence in the prosecution thereof its decision will not be disturbed on appeal unless it is made to appear that there has been a gross abuse in the exercise of such power. Inderbitzen v. Lane Hospital, 17 Cal.App.2d 103, 61 P.2d 514; Hibernia Sav. & Loan Soc. v. Lauffer, supra, and cases cited therein; Steinbauer v. Bondesen, 125 Cal.App. 419, 14 P.2d 106; Vogel v. Marsh, 122 Cal.App. 748, 10 P.2d 791. In the present case it does not so appear. The undisputed facts are that plaintiff did nothing for a period of more than seven years after the submission was set aside to bring the case to a final termination. It is quite obvious, therefore, that there could be no justification for holding on appeal that the trial court abused its discretionary power in dismissing the action.

[4, 5] Moreover, it is well settled that the power of the court to dismiss an action for failure to prosecute it with diligence is an inherent power which exists without the aid of statutory authority and that the provisions of section 583 and other related sections must be read in the light of the existence of such inherent power. Hibernia Sav. & Loan Soc. v. Lauffer, supra; Inderbitzen v. Lane Hospital, supra; Romero v. Snyder, supra; Johnston v. Baker, 167 Cal. 260, 139 P. 86. The only limitation placed upon such inherent discretionary power is that it may not be exercised until a period of two years has elapsed after the action has been commenced (Inderbitzen v. Lane Hospital, supra), and that the power shall not be abused (Jackson v. De Benedetti, 39 Cal.App.2d 574, 103 P.2d 990). It is apparent, therefore, that apart from the statutory authority granted by section 583, it was within the inherent discretionary power of the court to dismiss the action. Inderbitzen v. Lane Hospital, supra; Hibernia Sav. & Loan Soc. v. Lauffer, supra. In applying the foregoing doctrine it has been held that it is not an abuse of the discretionary power of the court to dismiss an action where it has not been brought on for retrial for more than two years after the disagreement of the jury at the first trial. Oberkotter v. Spreckels, 64 Cal.App. 470, 221 P. 698. Furthermore in the Inderbitzen case, supra, it is held that the mandatory portion of section 583 compelling a dismissal for failure to bring a case on for retrial within three years after the filing of the remittitur on reversal of the judgment does not deprive a trial court of the discretionary power to dismiss the action for delay amounting to a shorter period than that which under the statute gives a defendant an absolute right to a dismissal.

Plaintiff cites cases holding that when a cause has been partially tried within the maximum five-year period fixed by section 583 a defendant is not entitled as a "mandatory right" to a dismissal, and that in those circumstances a trial court cannot be compelled by mandamus to grant the motion to dismiss, nor restrained by prohibition from taking further proceedings in case it has seen fit to deny the motion. Allyne v. Superior Court, 200 Cal. 661, 254 P. 564; Mercantile Invest. Co. v. Superior Court, 218 Cal. 770, 25 P.2d 12; Mussat v. Superior Court, 16 Cal.App.2d 291, 60 P.2d 323; Krasnow v. Superior Court, 15 Cal.App.2d 141, 59 P.2d 442. But the reviewing courts in those cases go on to point out that in those circumstances the trial court may nevertheless, in the exercise of its statutory and inherent discretionary power, dismiss the action for lack of diligence in the prosecution thereof; and such was the case here.

[6-8] The substance of plaintiff's second main contention is that since the trial court, of its own motion, set aside the submission "for further proceedings" plaintiff cannot be held guilty of laches for having waited for notice from the clerk as to when and for what purpose further hearing would be had. This contention is likewise without merit. As has been frequently said, the duty rests upon a plaintiff at every stage of the proceedings to use due diligence to expedite his case to a final determination that there may be an end to litigation. 9 Cal.Jur. p. 526; Lieb v. Lager, 9 Cal.App.2d 324, 49 P.2d 886; Inderbitzen v. Lane Hospital, supra. In declaring such to be the law, the court in Gray v. Times Mirror Co., 11 Cal.App. 155, 104 P. 481, 484, went on to say: "It is the policy of the law to favor and encourage a prompt disposition of litigation, and this policy is the outgrowth of sound and substantial reasons. The doctrine of laches as a bar to the assertion of stale claims and statutes of limitations rest upon the same reasons or principle. A party against whom an action is instituted is entitled to as speedy a disposition thereof as is consistent with his own and the rights of the plaintiff; and, if he who starts the law in motion does not with reasonable promptness pursue all the steps necessary to bring the litigation to an end, he should suffer the penalty of his default. It is no answer to say that the respondent did not, during the period of the delay, utter a word of protest against such delay. As we have said, it was the duty of the plaintiff to act and to act with reasonable promptness and diligence. It was not the duty of the respondent to make any move except such as the law requires it to make in response to the movements of plaintiff at the various stages of the litigation." Even though it could be said in the present case, as plaintiff seems to contend, that under the circumstances he was not called upon to take any steps to reinstate the case on the trial calendar "for further proceedings" during the three and a half years that elapsed between the entry of the order setting aside the submission and the date of the judge's retirement, there could be no legal justification for having failed to have the cause restored to the trial calendar for retrial during the additional three and a half years following the date of the judge's retirement, because obviously immediately upon his retirement without having decided the case the cause was automatically set at large on all issues, and necessarily required that it be tried anew before another judge. Nor does the fact that after January, 1939, plaintiff's attorney could no longer act for him serve as legal ground for setting aside the trial court's affirmative finding of laches, for it will be noted plaintiff waited three years before he secured the services of another attorney.

The judgment is affirmed.

PETERS, P. J., and WARD, J., concur.

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62 Cal.App.2d 165

R. H. GEOFFROY & CO. v. FARIA et al.

Civ. 12473.

District Court of Appeal, First District, Division 1, California.

Jan. 4, 1944.

1. Appeal and error 🔑1011(1)

Where evidence on question of defendant's negligence and plaintiff's employee's contributory negligence was conflicting, District Court of Appeal cannot say, on appeal from judgment for plaintiff, that defendants were free from negligence or that such employee was guilty of negligence constituting sole or contributory cause of accident.

2. Appeal and error 🔑1011(1)

The proximate cause of accident is question for trier of facts to determine on conflicting evidence.

3. Appeal and error 🔑931(1)

The trial court's findings on question of plaintiff's contributory negligence, if reasonable, should be construed to support judgment for plaintiff on appeal therefrom.

4. Appeal and error 🔑1071(6)

Where trial court found that defendants' negligence was proximate cause of accident, failure to find that plaintiff's negligence was contributing proximate cause was not ground for reversal of judgment for plaintiff, as finding made negatived such negligence of plaintiff.

5. Appeal and error 🔑891
Stipulations 🔑14(7)

In action for damages to semi-tractor and trailer, where defendants' counsel stipulated that mechanic, who repaired equipment, would testify, if called as witness, that specified sums spent for repairs were necessary and reasonable, trial court had right to adopt such figures as amount of damages, in absence of contrary evidence, and reviewing court need not resort to statutory provisions for taking additional evidence on question of damages. Code Civ.Proc. § 956a.

Appeal from Superior Court, Alameda County; S. Victor Wagler, Judge.

Action by R. H. Geoffroy & Company against Frank Faria and another, individually and doing business under the fictitious name and style of Faria Brothers, and others for damages to a semi-tractor and trailer and its load as the result of overturning on a highway. From a judgment for plaintiff, defendants appeal, and plaintiff moves for an order to take additional testimony on the question of damages.

Motion denied, and judgment affirmed.

Theodore Hale and Carroll B. Crawford, both of San Francisco, for appellants.

A. Brooks Berlin, of San Francisco, and Louis A. Musmaker, of Oakland (A. Dal Thomson, of San Francisco, of counsel), for respondent.

WARD, Justice.

This is an appeal by defendants from a judgment awarding plaintiff compensation for damage to hauling equipment and its load as the result of a mishap on the highway. The case was tried without a jury.

At the time of the accident plaintiff's employee Louis Vacarella, driving in an easterly direction a semi tractor, to which was attached a trailer, was transporting bottled beer, weighing approximately sixteen tons, from San Jose to Modesto. The highway along which he was proceeding has two lanes and is sixteen feet wide, with a two foot shoulder and a ditch on each side. Just ahead of plaintiff and moving in the same direction was an empty flat-bed truck with separate trailer attached. This equipment belonged to defendants Faria and was operated by one of their employees, W. K. Moore, who was accompanied by a helper. Moore had been having trouble with the engine of his truck and there is testimony that at the time of the accident its motor was dead and he was attempting to roll it on a slight down grade to a garage just ahead and on the left side of the road. There is varying testimony that his speed at the time was from five to twenty miles an hour. As Vacarella approached defendants' equipment, he put on his brakes and reduced his speed from forty miles an hour, at which he had been driving, to thirty or thirty-five miles, and testified that when he was fifty or seventy-five feet behind defendant he blew his horn and attempted to pass defendants' truck on the left. When the front of his truck, then on the northerly side of the highway, was twenty or thirty feet to the rear of the equipment preceding him, he saw its driver signal for a left hand turn, and immediately execute such maneuver, thus bringing his vehicle directly in the path of the on-coming truck; that the vehicles of defendants were actually about a foot over the white line when the signal was given. Vacarella applied his brakes and turned to the right in an effort to pass on that side, but he found that part of the "large equipment" ahead of him was still across the highway sufficiently to prevent his passing. In order to avoid the ditch at his right, he attempted to get back to the center of the highway, but the swaying trailer overturned and its weight pulled the truck with it. Moore, apparently unaware of the accident, according to plaintiff continued to move along the left side of the road for some little distance before turning into the garage above mentioned. There is conflicting testimony as to the point at which Moore turned into the left side of the highway, and also as to the place where a signal indicating his intention to do so was given.

Appellants contend that the trial court committed prejudicial error in three particulars, namely, (1) in finding that the overturning of plaintiff's vehicles was the result of carelessness and negligence on the part of defendants; (2) in fixing plaintiff's damages in the sum of $2,681 or in any greater sum than $350—assuming without conceding that defendants were guilty of negligence and the plaintiff free from contributory negligence; (3) in failing to make any finding whatever on the allegations of defendants' answer and defense that the damage to plaintiff's property was caused solely and proximately by plaintiff's own negligence.

There is also a motion by plaintiff, heard prior to the argument on the merits of the case, to produce additional evidence on the question of damages. This motion is due to a dispute relative to certain stipulations made during the trial.

[1, 2] In view of the conflicting evidence, this court is unable to say that defendants were free from negligence, or that Vacarella was guilty of negligence which was either the sole or a contributory cause of the accident. The determination of proximate cause where the evidence is conflicting is a question to be determined by the trier of the facts.

[3, 4] The allegations of the answer sufficiently raised the defense of contributory negligence. Friddle v. Southern Pac. Co., 126 Cal.App. 388, 14 P.2d 568; Mardesich v. C. J. Hendry Co., 51 Cal.App.2d 567, 125 P.2d 595. It is the rule that findings thereon, if reasonable, should be construed to support the judgment. E. W. McLellan v. East San Mateo L. Co., 166 Cal. 736, 137 P. 1145; Gin S. Chow v. City of Santa Barbara, 217 Cal. 673, 22 P.2d 5. In the present case the judgment was for plaintiff. The court found "that as a result of said carelessness and negligence of the defendants, as aforesaid, the plaintiff's semi-tractor and trailer in attempting to avoid a collision with said truck and trailer of defendants was caused to and did overturn." The finding that the negligence of the defendant agent was the proximate cause of the accident, in the absence of any further finding, negatives any negligence of the plaintiff as a contributing proximate cause. A finding on this issue therefore must have been in favor of plaintiff and adverse to defendants, and hence the failure to make such finding is not ground for reversal. Arrelano v. Jorgensen, 52 Cal.App. 622, 199 P. 855; Reiniger v. Hassell, 216 Cal. 209, 13 P.2d 737. In Pacific States S. & L. Co. v. Perez, 51 Cal.App.2d 84, 94, 124 P.2d 184, 189, the court said: "Where an omitted finding must be inferred from a consideration of the findings actually made, an appellate court will recognize the necessary inference and consider the finding in question as having in effect been made."

On the subject of damages, there is a written stipulation in the record that "in the event of judgment against the defendant loss of use may be reckoned at not to exceed the sum of $350.00." This leaves for consideration the question of support for other findings of damages.

[5] This last question involves the stipulation, result of certain discussions during the trial, relative to the testimony of a witness if called. It is true that vouchers for the cost of repairs were not introduced as exhibits, and for that reason the form of proof can not meet with judicial approval; but certain sums were specifically mentioned in an attempt to reach a stipulation, without contradiction as to their correctness. It is not necessary to quote the numerous statements of respective counsel, or the fact that some misunderstanding arose relative to a further hearing, in view of the fact that the record, reasonably construed, shows that the parties stipulated that the disputed amounts were reasonable and necessary. During the discussions involving various items, the court addressing counsel for defendants said:

"As I understand counsel he is willing to stipulate that if the mechanic was called he would testify that these repairs were necessary and reasonable. Is that right?

"Mr. Hale: Yes. He wouldn't testify that he had overcharged him.

"The Court: I understand it. Let's go ahead.

"Mr. Berlin: And the sum of $345.89 was the sum stipulated on as the damage done to the Dodge semi-tractor.

"Mr. Hale: One minute. Same stipulation covers the whole thing, and all in the same way.

"The Court: All right."

The effect of the stipulation as to the amount of damages was that the specified sums would be stated by the witness to be necessary and reasonable. In the absence of any evidence to the contrary, the court had a right to adopt the figures designated as the amount of damages on each item, and a reviewing court under the circumstances need not resort to the provisions of Code of Civil Procedure sec. 956a.

The motion for an order to take testimony is denied. The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

62 Cal.App.2d 193

KIRKMAN CORPORATION v. OWENS et al.

Civ. 7000.

District Court of Appeal, Third District, California.

Jan. 4, 1944.

Rehearing Denied Feb. 2, 1944.

1. Trover and conversion 🔑37

In action for conversion of nursery stock, agreement by defendants' lessor to grow certain nursery stock for plaintiff from seeds furnished by plaintiff, which seeds and trees were to remain property of plaintiff, upon land farmed by defendants' lessor, wherein space for description of land was left blank, was relevant to show basis on which nursery stock was produced and to show link in plaintiff's claim of title thereto, and should have been admitted over objection that agreement was not a contract because of failure to fill in land description.

2. Contracts 🔑39
Evidence 🔑417(10)

Where space provided in contract covering the growing of nursery stock for the description of land on which nursery stock was to be grown was left blank, omission did not invalidate the contract and parol testimony to supply the omission was not objectionable as an attempt to vary the terms of a written instrument.

3. Trover and conversion 🔑37

In action for conversion of nursery stock which defendant's lessor had contracted to grow for plaintiff pursuant to contract which plaintiff alleged that defendant had assumed, preliminary memorandum on printed tag of nursery of defendants' lessor, signed by plaintiff and defendants' lessor and relating to the growing of nursery stock, should have been admitted over objection that it was immaterial.

4. Trover and conversion 🔑37

In action for conversion of nursery stock, where plaintiff claimed that defendants' lessor agreed to grow the stock for plaintiff under terms of a certain contract, plaintiff was entitled to have agreement and memorandum relating thereto admitted in evidence in order to establish plaintiff's title.

5. Infants 🔑58(1)

Where disaffirmance of contract to grow nursery stock for plaintiff, under which contract plaintiff retained title to seed and trees, merely showed that 18-year-old minor of Japanese ancestry abandoned any interest in contract, and evidence merely disclosed that Japanese were evacuated from the territory in 1942 without disclosing that consideration was returned to or its equivalent paid to plaintiff, in plaintiff's conversion action, defendants, as subsequent lessees of land from which such minor and his father were evacuated, could not rely on such disaffirmance to defeat plaintiff's title. Civ.Code, § 35.

6. Appeal and error 🔑1011(1)

In action for conversion of nursery stock, where the evidence was conflicting as to whether defendants knew of agreement between plaintiff and defendants' lessor and as to whether defendants performed labor on the nursery stock at plaintiff's request, implied finding of the trial court for defendants could not be disturbed on appeal.

7. Bailment 🔑18(2, 4)

The lien upon personal property acquired by the rendition of service to the owner thereof for the protection, improvement, safekeeping, or carriage thereof, is dependent upon possession, and if the lien is lost by relinquishment of possession it cannot be revived by any subsequent reacquired possession. Civ.Code, § 3051.

8. Agriculture 🔑11

Where lease under which defendants acquired possession of land formerly occupied by a person of Japanese ancestry, who was evacuated, specifically excluded area in which plaintiff's nursery stock was being grown by such Japanese defendants acquired no lien on the nursery stock for any labor performed thereon before the performance of labor was requested by plaintiff. Civ.Code, § 3051.

9. Agriculture ⚷11

Where defendants, at plaintiff's request, commenced to dig, tie, haul, and store plaintiff's nursery stock, defendants could properly claim a possessory lien thereon for the reasonable value of the services rendered during and after such labor. Civ.Code, § 3051.

10. Agriculture ⚷11

Where defendants in conversion action claimed a lien on plaintiff's nursery stock for services rendered in connection therewith, a part of which services did not give rise to a lien, finding that defendants were entitled to a lien for full amount claimed was error.

11. Agriculture ⚷11

Where plaintiff did not offer to pay defendants amount to which defendants were entitled under defendants' claim of lien upon plaintiff's nursery stock, defendants' claim of an excessive lien did not defeat right to a lien for proper amount. Civ.Code, §§ 3051, 3052.

◆

Appeal from Superior Court, Placer County; J. B. Landis, Judge.

Action by Kirkman Corporation against Vernon P. Owens, Oke Fredricksson, Owens & Fredricksson, a copartnership, to recover for the alleged conversion by defendants of certain nursery stock. Judgment for defendants, and plaintiff appeals.

Reversed and remanded.

J. Kingsley Chadeayne, of Tracy, for appellant.

Floyd H. Bowers, of Roseville, for respondents.

SHOTTKY, Justice pro tem.

Appellant corporation commenced an action against respondents, who were copartners, alleging that it had since February 1, 1941, been the owner of certain nursery stock; that prior to February 2, 1943, respondents came into possession of said nursery stock; that appellant was at all times entitled to the possession of said nursery stock and demanded possession thereof from respondents, but that respondents refused to deliver same to appellant; and that by reason of the conversion of said nursery stock by respondents, appellant had been damaged in the sum of $5,000.

Respondents denied all the material allegations of the complaint and also set up as a special defense that they had performed labor and furnished materials in the growing, irrigating, cultivation, fertilizing, digging, hauling, sorting and preserving of said nursery stock from May, 1942, to the filing of complaint (Feb. 16, 1943), and that they were detaining said nursery stock by virtue of a lien for such labor and material under section 3051 of the Civil Code. Respondents set forth as an additional defense that appellant's claim of ownership was based upon a certain written contract between it and one M. Nishimura, a minor of eighteen years, and that said minor had disaffirmed said contract with appellant and appellant had no lawful claim to said nursery stock.

Following the trial of the action, the court found that it was not true that plaintiff was the owner of the nursery stock; that prior to February 5, 1943, respondents lawfully came into possession of same; that on February 5th and also on or about February 9, 1943, appellant demanded possession thereof but respondents refused to deliver it to appellant, but it was not true that respondents on February 2, 1943, or at any other time converted said nursery stock; that it was not true that appellant had been damaged in the sum of $5,000, or any other sum. The court found further that during the period between May 11, 1942, and the filing of the complaint, respondents had at the special instance and request of appellant performed the labor and furnished the materials specified in the special defense as hereinbefore set forth, of the reasonable value of $1,044.64, and that respondents had detained said nursery stock under a valid claim of lien for said labor and materials and had offered to deliver said nursery stock to appellant upon payment of the amount of their said claim, but that appellant had refused to pay said claim or any part thereof; that all right or title of appellant in said nursery stock is subordinate to the claim of lien of respondents. The conclusions of law were that appellant corporation should take nothing by reason of said action and that respondents should have judgment for their costs. Judgment was entered accordingly, and this appeal is from said judgment.

We glean from the evidence in the case that appellant entered into a contract with the Nishimuras, father and son, under which the former was to furnish seeds for the growing of special nursery root stock; that the Nishimuras were to plant said seeds and raise the stock on land occupied by them, and, at the proper time, bud same to peaches, etc., with buds furnished by appellant; that title to the said nursery stock was at all times to remain in appellant, and at the proper time the budded trees were to be delivered to appellant; that before this contract was fully performed the Japanese were evacuated, and the Nishimuras leased to respondents all of their land except a portion upon which the nursery stock in controversy was growing; that thereafter respondents took care of said nursery stock, and eventually dug same and "heeled it in" at Smyth's nursery yards, where further labor was performed upon it; that appellant eventually demanded delivery of said stock to it, but that respondents refused to make delivery until paid the sum of $1,044.64 which they claimed on account of labor and materials furnished by them, in the growing, preserving, digging, hauling and caring for same from the time of the evacuation of the Japanese to date; that appellant refused to pay the amount claimed by respondents or any amount other than $14 claiming that respondents had undertaken to complete the contract entered into by appellant with the Nishimuras, and that, as appellant had made certain money advances to the Nishimuras, there was a balance of but $14.00 unpaid under said contract. Respondents denied that they had assumed to perform that contract and contended that at appellant's request they had performed the services and made the expenditures for which they claimed compensation. They therefore claimed a lien upon said nursery stock and refused delivery of same to appellant. Appellant then commenced this action. Respondents made no claim of ownership of said nursery stock and in fact conceded in their written lien that appellant was the owner or reputed owner of same; and no one else has laid claim to same.

[1-3] On this appeal appellant attacks a number of rulings of the trial court upon offers of testimony. Appellant offered in evidence a written agreement under the terms of which one M. Nishimura agreed, among other things, to grow certain nursery stock for appellant from seeds furnished by appellant, said seeds and trees to remain at all times the property of appellant, and said nursery stock to be grown upon the land farmed by Nishimura, the space for the description of the land being left blank. Respondent objected to the introduction of this agreement (Plaintiff's Exhibit A for identification) upon the ground chiefly that it was not a contract because the property upon which the nursery stock was to be grown was not described therein, although some other grounds of objection were stated. The court sustained the objection and refused to admit the agreement in evidence. This was clearly error as the agreement was relevant and important to show the basis on which the nursery stock was produced, and as a link in plaintiff's claim of title thereto. The omission of the description of the land upon which the nursery stock was to be grown did not invalidate the agreement and it was entirely proper to supply this omission by parol testimony, if it became necessary to supply it in order to identify the nursery stock. Appellant offered such testimony and was met by respondents' objection that plaintiff was attempting to vary the terms of a written agreement by parol testimony. This objection was likewise sustained by the court. The second ruling was clearly erroneous as there was here no attempt to vary the terms of the written instrument, but merely to supply the description of the land upon which the nursery stock was to be grown. Appellant also offered in evidence a document marked as Plaintiff's Exhibit D, for identification, which was a preliminary memorandum on the printed tag of Nishimura Nursery, signed by appellant and M. Nishimura, and relating to the growing of nursery stock. Respondents' objection that it was immaterial and irrelevant was sustained by the court, in which ruling error was again committed. After these various objections had been sustained by the court, appellant made this final offer: "I would offer to prove by the testimony of Mr. Kirkman that the seed and the growing of trees mentioned in those plaintiff's Exhibit A and plaintiff's Exhibit D are the same trees that are mentioned in the complaint, that Mr. Kirkman at all times was familiar with the planting, with the growth, with the budding, and that those seeds and buds developed into the trees that are mentioned in the Complaint." Respondents again objected and the objection was sustained by the court.

[4] It is apparent that both counsel for respondents and the court were laboring under the mistaken impression that the contract in question was a contract relating to real property, when it was in fact by its terms merely a contract for the growing of nursery stock, and, under its terms and the circumstances here present, it related to personal property. Appellant claimed that Nishimura agreed to grow said nursery stock for it under the terms of said agreement, and it was entitled to have received in evidence the agreement and memorandum relating thereto in order to establish its title. No citation of authority is necessary to support so elementary a proposition.

[5] Curiously enough, respondents themselves offered in evidence a purported disaffirmance by M. Nishimura, a minor, of the very contract which they had been successful in keeping out of the record, which said disaffirmance contained the detailed description of the real property on which the nursery stock was grown. This was admitted by the court over appellant's objection. It is difficult to understand how the disaffirmance could be admissible and the contract itself not admissible, especially since both were pleaded by respondents. Appellant claimed the nursery stook agreement was with M. Nishimura, the father, and respondents claimed it was with M. Nishimura, the son, a minor of the age of eighteen years. Respondents evidently sought to show appellant's lack of title to the nursery stock by offering the disaffirmance in evidence. It is extremely doubtful whether third persons such as respondents could rely upon the disaffirmance, but even if they could, this purported disaffirmance does not meet the requirements of section 35 of the Civil Code, which provides that a contract made by a minor "may be disaffirmed in like manner upon restoring the consideration to the party from whom it was received, or paying its equivalent." There is no evidence in the record of any such restoration of consideration or payment of the equivalent to appellant. The record merely shows that the Japanese were evacuated from the territory in 1942 and could no longer care for said nursery stock, and the purported disaffirmance merely tended to show that M. Nishimura, the minor, abandoned any interest in said nursery stock. It could not have the effect of depriving appellant of such title to the stock as it may have had.

[6] Appellant contends that the rights of respondents in said nursery stock were subject to the agreement between appellant and M. Nishimura. Mr. Kirkman, president of appellant corporation, testified that respondents were advised of said agreement in May of 1942, and that he at all times insisted that this agreement be complied with. Respondents, however, denied this and insisted that they did not know of said agreement and that they performed the labor on the nursery stock at Mr. Kirkman's request and upon his express promise to reimburse them. This, of course, created a conflict upon that point, and the implied finding of the court, which is against the appellant, cannot be disturbed by this court.

As hereinbefore set forth, the trial court found that respondents had detained said nursery stock upon a valid claim of lien in the sum of $1,044.64 for labor and material performed and furnished by respondents at the special instance and request of appellant, and that appellant had refused to pay the amount of said lien. Appellant vigorously attacks this finding and contends (1) that under sections 3051 and 3052 of the Civil Code, respondents could have no lien on the nursery stock; (2) that if respondents ever had a right of lien it was for a lesser amount than the amount claimed and that found by the court; and (3) that by claiming an excessive lien respondents waived any right to a lien.

[7] The portion of section 3051 of the Civil Code applicable to the lien claimed by respondents reads as follows: "Every person who, while lawfully in possession of an article of personal property renders any service to the owner thereof, by labor or skill, employed for the protection, improvement, safekeeping, or carriage thereof, has a special lien thereon, dependent on possession, for the compensation, if any, which is due to him from the owner for such service." Under said provision it was held by this court in Golden State Orchards v. Harter, 93 Cal.App. 390, 269 P. 735, that one who rendered services in the drying and processing of fruit was entitled to a lien on the fruit and the possession thereof until his proper charges were paid. See also People v. Photo, 45 Cal.App.2d 345, 114 P.2d 71. Such a lien is, however, dependent upon possession, and the law is well settled that if a lien is lost by relinquishment of possession it cannot be revived by any subsequently re-acquired possession.

People v. Photo, supra; Davis v. Young, 75 Cal.App. 359, 242 P. 743.

[8-10] It is conceded by the parties and apparent from the record that the lease under which respondents took possession of the land formerly farmed by the Nishimuras specifically excluded therefrom the land upon which the nursery stock here in controversy was growing. Therefore it cannot be held that said portion of the land was in respondent's possession, and we are unable to perceive how they could acquire a lien upon said nursery stock for any labor performed thereon prior to the time they commenced digging the nursery stock at Kirkman's request. When, however, they commenced to dig it and tie it and haul it and store it in Smyth's Nursery, and during such work took possession thereof and continued to hold possession thereof, we believe they could properly claim a lien under the provisions of section 3051 of the Civil Code for the reasonable value of the services rendered during and after digging. It is not possible to tell from the record what part of the claimed lien was for services performed prior to digging and what part was for services after digging commenced; but it is clear that the court erred in finding that respondents were entitled to a lien upon said nursery stock for the full sum of $1,044.64.

[11] We do not believe there is any merit in appellant's contention that in claiming an excessive lien respondents waived the right to any lien. Appellant did not offer to pay respondents for the portion of their services for which they might properly have claimed a lien, but claimed that respondents had assumed the obligations of the Nishimura contract and that they must accept the amount that could be due Nishimura for the completed contract after deducting certain payments which had been made by appellant to Nishimura. Respondents denied any connection with the Nishimura contract and declined the amount of $14 offered by appellant. If respondents were entitled to a lien they were entitled to retain possession of the nursery stock until they were offered the amount to which they were entitled. The mere fact that they may have mistakenly believed, or have been advised, that they had a lien for the entire amount claimed to be due for the services performed by them in caring for the nursery stock, would not defeat their right to a lien in the amount to which they were properly entitled, even though they filed a lien for a larger amount.

The errors hereinbefore set forth require a reversal of the judgment and a retrial of the entire matter. Upon such retrial it can no doubt be determined upon all the evidence whether or not appellant was the owner of said nursery stock, and the amount for which respondents were entitled to a lien under Civil Code, section 3051; and all other proper issues can be disposed of fully.

The judgment is reversed.

ADAMS, P. J., and THOMPSON, J., concur.

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62 Cal.App.2d 161

ZITO v. WEITZ.

Civ. 14158.

District Court of Appeal, Second District, Division 2, California.

Jan. 3, 1944.

Hearing Denied March 2, 1944.

1. Landlord and tenant 🔑169(4)

In action by tenant against landlord for injuries, tenant had burden at trial to establish that landlord failed to discharge duty to use reasonable care to keep premises in a safe condition.

2. Trial 🔑165

In passing upon a motion for a nonsuit, all conflicts in evidence must be resolved in favor of plaintiff, and all reasonable inferences favorable to plaintiff are to be deduced from the evidence, but when evidence is legally insufficient to support a judgment in plaintiff's favor, a nonsuit must be granted.

3. Landlord and tenant 🔑169(6)

In action for injuries sustained when apartment house tenant struck his head on a lowered fire escape ladder, where evidence disclosed that ladder was of a proper design and was not in a defective condition, and there was no showing that landlord knew that ladder was down, evidence that two years previously another party had struck his head against a lowered ladder on the premises and that one of the ladders was seen to be down on various prior occasions was insufficient to disclose any liability of landlord.

4. Landlord and tenant ⚷169(4)

Where landlord was compelled to erect and maintain fire escapes in such manner that they could be subjected to use of tenants in emergency, limited control of landlord over fire escapes did not authorize an inference of negligence of landlord when tenant struck his head against a lowered fire escape ladder so as to authorize application of doctrine of "res ipsa loquitur."

See Words and Phrases, Permanent Edition, for all other definitions of "Res Ipsa Loquitur".

Appeal from Superior Court, Los Angeles County; Georgia P. Bullock, Judge.

Action by Joseph Zito against Hanna E. Weitz to recover for injuries sustained when plaintiff struck his head against a fire escape ladder at defendant's apartment house. From an order granting defendant's motion for nonsuit, and from judgment entered thereon, plaintiff appeals.

Affirmed.

Cantillon & Glover, of Los Angeles, for appellant.

Crider, Runkle & Tilson, of Los Angeles, for respondent.

W. J. WOOD, Justice.

Plaintiff commenced this action to recover damages for injuries which he received when his head struck against a fire-escape ladder at defendant's apartment house. Upon the termination of plaintiff's evidence the trial court granted defendant's motion for a nonsuit. The appeal is from "the judgment and the order entered in the minutes".

Defendant owns and operates an apartment house on Fountain avenue in the city of Los Angeles known as "Fountain Manor Apartments". Along the outside west wall of the building a walk approximately thirty-six inches in width extends from the sidewalk at the front of the building to an alley in the rear. On the west side of the walk there is a cedar hedge approximately twelve feet in height. Three entrances, or exits, open onto the walk and at each of the entrances there is a metal fire-escape to permit emergency egress from the upper floors of the building. At the time of the accident and prior thereto the ladder in question was of the type in general use in apartment houses in Los Angeles. Its two rails were contained within parallel iron channels in a vertical position which served as guides within which the ladder could move up and down. A cable attached to the top of the ladder passed over a pulley and its other end was attached to the top of a counter-weight which was contained in a similar set of iron channels which permitted the counter-weight to move up and down in a plane parallel to the ladder. The ladder normally was retained in a raised position at the front floor level by an iron lever which operated in a horizontal plane so that one end could be placed under a ladder rung, and also by gravity, the counter-weight being somewhat heavier than the ladder itself. The ladder could not descend without being operated by some human agency. The lever had to be turned to release the rung which it retained and then pressure had to be applied in a downward direction to overcome the gravity pull of the counter-weight.

Plaintiff had been a tenant in the apartment house for about twelve years. In the afternoon of October 13, 1941, while walking towards one of the entrances, his head struck against the ladder of one of the fire-escapes, which was in a lowered position. No evidence was introduced to show how or in what manner or by whom the ladder had been lowered or for what length of time it had been in a lowered position. No defect in the ladder or the fire-escape was proved, but on the contrary it was shown in evidence that they were in good order at the time of the accident and were of a proper design. There was nothing in the evidence to charge defendant with notice, either actual or constructive, that the ladder was down at the time of the accident. Defendant was ill and in bed on the day of the accident and the apartment house clerk who was on duty knew nothing about the position of the ladder until after the accident.

On behalf of plaintiff Mrs. Amurl Campbell testified that before her discharge by defendant she had been housekeeper at the apartment house; that in the fall of 1939 a Mr. Sweet had been injured by one of the ladders; that in September of 1940 one of the ladders "kept falling down" and the witness said to defendant, "We are going to have to do something about our fire-escapes"; that the ladders would not fall of their own weight and that she had not seen any of them fall. C. F. Campbell, husband of Amurl Campbell, testified that he saw ladders in a down position on two occasions before the accident in question but he did not state the times at which the ladders were down or that there was any defect in them on those occasions.

[1, 2] The duty was upon defendant to see that reasonable care was exercised to keep the premises in a safe condition, and the burden was upon plaintiff at the trial to establish that defendant failed in the discharge of the duty to use reasonable care. Although it is the established rule that in passing upon a motion for a nonsuit all conflicts in the evidence must be resolved in favor of plaintiff and that all reasonable inferences favorable to plaintiff are to be deduced from the evidence, nevertheless a nonsuit must be granted when the evidence is legally insufficient to support a judgment in plaintiff's favor. Nicholas v. Jacobson, 113 Cal.App. 382, 389, 298 P. 505.

[3] Defendant was obligated to maintain fire-escapes on her building and to keep them in such condition that they could be used instantly in cases of emergency. The evidence was without conflict that the fire-escape in question was of a proper design and was not in a defective condition. It was necessary that the ladder be maintained in such manner that anyone leaving the upper floor of the building in an emergency could lower it. On the occasion of the accident it was not shown that the ladder was lowered by defendant or by anyone acting for defendant or that defendant had notice that it was down. The fact that on a previous occasion another party had struck his head against a lowered ladder on the premises would not charge defendant with liability for an accident which occurred two years later. Nor would the fact that one of the ladders was seen to be down on prior occasions give support to a judgment in favor of plaintiff. For aught that appears in the evidence the ladder might then have been lowered by an inspector from the fire department. No evidence was introduced showing that on the prior occasions there was anything defective about the fire-escapes or the ladders.

[4] The doctrine of res ipsa loquitur is not applicable, for an inference of negligence on the part of defendant did not arise from her limited control of the fire-escapes. She was compelled to erect and maintain them in such manner that they could be subjected to the use and control of the tenants in case of emergency.

The judgment and the order are affirmed.

MOORE, P. J., and McCOMB, J., concur.

Hearing denied; CARTER, J., dissenting.

62 Cal.App.2d 116

PEOPLE v. ROMERO et al.

Cr. 3722.

District Court of Appeal, Second District, Division 1, California.

Dec. 27, 1943.

1. Robbery ⚷24(1)

Evidence was sufficient to sustain conviction for robbery in second degree.

2. Sodomy ⚷6

Evidence was sufficient to sustain conviction for attempted sodomy.

3. Criminal law ⚷1160

Where evidence is conflicting, question of credibility of witnesses is for the jury and trial court.

4. Criminal law ⚷1170½(5)

In robbery prosecution, where witness had been permitted to answer cross-examination questions regarding what defendant had said when interrogated about what had become of complaining witness' money and witness had testified that defendant had stated he didn't know anything about the money, refusing to permit cross-examination of witness regarding defendant's response to question as to whether defendant had taken money was not prejudicial error.

5. Criminal law ⚷419(10)

In prosecution for robbery and attempted sodomy, refusing to permit defendant to cross-examine police officer as to what defendant and others had told officer regarding their difficulties with complaining witness was proper, since matter sought to be elicited was hearsay.

6. Indictment and Information ⚿191, 191(9)

The offense of battery is not necessarily included in that of robbery nor in that of attempted sodomy.

7. Criminal law ⚿814(1)

In prosecution for robbery and attempted sodomy, refusing to instruct jury as to battery was not error. Pen.Code, § 1159.

8. Infants ⚿69

Where statute providing punishment of imprisonment in state prison for not less than one year for second-degree robbery did not provide maximum, youth convicted of second-degree robbery was in legal effect "sentenced to term of life imprisonment" within statutory provision excluding person sentenced to life imprisonment from certification to Youth Authority. St.1941, p. 2522, § 1700 et seq.; p. 2526, § 1731.5(b); Pen.Code, § 213.

See Words and Phrases, Permanent Edition, for all other definitions of "Sentenced to Life Imprisonment".

◆

Appeal from Superior Court, Los Angeles County; Arthur Crum, Judge.

Amadeo Romero and Peter Silvas Nieblas were jointly charged by information with crimes of robbery and attempted sodomy, and Peter Silvas Nieblas was convicted of robbery in the second degree and of attempted sodomy, and he appeals.

Affirmed.

David C. Marcus, of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

DORAN, Justice.

Appellant and one Amadeo Romero were jointly charged by an information in two counts with the crimes of robbery and attempted sodomy. Appellant alone was brought to trial, before a jury, and was convicted of robbery in the second degree and of attempted sodomy. This appeal is prosecuted from the judgment, the order denying appellant's motion for a new trial, and the order of the court refusing to certify appellant to the Youth Authority, pursuant to the provisions of Division 2.5, Chapter I, of the Welfare and Institutions Code, Stats.1941, ch. 937, p. 2522, now known generally as the Youth Authority Act, Stats.1943, ch. 690, p. 2442. Appellant herein was convicted prior to the effective date of the amendments to the act in 1943. It is contended that the evidence is insufficient to support the judgment of conviction; that the court erred in admitting and rejecting certain testimony, and in failing to instruct the jury as requested by appellant, and in refusing to certify the appellant to the Youth Authority.

[1-3] Appellant was one of a party of youths who, on or about November 26, 1942, had joined the complaining witness, one Walter E. Rabb, at a cafe in Azusa, in the County of Los Angeles, later riding about Azusa with the complaining witness in an automobile. According to the testimony of complainant, the youths, while riding in the car, attacked him, dragged him out of the car, robbed him and attempted sodomy upon his person. There was evidence that the group had engaged in drinking, and that the complaining witness was intoxicated. In his opening brief appellant states: "Were it not for the fact that this complainant told several contradictory stories, both to the officers and while under oath, respecting his whereabouts, his sojourns through the beer parlors and restaurants of San Gabriel Valley, his sobriety, the liquor consumed by him and the conclusiveness of the defendants' evidence rebutting this witness's story about the money which he claims was taken from him appellant would not seriously urge this point, being mindful that the jury was the sole judge of the credibility of the witness, as was the court sitting as a thirteenth juror on the motion for a new trial." The record does not reveal the evidence presented by the defense to be in any respect conclusive; and, although appellant has engaged in an extensive discussion of the testimony of the complaining witness, nevertheless, no sound basis for urging the insufficiency of the evidence is demonstrated. Appellant's argument, upon the record presented, merely reveals the evidence to be conflicting, as between the testimony of the complaining witness and that for the defense, and the question of the credibility of the witnesses to be clearly one for the jury and the trial court. There is no merit in the claim that the evidence was not sufficient to support the judgment.

[4] In the cross examination of the investigating officer concerning certain

conversations had with appellant immediately after the arrest, appellant's counsel sought to elicit from the witness the answer appellant had made when the officer had questioned appellant as to the money that had been taken from the complaining witness. Appellant contends that since the conversations were elicited upon direct examination it was not objectionable to attempt to secure the entire conversation, which would show a denial of guilt. The following excerpt reveals the state of the record with regard to the cross examination here in question:

"Q. You asked him whether he took any money from Rabb, didn't you? A. Yes.

"Q. What did he say about that?

"Mr. Loucks (Deputy District Attorney): I will object to that as a self-serving declaration on the part of the defendant.

"Q. By Mr. Marcus: What was the conversation that you had with Mr. Rabb with reference to the money?

"Mr. Loucks: I will object to the conversation so far as it calls for self-serving declarations on the part of the defendant.

"Mr. Marcus: It was part of the conversation.

"The Court: Your question is now what conversation did you have with Mr. Rabb?

"Mr. Marcus: No, I didn't mean that. With reference to the money that he took from Rabb, the conversation relating to the defendant with reference to the money taken from Rabb. A. I believe several times, principally on the first conversation, and again we talked to him again after talking to the other boys and asked him what had become of the money that Rabb had on his person, and he said that he didn't know anything about the money.

"Q. You didn't ask him whether he took any money from Rabb, did you? A. I asked them what had become of the money that they had taken from Rabb, yes, I did, I asked him the question.

"Q. What did he say?

"Mr. Loucks: We will object to that as calling for a self-serving declaration.

"The Court: The objection is sustained.

"Q. By Mr. Marcus: What was the conversation that you had with the defendant with reference to the money that was taken from Rabb, in that first conversation as part of the conversation that you have related on direct examination?

"Mr. Loucks: I will object to that question as asked and answered.

"The Court: I understood you just had an answer to that, Mr. Marcus. Objection sustained."

It may be seen from the foregoing excerpt that the witness had been permitted to answer the question as to what appellant had said when interrogated about what had become of the complainant's money. However, it may be noted that the witness was not permitted to state what, if anything, appellant had said in response to any question as to whether appellant had taken the money. Nevertheless, the answer stands in the record that appellant had said that he didn't know anything about the money, which response is sufficiently broad to constitute a denial of guilt on the part of appellant, and eliminates the possibility of any prejudice in the matter.

Only a part of the conversation had been testified to by the officer on direct examination; and respondent contends that it is the rule in such circumstances that upon cross examination only that portion of the conversation which is germane to the direct examination may be elicited, citing People v. Kiser, 24 Cal.App. 540, at page 546, 141 P. 1078, at page 1081, quoting the following: "The contention is that the court erred because the defendant had the right to disclosure of all of the conversation described in the direct examination of the witness. The rule that where part of a conversation has been shown in testimony the remainder of that conversation may be brought out by the opposing party on cross-examination is necessarily subject to the qualification that the court may exclude those portions of the conversation not relevant to the items thereof which have been introduced." No authority is cited in People v. Kiser, supra, for the statement above quoted. Moreover, in the present case, that portion of the conversation sought to be elicited upon cross examination of the officer was germane to the portion elicited upon direct examination. The entire conversation had between the officer and appellant pertained to appellant's connection with the alleged offenses and the part appellant had played therein. People v. McHugh, 62 Cal.App. 17, at page 19, 216 P. 76, cited by respondent as authority for the same proposition, does not appear to be applicable.

Respondent also contends that the questions propounded to the witness under cross examination with respect to Rabb's money were improper as calling for self-serving declarations on the part of appellant. The authorities cited by respondent upon this point are not applicable here. In the circumstances here presented, respondent appears to take the position that a question, upon direct examination of a police officer, which seeks to elicit a confession, is proper; but where the conversations had between a defendant and a police officer brought out a denial of guilt by the defendant, it would be improper cross examination to question the officer concerning defendant's denial of guilt, as the denial of guilt would constitute a self-serving declaration. There appears to be little justice or reason in respondent's contention; but, as already pointed out, appellant was not prejudiced in the circumstances, and the point need not be discussed here.

[5] Appellant complains of having been precluded by the court from cross examining a police officer as to what appellant and two of the other boys had told the officer regarding their difficulties with the complaining witness, as shown by the following excerpt:

"Q. By Mr. Marcus: Now, Mr. Bletcher, in that conversation didn't the defendant tell you, and Urrea tell you, and Romero tell you, that they tried to get this fellow out of the car, and he would not leave?

"The Court: How is that admissible here in the cross examination of this witness?

"Mr. Marcus: He has listed the conversations that he had with the defendant, and I propose to show that not the entire conversation has been given.

"The Court: If that is a fact, or these things that you are inquiring about are the facts, you can show this when you get into your own defense. You can't demonstrate that here on cross examination of this witness as to what a defendant told him. It is pure hearsay, and it is immaterial and not proper cross examination."

The matter thus sought to be elicited through cross examination of the officer was hearsay, and the trial court was correct in ruling it out. Appellant contends that the examination of the witness was proper as tending to elicit an explanation of appellant's actions with respect to the complainant, thus in effect constituting a denial of guilt. However, the officer, upon cross examination, was permitted to testify that appellant had told him that appellant did not get into a fight with the complaining witness; and the same witness also testified upon direct examination that appellant had said that he did not beat the complainant and he and the other boys just let complainant out on the street. It therefore appears from the record that the end sought by appellant upon cross examination had been achieved notwithstanding the ruling of the trial court in the particular instance of which appellant complains.

[6, 7] Appellant complains that the trial court refused to instruct the jury on the charge of battery. It is appellant's contention that under the facts of this case the jury could have found appellant guilty of battery. Appellant was not charged with battery; and as respondent points out, the offense of battery is not necessarily included in that of robbery nor in that of attempted sodomy. Under these circumstances the jury was not privileged to find appellant guilty of battery. See sec. 1159, Pen.Code; also see People v. Lopez, 135 Cal. 23, 66 P. 965; People v. Watts, 198 Cal. 776, 796, 247 P. 884; and People v. McGrath, 94 Cal.App. 520, 525, 271 P. 549. Appellant cites no authority upholding his contention in this respect.

[8] As to the refusal of the court to certify appellant to the Youth Authority, section 213 of the Penal Code provides a punishment of imprisonment in the state prison for not less than one year for second degree robbery, with no maximum provided. In accord with the recent decision of this court in People v. Ralph et al., December 14, 1943, 143 P.2d 758, appellant was in legal effect sentenced to a term of life imprisonment under the provisions of section 1168 of the Penal Code, and hence came within the exception noted in subdivision (b) of section 1731.5 of the Welfare and Institutions Code, Stats.1941, ch. 937, p. 2522, excluding persons sentenced to life imprisonment from certification to the Youth Authority.

The judgment and the orders appealed from are affirmed.

YORK, P.J., and WHITE, J., concur.

WELLS FARGO & CO. v. CITY AND COUNTY OF SAN FRANCISCO.

Civ. No. 12457.

District Court of Appeal, First District,
Division 2, California.

Jan. 3, 1944.

Rehearing Denied Feb. 2, 1944.

Hearing Granted March 2, 1944.

1. Dismissal and nonsuit 🔑45

The statute providing that an action not brought to trial within five years "shall" be dismissed is mandatory and prohibitory. Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Shall".

2. Courts 🔑30

Plaintiff, by not entering judgment until four years and five months after amendment of the statute requiring dismissal of an action not brought to trial within five years, did not act within a "reasonable time," and the court lost "jurisdiction" to proceed to trial and judgment. Code Civ. Proc. § 583.

"Jurisdiction" has been defined as the authority to do the particular thing done, or as the power to hear and determine the cause, and it involves also the power to give the judgment that is entered.

See Words and Phrases, Permanent Edition, for all other definitions of "Jurisdiction" and "Reasonable Time".

3. Courts 🔑40

"Want of jurisdiction" arises when a tribunal seeks to exercise in a particular manner a power in excess of the authority possessed.

See Words and Phrases, Permanent Edition, for all other definitions of "Want of Jurisdiction".

4. Courts 🔑40

The criterion on which the question of jurisdiction is often determined is whether a writ of prohibition, certiorari, or mandamus will lie.

5. Certiorari 🔑64(2)
Prohibition 🔑28

A writ of prohibition is a "collateral attack," and certiorari is a "direct attack," at least as regards the determination of jurisdictional facts.

See Words and Phrases, Permanent Edition, for all other definitions of "Collateral Attack" and "Direct Attack".

6. Certiorari 🔑5(1)

Unlike prohibition, certiorari will not lie if there is an adequate remedy by appeal. Code Civ.Proc. § 1068.

7. Judgment 🔑336, 518

A motion to set aside a judgment after the statutory period is a "collateral attack," or at least is subject to the same rules.

8. Judgment 🔑489

A judgment entered for plaintiff without notice more than 27 years after the overruling of a demurrer to the complaint and almost four and one-half years after amendment of the statute requiring dismissal of an action not brought to trial within five years was void on the face of the record and vulnerable to collateral attack, as by a motion more than six months later to set it aside. Code Civ.Proc. § 583.

9. Courts 🔑30

A court given jurisdiction to perform a certain act within a certain time is without jurisdiction or power to perform it thereafter.

10. Mandamus 🔑4(1), 7

Mandamus is not a writ of right, but a writ of discretion, and may be denied if the reviewing court deems the remedy by appeal adequate. Code Civ.Proc. § 1085.

11. Judgment 🔑542

To render a matter "adjudicated", the determination must have been made by a tribunal within the limits of its jurisdiction.

See Words and Phrases, Permanent Edition, for all other definitions of "Adjudicate".

12. Mandamus 🔑43

Mandamus lies to compel an inferior tribunal to dismiss, under the statutes, an action in which the trial is not timely had or summons issued, etc. Code Civ.Proc. §§ 581a, 583, 1085.

13. Mandamus 🔑14(1)

Generally, a demand for performance of the act is a prerequisite to a petition for mandamus. Code Civ.Proc. § 1085.

14. Appearance 🔑17

Where a court has general jurisdiction of the subject matter, the parties' voluntary appearance and submission of the cause confers jurisdiction to try the issues.

15. Dismissal and nonsuit 🔑45

The statute which requires dismissal of an action not brought to trial within five years fixes the time and method of calculating it, and any departure from the statute in that respect is an "excess of jurisdiction". Code Civ.Proc. § 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Excess of Jurisdiction".

16. Statutes 🔑228

Since the statute requiring dismissal of an action not brought to trial within five years contains only one exception, relating to a stipulation extending the time, it must be presumed that no other exceptions were intended. Code Civ.Proc. § 583.

17. Judgment 🔑505

In an action against a city and county to recover taxes of $1,860 paid under protest, a judgment entered long afterward, without notice, for $5,700 was properly set aside, in view of the statute limiting the relief granted to that demanded, even if the excess consisted of interest, which the court was powerless to grant. Code Civ.Proc. § 580.

18. Appeal and error 🔑935(1)

As regards the propriety of the trial court's order setting aside a judgment allegedly awarding interest against the defendant municipality in an action for taxes paid, it must be presumed that the trial court regularly performed the duty imposed upon it. Code Civ.Proc. § 1963.

19. Judgment 🔑511

In an action against a city and county to recover taxes paid, if a request for judgment for $5,700 was made without disclosing that only $1,860 was sued for, or that the excess was interest, or that almost 30 years had elapsed since the filing of the complaint, such conduct, if not "fraud," was so intimately related thereto as to render the judgment subject to collateral attack by motion more than six months later to set it aside. Code Civ.Proc. §§ 580, 583.

See Words and Phrases, Permanent Edition, for all other definitions of "Fraud".

◆

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Action begun in 1908 by Wells Fargo and Company against the City and County of San Francisco to recover taxes paid under protest. In 1938 judgment was entered for plaintiff, and defendant moved to set it aside. From an order granting the motion and dismissing the proceeding, plaintiff appeals.

Affirmed.

Followed in 144 P.2d 423.

Pillsbury, Madison & Sutro, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Norman Sanford Wolff, Deputy City Atty., both of San Francisco, for respondent.

NOURSE, Presiding Justice.

On July 15, 1908, plaintiff filed its complaint to recover taxes paid under protest in the sum of $1,860. Notice of order overruling defendant's demurrer was served November 30, 1910. No further proceedings were had until January 25, 1938, when an attorney, who was not the attorney of record for plaintiff, applied to the superior court and procured entry of judgment for $5,700.90 and costs. On November 21, 1938, defendant gave notice of motion to set aside this judgment under section 583 of the Code of Civil Procedure. The motion was granted and the proceeding was dismissed on October 3, 1940. The appeal is from this order.

At the hearing of the motion the chief ground of attack was that the court was without jurisdiction to enter the judgment after the time fixed in the Code section. Secondarily the defendant attacked the incapacity of the attorney to appear and move for the entry of the judgment. This matter does not call for discussion, but is important only so far as it relates to the comments herein on the conduct of such attorney when the entry of the judgment was procured.

[1] The real issue on this appeal is whether the express provisions of section 583 are mandatory and prohibitory or whether the court has the power and jurisdiction to disregard the Code section and proceed within the barriers of "judicial discretion." The section provides that "Any action *heretofore* or hereafter commenced *shall be dismissed* by the court * * * after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action * * *." Emphasis added. The section

was amended in this form effective August 21, 1933. There thus elapsed since the effective date of the amendment a period of four years and five months before the judgment was entered and more than thirty years after the complaint was filed.

The cases uniformly hold that the provisions of the Code section are mandatory and prohibitory. Miller & Lux, Inc., v. Superior Court, 192 Cal. 333, 338, 219 P. 1006; Sacramento T. Co. v. California Reclam. Co., 205 Cal. 42, 44, 269 P. 640; Superior Oil Co. v. Superior Court, 6 Cal. 2d 113, 116, 56 P.2d 950; Cruse v. Superior Court, 102 Cal.App 290, 294, 283 P. 73; Prudential Ins. Co. v. Superior Court, 117 Cal.App. 528, 529, 4 P.2d 294; Bank of America, etc., v. Superior Court, 22 Cal. App.2d 450, 452, 71 P.2d 296; Donovan v. Hollar, 25 Cal.App.2d 548, 554, 78 P.2d 240.

[2, 3] The amendment to the statute above noted was held retroactive and constitutional in Rosefield Packing Co. v. Superior Court, 4 Cal.2d 120, 122, 47 P.2d 716, 717, as a statute which merely changed the civil procedure, and numerous cases are there cited to that point. The court there noted the qualification of the rule which gives a party a "reasonable time" to act where the change in the statute results in a shortening of the time. It was then held that this amendment to section 583 was applicable to the particular case because the plaintiff "had practically an entire year" to bring his case to trial after the effective date of the amendment. The court then cited and either distinguished or disapproved of Coleman v. Superior Court, 135 Cal.App. 74, 26 P.2d 673; Masonic Mines Ass'n v. Superior Court, 136 Cal. App. 298, 28 P.2d 691; and Shoemaker v. Superior Court, 4 Cal.App.2d 586, 41 P.2d 343.

Then upon the question which the appellant stresses here—the discretion of the trial court to determine what is a reasonable time in each case, the court said (4 Cal.2d at page 124, 47 P.2d at page 718): "It is clear that the Shoemaker case proceeds upon an erroneous interpretation of the principle considered in the Coleman case. Whether there was a reasonable time in these cases is not a matter committed to the discretion of the trial court. The question is one of constitutionality of the statute which in terms applies to the pending case; and if it appears that there was a reasonable time for exercise of the remedy before the statutory bar became fixed, the lower court cannot consider individual hardship or other circumstances, but must give effect to the express provisions of the law. On this point the case of Shoemaker v. Superior Court, supra, must be disapproved." Then in Superior Oil Co. v. Superior Court, supra, a period of one year and five months was held a reasonable time. In Murphy v. Murphy, 5 Cal.2d 640, 55 P. 2d 1169, a period of seventy-one days was held reasonable and in both cases it was held that failure to act within such "reasonable time" required a dismissal under the section.

Concluding as we must from these authorities that the period of four years and five months which elapsed after the effective date of the statute was not a reasonable time within which the plaintiff could bring this cause to trial, it necessarily follows that the jurisdiction of the trial court to proceed to trial and judgment was then lost, since there is nothing in the record which would permit any possible application of the only exception mentioned in the statute—a stipulation in writing extending such time. Conceding that the trial court had original jurisdiction of the parties and of the subject matter, and jurisdiction to try the cause and enter judgment within the statutory period, the question remains whether such jurisdiction having been lost by the lapse of time the subsequent trial and judgment was void upon the face of the record.

"Jurisdiction" has been defined to mean the "power to hear and determine, but it involves also the power to give the judgment that is entered." State v. Reed, 132 Minn. 295, 156 N.W. 127. "Jurisdiction is the power to hear and determine the cause." Pacific States Savings & Loan Co. v. Superior Court, 217 Cal. 517, 521, 19 P.2d 977, 979. It means the "authority to do the particular thing done." Spreckels S. Co. v. Industrial Acc. Comm., 186 Cal. 256, 260, 199 P. 8, 9. A want of jurisdiction arises when a tribunal seeks to exercise in a particular manner a power in "excess of the authority possessed." Id. In a discussion of this subject the Supreme Court in Abelleira v. Disritct Court of Appeal, 17 Cal.2d 280, 288, 289, 109 P.2d 942, 947, 132 A.L.R. 715, said:

"Lack of jurisdiction in its most fundamental or strict sense means an entire absence of power to hear or determine the case, an absence of authority over the subject matter or the parties. * * *

"But in its ordinary usage the phrase 'lack of jurisdiction' is not limited to these fundamental situations. For the purpose of determinng the right to review by certiorari, restraint by prohibition, or dismissal of an action, a much broader meaning is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites. Thus, a probate court, with jurisdiction of an estate, and therefore over the appointment of an administrator, nevertheless acts in excess of jurisdiction if it fails to follow the statutory provisions governing such appointment. Texas Co. v. Bank of America [Nat. Trust & Savings Ass'n], 5 Cal.2d 35, 39, 53 P.2d 127. The Superior Court may have jurisdiction over a cause of action and the parties to a suit for libel, but in the case of non-residents, a bond for costs is required by statute, and unless such bond is filed, it is without jurisdiction to proceed, and will be restrained by writ of prohibition. Shell Oil Co. v. Superior Court, 2 Cal.App.2d 348, 37 P.2d 1078; see, also, Carter v. Superior Court, 176 Cal. 752, 757, 169 P. 667. A court with jurisdiction over a cause may hear and determine it and give judgment, but it cannot award costs in a situation not provided by statute. Michel v. Williams, 13 Cal.App.2d 198, 56 P.2d 546. The Superior Court may have jurisdiction over a particular cause, but a disqualified judge may not sit and hear it if objection to his qualifications is raised, and prohibition will lie to prevent him from trying it. Hall v. Superior Court, 198 Cal. 373, 387, 245 P. 814. Where an injunction is sought against enforcement of a public statute, the court despite its general equitable powers, has no jurisdiction to issue it. Loftis v. Superior Court, 25 Cal.App.2d 346, 352, 77 P.2d 491; Reclamation Dist. v. Superior Court, 171 Cal. 672, 154 P. 845. A court may have jurisdiction to grant a new trial after motion based upon proper statutory grounds, but has no jurisdiction to make the order unless the moving party has given his notice of intention within the prescribed statutory time. See Peters v. Anderson, 113 Cal.App. 158, 298 P. 76. The court has power under section 473 of the Code of Civil Procedure to set aside its judgment or order on motion where it was entered against a party through inadvertence, excusable neglect, or mistake; but that power is wholly lost at the end of the six months' period prescribed by statute. [In re] Estate of Hunter, 99 Cal.App. 191, 196, 278 P. 485. An appellate court may have power to hear and determine a particular case on appeal, but is without jurisdiction to do so unless the procedural step of notice of appeal within the prescribed statutory time is taken. Aregood v. Traeger, 94 Cal.App. 227, 270 P. 1002. And if the notice is given before judgment is actually rendered, the premature appeal will be dismissed (Aspegren & Co. v. Sherwood, Swan & Co., 199 Cal. 532, 250 P. 400), or a lower appellate court may be prevented from hearing it by writ of prohibition. Shriver v. Superior Court, 48 Cal.App. 576, 582, 192 P. 124. After reversal of a judgment with directions to the lower court, it has jurisdiction to enter judgment, but is limited by the directions of the appellate court and is without jurisdiction to permit amended pleadings to raise new issues; hence prohibition will lie to prevent it from retrying the case. Lial v. Superior Court, 133 Cal.App. 31, 23 P.2d 795. The same is true where the superior court, in an appeal from a justice's court on questions of law alone, attempts to try the cause de novo. Sour v. Superior Court, 1 Cal.2d 542, 36 P.2d 373."

In the Abelleira case a writ of prohibition was issued restraining the District Court of Appeal from entertaining an original proceeding in mandamus on the ground that it had no jurisdiction of the subject matter. In Evans v. Superior Court, 14 Cal.2d 563, 96 P.2d 107, the Supreme Court issued a writ of prohibition restraining the superior court from enforcing a temporary injunction upon the ground that the injunction was in excess of the court's jurisdiction since the act sought to be restrained was one specially authorized by statute. In Beard v. Superior Court, 39 Cal.App.2d 284, 102 P.2d 1087, prohibition was issued to restrain enforcement of an order for the payment of alimony made after defendant had filed a motion for change of venue. In Daugherty v. Superior Court, 23 Cal.App.2d 739, 74 P.2d 549, prohibition issued to restrain issuance of an injunction to restrain execution of a public statute.

[4] The theory upon which these cases are based is that an act is beyond the jurisdiction of a court which, though having jurisdiction over the subject matter and of the

parties, has "no 'jurisdiction' (or power) to act except in a particular manner." Abelleira v. District Court of Appeal, supra. Cases are numerous holding that when such an act is threatened it may be restrained by prohibition, that when the act is done it may be annulled by certiorari, and that when it is refused it may be enforced by mandamus. The criterion upon which the question of "jurisdiction" is often determined, therefore, is whether any one of those writs will lie.

[5-8] When we come to the subject of direct and collateral attack we are met by the long recognized confusion of the decisions as to the legal effect of the various methods used. The decisions agree that the writ of prohibition is a collateral attack and that the writ of certiorari is a direct attack, though a distinction between such writ and a direct appeal is fully recognized. Certiorari is said to be a direct attack—"at least so far as the determination of jurisdictional facts is concerned." 15 Cal.Jur. p. 48. But, unlike prohibition, the writ of certiorari will not lie if the party has an adequate remedy by appeal. Code of Civil Procedure, sec. 1068. A motion made to set aside a judgment or order, if made within the statutory period, is often treated as a direct attack, while one not made within such period has been held to be a collateral attack, or at least subject to the rules governing such attacks. 15 Cal.Jur. p. 47. If we may assume from the authorities there cited that the motion under consideration having been made after the expiration of the statutory period is governed by the rules of collateral attack we may rely upon the authorities construing the offices of prohibition and mandamus as bearing more directly on the question presented—whether, assuming that the entry of the judgment was beyond the jurisdiction and power of the court, the respondents were entitled to move in this manner to have it vacated. The clearest expression of this phase of the rule is found in the Abelleira case, 17 Cal.2d 288, 109 P.2d 947, 132 A.L.R. 715, where the Supreme Court said: "For the purpose of determining the right to review by certiorari, restraint by prohibition, or dismissal of an action, a much broader meaning is recognized. Here it may be applied to a case where, though the court has jurisdiction over the subject matter and the parties in the fundamental sense, it has no 'jurisdiction' (or power) to act except in a particular manner, or to give certain kinds of relief, or to act without the occurrence of certain procedural prerequisites."

A motion to vacate a judgment made after the statutory period, and which is therefore a collateral attack upon the judgment, has been approved in McGuinness v. Superior Court, 196 Cal. 222, 237 P. 42, 40 A.L.R. 1110, where the Supreme Court, in denying a writ of prohibition, held that the superior court had "jurisdiction" to entertain a motion to set aside a final decree of divorce where the motion was made more than six months after the entry of the decree. The basis of the decision was that, since the parties had resumed the marital relations after the entry of the interlocutory decree of divorce, it was an extrinsic fraud upon the court to have the final decree entered or, to state it in another way, the failure to disclose to the court the fact of the resumption of marital relations was an imposition upon the court because, if that fact had been disclosed, the court might have refused to enter the final decree. To the same effect are Britton v. Bryson, 216 Cal. 362, 14 P.2d 502; Raps v. Raps, 20 Cal.2d 382, 125 P.2d 826. Though there is a great deal said in the McGuinness case [196 Cal. 222, 237 P. 44, 40 A.L.R. 1110] about "extrinsic fraud" and the power of the court to "purge its records" of a judgment or order tainted with such fraud, the pith of the decision is that the entry of the final decree under those circumstances was beyond the "power" of the superior court and for that reason could be vacated on motion. The "power" of the superior court is found in the provisions of section 132 of the Civil Code that "When one year has expired after the entry of such interlocutory judgment, the court * * * may enter the final judgment granting the divorce * * *." Thus, if a final decree is entered before the expiration of one year after the entry of the interlocutory decree, it is beyond the power and jurisdiction of the court and so may be attacked by motion made more than six months after its entry. Nolte v. Nolte, 29 Cal.App. 126, 154 P. 873; Grannis v. Superior Court, 146 Cal. 245, at page 252, 79 P. 891, at page 894, 106 Am.St.Rep. 23, where the court said: "The law can only be made effectual for the accomplishment of its object by holding that any final judgment purporting to grant the divorce is absolutely void if thus prematurely entered." And (146 Cal. at page 254, 79 P. at page 895, 106 Am.St.Rep. 23) "The law in question in this case, as we have construed it, was intended as a limitation upon the power of the court with respect to the subject-matter, so that the court shall not be competent to grant a final divorce at any time during the year succeeding the interlocutory judgment, and so as to require that the interlocutory judgment be first entered." And hence where it is held in this line of cases that section 132 of the Civil Code is a limitation upon the power of the court to enter a final decree prior to the expiration of one year after the entry of the interlocutory decree, so it is held in the McGuinness and similar cases that the same section is a limitation upon the power of the court to enter a final decree after the expiration of that period if the parties have resumed marital relations in the meantime. If, therefore, such a decree is void and open to attack by motion made more than six months after its entry because the parties failed to disclose facts which would have *permitted* the trial court to deny the decree, it would seem to follow necessarily that the failure here to diclose facts which would have *compelled* the trial court to deny the judgment must render that judgment open to the same method of attack.

In Williams v. Reed, 43 Cal.App. 425, 432, 185 P. 515, emphasis is placed on the language of section 473 of the Code of Civil Procedure permitting the court, within the six months' period, to relieve a party from a judgment taken against him through his mistake or neglect, rather than upon the mistake of the court. And cases are there cited, as well as in McGuinness v. Superior Court, supra, pointing to the difference between "judicial error," to be corrected on appeal, and excess of jurisdiction which may be attacked collaterally.

The cases coming under section 132 of the Civil Code and those coming under section 583 of the Code of Civil Procedure are strikingly alike. In the first the language of the section is "when one year has expired * * * the court * * * *may* enter the final judgment." In the second the language is that when an action has not been brought to trial within five years after it was filed the same "*shall* be dismissed by the court." If there is any difference between the Code sections in so far as the question of jurisdiction or power is concerned, the stronger restriction is found in the latter which expressly demands the dismissal of the action and thereby withholds from the court power or jurisdiction to take any other proceedings. This is not unlike the rule of those cases coming under what is now section 396b of the Code of Civil Procedure holding that when a motion for change of place of trial is duly made the court is without power to take any other proceedings in the action until such motion is disposed of. Nolan v. Mc Duffie, 125 Cal. 334, 337, 58 P. 4; Beard v. Superior Court, 39 Cal.App.2d 284, 286, 102 P.2d 1087.

There is a line of cases involving the provisions of section 581a of the Code of Civil Procedure which calls for discussion. The first paragraph of that section provides: "No action * * * shall be further prosecuted * * * and all [such] actions * * * must be dismissed" unless summons shall have been issued within one year. The second paragraph provides: "All actions * * * must be dismissed * * * if summons has been served, and no answer has been filed, if plaintiff fails * * * to have judgment entered within three years after service of summons." In interpreting these two pargaraphs some of the cases have made a distinction in the language used and have held the first paragraph to be mandatory and jurisdictional and the second a matter permitting "judicial error."

In the early case of Modoc Land, etc., Co. v. Superior Court, 128 Cal. 255, 60 P. 848, it was held that the provisions of the first paragraph were mandatory and jurisdictional. The Supreme Court issued a writ of prohibition preventing further proceedings in the case saying (128 Cal. at page 256, 60 P. at page 849): "The court is deprived of jurisdiction to take any other action than to dismiss the cause, whether one day or many years elapse before its attention is called to the subject. The declaration that 'no further proceedings shall be had therein' is a statutory prohibition against any further proceedings, and, if the court should assume to act in disregard of this prohibition of the statute, it would be acting without any jurisdiction." The case was followed with approval in Bellingham Bay L. Co. v. Western A. Co., 35 Cal.App. 515, 518, 170 P. 632, where many other authorities are cited.

But when the appellate courts approached the second paragraph of the section they have intimated that a different rule should be applied. Cook v. Justice's Court, 16 Cal. App.2d 745, 61 P.2d 357; Merner L. Co. v. Silvey, 29 Cal.App.2d 426, 84 P.2d 1062; Pavlovich v. Watts, 46 Cal.App.2d 103, 115

P.2d 511. In the Cook case the holding was not pertinent to the decision as the question involved was the entry of a default judgment by the clerk of the justice's court, and it was held that such act was ministerial and hence not subject to prohibition. In the Merner case it was held that because of the difference in the language between the first and second paragraphs of section 581a the intention of the Legislature appeared to be that the latter should not be prohibitory or mandatory. This ruling was followed in the Pavlovich case without extended discussion.

But in Lynch v. Bencini, 17 Cal.2d 521, 110 P.2d 662, which is the latest expression of the Supreme Court on the subject, some doubt is cast upon the rulings in the Cook and Merner cases. The language of the Cook case was termed dicta and the distinction made in the Merner case between the two paragraphs of section 581a was disapproved in the following language (17 Cal.2d at pages 532, 533, 110 P.2d at page 668): "The provision of section 581a which we have been considering would be largely meaningless if, where such a judgment is applied for in the absence of the defendant, the judgment is to be taken as conclusive and immune from direct attack. To so construe this provision would be not only to disregard that part thereof which provides that the action must be dismissed by the court 'on its own motion', but would be to write in a provision that the amendment was to apply only when the defendant objected at the time the judgment was applied for. No such provision was included by the legislature and should not be added by judicial decision to the plain language of the statute."

[9] This language merely emphasizes the simple formula that when a court is given jurisdiction to perform a certain act *within* a certain time only it is without jurisdiction or power to perform the act after the period fixed. As said in the Abelleira case [17 Cal.2d at page 288, 109 P.2d at page 947, 132 A.L.R. 715) "it has no 'jurisdiction' (or power) to act except in a particular manner, * * * or to act without the occurrence of certain procedural prerequisites." Here the "procedural prerequisites" were that the *time* when the court could act was fixed by statute at five years after the action was filed. Certainly it would not be argued that, under section 660 of the same Code, the court would have "jurisdiction" to commit "judicial error" by granting a motion for new trial after the expiration of the sixty-day period.

[10] This presents another line of decisions which requires dicussion—the cases holding that when an inferior tribunal threatens action in excess of its jurisdiction, or refuses action within its jurisdiction, mandamus is available to compel action within the limits of jurisdiction. In a recent case the Supreme Court held that mandamus was the proper remedy to compel the clerk to issue a writ of execution notwithstanding an order of the trial court granting a new trial since such order was beyond the jurisdiction of the trial court because entered more than sixty days after service of notice of motion. Kahn v. Smith, 23 Cal.2d 12, 142 P.2d 13. The judgment in the Kahn case was by a divided court and in both the majority and minority opinions there is considerable discussion of the question of the availability of mandamus in view of the remedy by appeal, and of the related question whether the failure to pursue the latter remedy rendered the "validity" of the order res judicata. In holding that the remedy was available the majority opinion cites and relies upon Payne v. Hunt, 214 Cal. 605, 7 P.2d 302, and similar cases. In holding that the matter was not adjudicated by the failure to appeal it relied upon Middlecoff v. Superior Court, 220 Cal. 410, 31 P.2d 200, and other cases cited. If a more extended discussion had been deemed necessary the same result would appear to have been obvious. Mandamus is not a writ of right, but a writ of discretion. If to the reviewing court the remedy by appeal is deemed adequate under all the facts and circumstances of the particular case, the reviewing court may, in the exercise of its discretion, deny mandamus. If under those circumstances an appeal is deemed inadequate the writ may issue. Though not stated in this language such is the pith of the authorities which the majority in the Kahn case cited.

[11] As to the second point the result reached by the majority follows from the simple formula that to render a matter "adjudicated" the determination must have been made by a tribunal within the limits of its jurisdiction. Hence, when the the trial court purports to grant a new trial after expiration of the statutory period its order is in excess of its jurisdiction and can not be given jurisdictional validity by a failure to appeal.

[12, 13] As we understand the ruling in the Kahn case it is that, notwithstanding the right of appeal from a void order, the reviewing court may in its discretion, if it deems such remedy inadequate, issue mandamus to compel compliance with the statutory procedure. The function of the writ of mandamus is to require an inferior tribunal or official to perform "an act which the law specially enjoins." Section 1085, Code of Civil Procedure. Hence the writ will lie to compel an inferior tribunal to dismiss an action under sections 581a and 583 of this Code. But it has always been recognized that a demand for performance of the act is a prerequisite to a petition seeking the writ to compel performance (but with exceptions which are not material here). 16 Cal.Jur. p. 771. Since the Code section "specially enjoins" upon the trial court the duty to dismiss the action upon demand, or upon its own motion, and since this is a duty which can be enforced by mandamus, it would appear without any sense or reason to hold that the trial court, upon application to it alone as was done here, could not perform the duty which "the law specially enjoins" because it had theretofore done a wholly illegal act in entering the judgment.

[14] Another line of cases requires some comment. Rio Vista Mining Co. v. Superior Court, 187 Cal. 1, 200 P. 616; Perry v. Magneson, 207 Cal. 617, 279 P. 650; and Bayle-Lacoste & Co. v. Superior Court, 46 Cal.App.2d 636, 116 P. 2d 458, are all cited to the proposition that "Section 583 does not deprive the court of jurisdiction." Artificially the statement is correct, but it must be examined in the light of the connection in which it was used. The cases involved the exception contained in the Code section "where the parties have stipulated in writing that the time may be extended." In discussing this portion of the Code section, and relying upon the well settled rule that when a court has general jurisdiction of the subject matter of the cause the voluntary appearance of the parties and submission of the cause confers jurisdiction to try the issues, the Supreme Court, in the Rio Vista case 187 Cal. at page 5, 200 P. at page 618, said: "There is, moreover, nothing in the wording of the statute in question to deprive the court of jurisdiction upon the mere lapse of five years." The Bayle-Lacoste case cited this language and reached the same result—that because the parties had stipulated for a continuance of the time of trial beyond the five-year period the court was not therefore deprived of jurisdiction to try the issues after the elapse of that period. The soundness of these rulings is not open to question because they are in accord with the express language of the exception. The effect of the decisions is that the trial court retains jurisdiction to try the issues if such a stipulation extending the time is on file, but we can find nothing in any of these cases which purports to hold that if such a stipulation has not been made the trial court, without the consent of the defendant, and without notice or motion, may proceed to trial and judgment after such period has expired. We view the case in the same light as Kahn v. Smith, supra. If the court is without "jurisdiction" to grant a new trial after the expiration of the sixty-day period, and if an order so made is void on its face and may be collaterally attacked in mandamus to enforce execution on the judgment, we can find no reason why a judgment entered in total disregard of the express provisions of section 583 is not equally void and subject to collateral attack.

[15, 16] It is suggested that, notwithstanding the express provisions of the statute, the trial court had "power" to commit judicial error and determine that the time had not expired, or that it had been extended by stipulation. It is not consistent with the rules of law that a court may determine that each month of the year contains forty-one days and that this may be ascribed to "judicial discretion." As the Supreme Court said in Kahn v. Smith, supra, the statute fixes the time and method of calculating it, and any departure from the statute in that respect is an excess of "jurisdiction." Here there is no contention that any act of respondent took the place of an extension of the statutory time. The case lay idle for nearly thirty years, and the judgment was taken without notice. It thereupon became the duty of the trial court to dismiss the action upon respondent's motion because the statute expressly provides that any action not brought to trial wtihin the time fixed "shall be dismissed," and, since the only exception stated is a stipulation extending time, it must be presumed that no other exceptions were intended. Hence, even if the judgment were not void on its face, the express wording of the statute would require a dismissal. But we hold that the judgment was void

on the face of the record and as such subject to the attack by the motion made here.

[17] We reach the conclusion that the order should be affirmed for another reason. The complaint was one to recover $1,860 for taxes paid under protest. The judgment was for $5,700.90. Section 580 of the Code of Civil Procedure provides that in a default judgment the relief granted to the plaintiff cannot exceed that demanded in the complaint. It does not appear upon the record, but the parties assume that the excess is made up in interest. If so, it was a relief which the court was without power to grant. Spencer v. City of Los Angeles, 180 Cal. 103, 115, 179 P. 163; United Taxpayers' Co. v. City & County of San Francisco, 55 Cal.App. 239, 243, 203 P. 120; 24 Cal.Jur. p. 318. And directed particularly to the allowance of costs against public agencies see Ridge v. Boulder Creek, etc., School Dist., 60 Cal.App.2d 453, 140 P.2d 990; 23 Cal.Jur. p. 587.

[18, 19] It may be argued that it was simply judicial error to allow the excess and that such error could be corrected on appeal alone. But in Michel v. Williams, 13 Cal.App.2d 198, 56 P.2d 546, it was held that the allowance of costs against a defaulting party in a suit to quiet title was an excess of jurisdiction open to collateral attack. The ruling was cited with approval in the Abelleira case, 17 Cal.2d at page 289, 109 P.2d at page 947, 132 A.L.R. 715, as an instance of a judicial act which was beyond jurisdiction. It would follow therefore that, upon the face of the record the judgment as entered was one which the trial court had no power or jurisdiction to enter. When these facts were presented on the motion to vacate, the trial court was confronted with precisely the same situation as that in McGuiness v. Superior Court, supra. Was the request for judgment without a disclosure of the true amount sued for, and the elapse of time, a fraud or imposition upon the court which it had the "inherent" right to remedy? (Here it should be repeated that the entry of the judgment was procured by an attorney other than those who appear for appellant.) If we may assume that the excess in the judgment is based upon interest on the taxes paid, it is a fair assumption that such fact was not disclosed to the trial court because we must presume that the trial court regularly performed the duty imposed upon it (section 1963, Code of Civil Procedure) and hence that the "irregular" judgment was the result of appellant's concealment. There is no essential difference between the withholding of such facts and the withholding of information that the parties cohabited after entry of an interlocutory decree of divorce. In the latter case, if the information had been disclosed, the law, at the time of the McGuinness decision, did not prohibit the entry of a final decree. Here, if the information as to the elapse of time and the character of the case had been disclosed the law did prohibit the entry of any judgment. If the one is fraud, so is the other, or, if we do not call either fraud, both are so intimately related to it that both should be subject to the same method of attack.

Other questions do not require discussion.

The order is affirmed.

STURTEVANT and SPENCE, JJ., concur.

WELLS FARGO & COMPANY (a Corporation), Plaintiff and Appellant, v. CITY AND COUNTY OF SAN FRANCISCO (a Municipal Corporation), Defendant and Respondent.

Civ. No. 12458.

District Court of Appeal, First District, Division 2, California.

Jan. 3, 1944.

Rehearing Denied Feb. 2, 1944.

Hearing Granted March 2, 1944.

Appeal from Superior Court, City and County of San Francisco; George J. Steiger, Judge.

Pillsbury, Madison & Sutro, of San Francisco, for appellant.

John J. O'Toole, City Atty., and Norman Sanford Wolff, Deputy City Atty., both of San Francisco, for respondent.

NOURSE, Presiding Justice.

For the reasons given in 144 P.2d 415, herewith filed, the order appealed from is affirmed.

62 Cal.App.2d 179

REYNOLDS v. MEAD.

Civ. 12547.

District Court of Appeal, First District, Division 2, California.

Jan. 4, 1944.

1. Pleading ⚿237(1)

Pleadings may be amended at trial to conform to proof to prevent a failure of justice.

2. Novation ⚿11

Pleading ⚿258(4)

Where plaintiff in action to quiet title and for rescission, after executing a mortgage to third party, opened an escrow requiring that escrow holder deliver to defendant upon plaintiff's death a deed subject to the mortgage, and other documents, and thereafter executed a new mortgage to third party as a substitute for original mortgage, defendant was properly permitted to introduce evidence pertaining to latter mortgage and to thereafter amend answer to conform to proof by alleging a novation.

◆

Appeal from Superior Court, Mendocino County; W. D. L. Held, Judge.

Action by H. R. Reynolds, as guardian of the estate of A. L. Reynolds, an incompetent person, against Benjamin F. Mead to quiet title and for rescission. Judgment for defendant, and plaintiff appeals.

Affirmed.

Henry C. Spurr and Frank W. Taft, both of Ukiah, for appellant.

Burke & Rawles, of Ukiah, for respondent.

STURTEVANT, Justice.

The plaintiff, as guardian of A. L. Reynolds, an incompetent person, commenced an action against the defendant. In his second amended complaint he pleaded a cause of action to quiet title and a cause of action for rescission. The defendant answered both counts. The trial court made findings in favor of the defendant. From the judgment entered thereon the plaintiff appealed. He claims the judgment is not sustained by the evidence. We think he is mistaken.

[1, 2] In 1936, A. L. Reynolds was the owner of a certain lot in Ukiah. On it was a house in which he lived. He was also the owner of certain furniture and other personal property which was contained in the house. Prior to July 27, 1938, the owner had mortgaged said real estate to George E. Cook to secure the payment of a promissory note and on said date the balance due on said note was $389. On said date the owner executed four several documents and placed them in escrow to be delivered to the defendant upon the death of said A. L. Reynolds. Said documents were (1) a deed conveying said real estate; (2) a bill of sale conveying said personal property; (3) an agreement admitting services rendered and providing for services to be rendered; (4) escrow instructions. By a provision in the "agreement" the defendant agreed that the conveyance of the real estate was subject to the mortgage in favor of George E. Cook. Later, January 13, 1941, defendant gave Cook his note for $394.84 and a mortgage on the real estate to secure the payment of said note. That transaction was done to secure the claim of Cook and was done with the intention of substituting the later mortgage for the earlier one. All of the evidence about the later mortgage was objected to by the plaintiff. At first the objection was sustained because such transaction had not been alleged. Later that ruling was reversed. The trial court held it showed a novation. Therefore the court ruled that the evidence should stand, that the defendant should amend by pleading the novation, and that a finding in support of the novation should be made. Later the defendant amended his pleadings to conform to the proof. The plaintiff objects to said rulings of the court and the procedure of the defendant as not proper practice. His specific objection is that "the issues should be joined by the pleadings before trial so that a litigant would know what facts he had to meet * * *." That contention is sound but there are exceptions. 49 C.J. 530, Pleading, § 703 et seq. Where, as here, the amendment is necessary to prevent a failure of justice the allowance of an amendment is specially appropriate. Farmers' Nat. Gold Bank v. Stover, 60 Cal. 387, is determinative of the question presented in the instant case. The facts are nearly parallel. However, in that case the evidence offered was stricken out and permission to amend was denied. On page 395 of 60 Cal. the court said:

"This was error. The evidence which was admitted and afterwards excluded, tended to prove that the bank had accepted the individual note and mortgage of Stover as a substitute for the note in suit, for the purpose of extinguishing the obligation arising from it, or of releasing the parties to it who had become insolvent. If the note and mortgage were, in fact, taken as a substitute for the note in dispute, with the intent of extinguishing the obligation of it, or releasing the parties to it, the transaction constituted a defense by way of novation, under Sections 1530, 1531, 1532 of the Civil Code; and the defendants were entitled to have it presented to the consideration of the jury upon the evidence adduced to sustain it. It may be conceded that the issue was not properly framed so as to admit of the evidence, yet, as it had been offered and was admitted, the Court should have allowed the pleadings to be amended so as to conform to the facts proved by it.

"In Kirstein v. Madden, 38 Cal. 158, where the denials of the answer on file were insufficient to raise an issue, and the plaintiff moved for judgment on the pleadings, which was met by a counter motion to file an amended answer, the trial Court refused leave to amend, and entered judgment for the plaintiff. That judgment the Supreme Court reversed, saying: 'We think the defendant ought to have been permitted to amend his answer. From oversights of counsel committed under pressure of business, pleadings are often defective. In such cases, when an offer to amend is made, at such a stage in the proceedings that the other party will not lose an opportunity to fairly present his own case, amendments should be allowed with great liberality.'

"In Stringer v. Davis, 30 Cal. 318, it is said: 'When in the course of a trial it is discovered that pleadings are so defective that the real subject of dispute cannot be finally determined, the Court, if an application is made therefor, should allow amendments on such terms as may be just.' The fact that the new matter set up by way of amendment was known to the defendant at the time of filing his original answer, is no good reason why the amendment should not be permitted. (Pierson v. McCahill, 22 Cal. 127.) An amendment of pleadings should be allowed at any stage of the trial when it is necessary for the purposes of justice. (Peters v. Foss, 16 Cal. 357; Lestrade v. Barth, 19 Cal. 660); and whenever it is not done, it is error. (Connalley v. Peck, 3 Cal. [75], 82; Tryon v. Sutton, 13 Cal. 494; Hooper v. Wells, Fargo & Co., 27 Cal. [11], 35 [85 Am.Dec. 211]). Judgment reversed and cause remanded." That case has been cited and followed many times. It is controlling in the instant case.

The judgment appealed from is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

62 Cal.App.2d 228

In re CLARKE'S ESTATE.

BOLTON v. BANK OF AMERICA, NAT. TRUST & SAVINGS ASS'N et al.

Civ. 14193.

District Court of Appeal, Second District, Division 2, California.
Jan. 7, 1944.

1. Wills 🔑155(1)

To set aside a will on the ground of "undue influence" it is necessary to establish that the influence was such as, in effect, to destroy the free agency of testatrix, that the influence was used directly to procure the will, proof of general influence, however strong and controlling, not being sufficient.

See Words and Phrases, Permanent Edition, for all other definitions of "Undue Influence".

2. Wills 🔑155(1)

Undue influence necessary to set aside a will must amount to coercion destroying the free agency on the part of testatrix, and opportunity to influence the mind of testatrix, even coupled with an interest, is not sufficient.

3. Wills 🔑386

On appeal from order refusing to set aside a will on ground of undue influence, the function of the District Court of Appeals is to determine whether the findings are supported by substantial evidence.

4. Wills 🔑166(1)

Evidence sustained finding that will executed by a woman 82 years of age, in which no provision was made for sister of testatrix as next of kin, was not obtained by undue influence of beneficiary.

5. Wills ⚷164(1)

In proceeding to set aside a will on ground of undue influence, refusing to admit testimony concerning conversation between witness and officer of bank named as trustee in the will, in which officer stated that there was not a chance to break deceased's will, was not error since evidence was not material.

6. Wills ⚷164(1)

In proceeding to set aside will on ground of undue influence, evidence as to value inheritance tax appraiser placed upon personal property, for purpose of showing that beneficiary was preventing the state from getting the proper tax money, was properly excluded as immaterial.

◆

Appeal from Superior Court, Los Angeles County; Ben. R. Ragain, Judge.

Proceeding in the matter of the estate of Mary I. Reade Clarke, deceased, wherein Hilda Bolton filed a petition against the Bank of America National Trust & Savings Association, executor, and others seeking the revocation of the probate of the will of deceased. From a judgment denying her petition, Hilda Bolton appeals.

Affirmed.

A. Moresby White and Lorrin Andrews, both of Los Angeles, for appellant.

C. L. McGaughey, of Los Angeles, and Richard K. Gandy, of Santa Monica, for respondents.

W. J. WOOD, Justice.

This is an appeal from a judgment of the superior court sitting in probate denying the petition of Hilda Bolton for the revocation of the probate of the will of Mary I. Reade Clarke. By this will, which was executed on June 13, 1940, Mrs. Clarke left her entire estate, valued at about $25,000, to Lorna Isobel Webster, with the British Old People's Home as the alternate distributee in the event Mrs. Webster did not survive the administration of her estate. The petition filed by Mrs. Bolton contained three grounds for revocation; That the testatrix lacked testamentary capacity, that the will was not executed in conformity with law, and that the execution of the will was procured by the undue influence of Mrs. Webster. At the trial before the court sitting without a jury the two grounds for revocation first mentioned were abandoned. On the remaining issue the court found that the execution of the will "was not procured by the undue, or any, influence of the said Lorna Isobel Webster or of any person whomsoever". On this appeal it is contended that the findings of the court are not supported by the evidence.

At the time of her death on November 18, 1940, Mrs. Clarke was eighty-two years of age. At that time her only living relatives other than her sister Mrs. Bolton were three first cousins and six second cousins. Mrs. Clarke was married in England in 1882 and soon after her marriage moved to the United States. Mrs. Bolton and Mrs. Clarke did not see each other thereafter at any time but they exchanged letters until Mrs. Clarke's death. Mrs. Bolton had an income of her own stated by respondents to be six hundred pounds sterling per year and by appellant to be five hundred twenty-two pounds sterling per year.

From the testimony presented by respondents it appears that about two weeks prior to the execution of the will Mrs. Clarke stated to a Mrs. Prickett, a friend of twenty-five years' standing, that she was worried because she had not made a will. Mrs. Prickett told her that her own father had left his affairs to a trust company and suggested that Mrs. Clarke follow the same course. About a week thereafter a Mr. Turner, who was trust officer at the Santa Monica branch of the Bank of America, telephoned to Richard Gandy, a lawyer, asking him to call upon Mrs. Clarke. Mr. Turner died prior to the trial. Mr. Turner went with Mr. Gandy to Mrs. Clarke's home and Mr. Gandy was left alone with Mrs. Clarke. Mr. Gandy, testifying concerning his conversation with Mrs. Clarke, stated that Mrs. Clarke informed him that she wished to have a will drawn in favor of Mrs. Webster; that he inquired concerning Mrs. Clarke's family and Mrs. Clarke told him that she had a sister in England but that she did not desire to leave anything to this sister because she was elderly and was adequately provided for; that the sister had received money from the family; that she did not care to leave anything to her relatives who were of a distant degree; that he asked concerning the disposition of her property if Mrs. Webster should not survive her and Mrs. Clarke said she would like to leave it in that event to the British Old People's Home. Two or three days later Mr. Gandy returned to Mrs. Clarke's home with a draft of the will, accompanied by Mr. Cockins, an associate lawyer, and by Mrs. Hanson, a stenographer. The will was then executed by Mrs. Clarke. Mrs. Webster had met them at the door but she was not present in Mrs. Clarke's room when the will was executed and witnessed. It was further shown in evidence that Mrs. Clarke had been a close friend of Mrs. Webster for many years. Mrs. Webster's husband died in May, 1939, and during his lifetime there also existed a close friendship between Mr. and Mrs. Webster and Mrs. Clarke. Mr. Webster had been able to assist Mrs. Clarke in an important financial transaction. When Mr. Webster died Mrs. Clarke asked Mrs. Webster to come and live with her because they needed each other. Mrs. Webster thereafter lived with Mrs. Clarke until her death, giving her the best of care and doing all of the housework. Evidence was also presented on behalf of respondents to establish that Mrs. Clarke was mentally alert up to the time of her death.

The principal witnesses on behalf of appellant were two clergymen of the Episcopal church. One of them testified that he had heard Mrs. Webster state that she knew that Mrs. Clarke did not like her; that she had said to him: "Mrs. Clarke's mind became clear and she asked me to bring her a piece of paper so she could write out saying that I should have the property, and I said 'No, that won't do. If you want to leave me the property make a regular will.'" He also testified that Mrs. Clarke had told him Mrs. Webster had come to her when she was dazed over Mr. Webster's death and that she (Mrs. Clarke) did not know "how to get rid of her". It also appears from the evidence of appellant that Mrs. Clarke had been a devout attendant upon the Episcopal church prior to the arrival of Mrs. Webster at her home and that her attitude toward the church appeared to have changed; that Mrs. Clarke became seriously ill in February, 1940, and that thereafter her home was under the control of Mrs. Webster; that Mrs. Clarke had deteriorated mentally.

[1, 2] In order to set aside a will on the ground of undue influence it is necessary to establish that the influence was such as, in effect, to destroy the free agency of the testatrix. It is not sufficient to prove general influence, however strong and controlling, but it must be shown that the influence was used directly to procure the will. It must amount to coercion destroying the free agency on the part of the testatrix. Opportunity to influence the mind of the testatrix, even coupled with an interest is not sufficient. In re Arnold's Estate, 16 Cal.2d 573, 577, 107 P.2d 25.

[3, 4] The trial court made findings favorable to respondents and under well established principles our function is to determine whether the findings are supported by substantial evidence. There is no question whatever but that the findings are very abundantly supported. Since there is no question before us as to the propriety of a nonsuit there is no occasion to pass upon the contention of respondents that the evidence is insufficient to support a judgment for appellant if such a judgment had been entered.

[5, 6] The trial court did not err in refusing to admit testimony concerning a conversation between Mr. Turner, of the bank, and Reverend Maltas on April 15, 1941. After the death of Mrs. Clarke, Mr. Turner was handling matters for the estate. According to the statement of Mr. Maltas, when he went to the bank to see the will Mr. Turner loudly declared, "there isn't a chance in the world for you to break Mrs. Clarke's will", and then walked away. Nothing had been said about breaking the will. Clearly the conversation between Mr. Maltas and Mr. Turner on that occasion was not material to any of the issues before the court. Nor did the court err in excluding testimony of Mr. Meyer, the inheritance tax appraiser, as to the valuation of $25 which he had placed upon the personal property in Mrs. Clarke's home. Appellant sought to show by this testimony that Mrs. Webster was preventing the state from getting the proper tax money. The testimony was immaterial to any issue before the court. Appellant has listed a number of instances in which she claims that the court erred in its rulings upon the admissibility of evidence. Respondents have not considered these matter of sufficient importance to make any reference to them in their brief. In a trial such as we are now called upon to review many close questions on the admissibility of testimony are presented to

the court. We are satisfied from an examination of the points made by appellant that the court's rulings on the admissibility of evidence were generally correct; that appellant was permitted to make a full presentation of her evidence on the issues before the court; and that the errors, if any, in the rulings upon the admissibility of evidence were not prejudicial.

The judgment denying the petition for the revocation of the will is affirmed. Respondents to recover costs from appellant.

MOORE, P. J., and McCOMB, J., concur.

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62 Cal.App.2d 214

HENZGEN v. HENZGEN.

Civ. 14045.

District Court of Appeal, Second District, Division 3, California.

Jan. 6, 1944.

1. Divorce 🔑249(2), 254
Husband and wife 🔑279(1)

If husband and wife by contract dispose of their property and include as integral part thereof a provision that husband shall pay wife a sum fixed, monthly or otherwise, whether identified as alimony or not, wife is not only entitled to be paid that sum because of contract, but, if agreement is approved and made part of subsequent divorce judgment, she is entitled to payment by virtue of the judgment, and, notwithstanding statutory provision that "court may from time to time modify its orders in these respects", it may not do so. Civ.Code, § 139.

2. Divorce 🔑254

A divorce decree should not be too readily interpreted as beyond court's power to modify on theory that it incorporates agreement of parties adjusting property rights. Civ.Code, § 139.

3. Divorce 🔑95

The fact that wife's complaint, which alleged husband's extreme cruelty and prayed that husband be required to pay a sum temporarily and permanently for support and alimony of wife and minor children, that wife be given all community property, and for such other and further relief as might to court seem just and equitable, failed to pray specifically for divorce, did not deprive trial court of jurisdiction to decree divorce. Code Civ.Proc. § 580.

4. Divorce 🔑169, 254

Interlocutory decree and final judgment granting divorce to wife, not having been attacked by appeal or otherwise directly, must be accepted as judgments granting divorce, and as one incident making disposition of property of parties, notwithstanding complaint did not specifically pray for divorce. Code Civ.Proc. § 580.

5. Divorce 🔑254

The fact that alleged property "settlement" between parties to divorce action did not take form of contract, but of stipulation by their attorneys at law, though not determinative of matter, was persuasive as to intent of parties that stipulation was not an agreement adjusting property rights within rule against modifying decree based on such an agreement. Civ.Code, § 139.

6. Divorce 🔑169

The intent of parties to divorce action and intent of court in entering interlocutory decree and final judgment of divorce could be gathered from stipulation of parties as to disposition of property and custody of children and from provisions of decree.

7. Divorce 🔑254

Where parties made stipulation as to monthly payments to be made by husband for support of wife and minor children, better practice would have been for trial court, when it rendered divorce decree, to determine whether stipulation was a property settlement agreement and whether monthly payments ordered by decree were a phase of the property settlement rather than mere alimony, instead of following ambiguous provisions of the stipulation. Civ.Code, § 139.

8. Divorce 🔑243, 308

Divorce decree which, in awarding $120 per month for support of wife and minor children until mortgage on property owned by parties as joint tenants should be fully paid, whereupon payments should be reduced by $27.50 per month, followed closely language of stipulation between parties' attorneys, was a decree for "alimony" and child support, notwithstanding decree did not designate it as "alimony". Civ. Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Alimony".

9. Divorce 🔑243, 245(1), 254, 308

Divorce decree requiring husband to pay wife $120 monthly until mortgage was fully paid, and thereafter monthly payments should be reduced by $27.50 to $92.50 per month as alimony and child support, in view of practical construction by parties, made the $27.50 monthly payment on mortgage a part of total $120 monthly payment to enable wife to make payments on the mortgage, and was, therefore, part of "property settlement" not subject to modification by the court, and balance constituted "alimony" and child support, subject to modification by further order of the court. Civ. Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Settlement".

10. Divorce 🔑303(1), 309

A divorce decree providing for custody and support of minor child may be modified as circumstances require, though based on stipulation of parties. Civ.Code, § 139.

11. Divorce 🔑254

Where divorce decree followed closely wording of stipulation between parties providing for monthly payments to wife, it was reasonable to interpret decree as parties to stipulation must have meant it to be understood.

12. Divorce 🔑249(2)

Where stipulation between attorneys of parties to divorce action providing for monthly payments to wife was drafted by wife's former counsel, uncertainties therein should be resolved in husband's favor.

13. Divorce 🔑285, 312

On appeal from order reducing monthly payments for alimony and child support, where amount of mortgage on property owned jointly by parties did not appear in record, appellate court could properly accept amount stated in briefs of both parties as minimum amount due for purpose of determining period during which payments on such mortgage by husband were required to be made as part of agreed alimony. Civ.Code, § 139.

14. Divorce 🔑245(1), 309

Divorce decree requiring husband to make monthly payments as alimony and child support, "subject to the further order of the court", could be modified by court on change of conditions. Civ.Code, § 139.

15. Divorce 🔑245(2), 309

Where divorce decree, awarding $120 monthly to wife for alimony and child support, granted custody of two minor children to wife and of third minor child to husband, and at hearing on order to show cause for reduction of alimony it appeared that wife was earning over $120 monthly, that daughter living with wife was earning over $140 monthly, and that son whose custody had been given to wife was living with husband, there was a "change in conditions" warranting reduction in amount. Civ.Code, § 139.

See Words and Phrases, Permanent Edition, for all other definitions of "Change in Conditions".

◆

Appeal from Superior Court, Los Angeles County; William S. Baird, Judge.

Action by Elsie Idell Henzgen against Arthur Conrad Henzgen, wherein a divorce was granted plaintiff. From an order reducing from $120 to $60 the amount which defendant was required to pay plaintiff each month, plaintiff appeals.

Affirmed.

Barry Sullivan, of Los Angeles, for appellant.

Leonard S. Barnes, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

The plaintiff appeals from an order reducing from $120 to $60 the amount which the defendant is required to pay her each month. We find no merit in any of the arguments advanced by the plaintiff in support of her appeal.

An interlocutory decree was entered in this cause on November 19, 1940, followed, on November 28, 1941, by the entry of a final judgment of divorce which adopted by reference the provisions of the decree respecting alimony and those relating to the property of the parties. By these judgments plaintiff obtained a divorce from the defendant, and was awarded the custody of Arthur and Donna Lee, two of their minor children. Custody of the third minor child, Elsie Marie, was given to the defendant.

Following the paragraphs, in the decree, dealing with the custody of the children, this paragraph appears:

"It is further Ordered, Adjudged and Decreed that the defendant pay to the plaintiff the sum of $120.00 per month, and said $120.00 per month shall be paid in two installments of $60.00, first installment of $60.00 to be paid on the 1st day of November, 1940, and $60.00 on the 15th day of November, 1940, and $60.00 on each 1st and 15th day of each and every calendar month until the mortgage or deed of trust against said 88th Street property is fully paid; that when the payment of said mortgage or deed of trust against said property is paid in full, then in that event the said order is hereby reduced to the extent of and by the sum of $27.50 per month, to wit: $92.50 per month as alimony and for support of the said minor children of plaintiff and defendant; and subject to the further order of the court."

[1, 2] Section 139 of the Civil Code opens with this sentence: "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life or for a shorter period as the court may deem just, having regard to the circumstances of the parties respectively; and the court may from time to time modify its orders in these respects." It is now settled that if a husband and wife enter into a contract disposing of their property and include as an integral part of the agreement a provision that the husband shall pay the wife a sum fixed, monthly or otherwise, whether identified as alimony or unidentified, not only is she entitled to be paid that sum because of the contract, but if the agreement is approved and by some suitable means made a part of a subsequent judgment of divorce, she is entitled to it by virtue of the judgment as well. In such event, notwithstanding the words of Section 139 that "the court may from time to time modify its orders in these respects" it may not do so. See Puckett v. Puckett, 1943, 21 Cal.2d 833, 136 P.2d 1, and cases cited. Plaintiff's hope of a reversal on this appeal is based on her contention that for either one or both of two reasons we should find the provision, which we quoted from the decree, to be an essential part of a judgment making a disposition of the property of the parties and so immune from judicial change. We are of the opinion that a decree should not be too readily interpreted as beyond the court's power to modify, and have concluded that the trial judge's determination, apparent from his action, that the decree before him was subject to modification, was fully justified.

[3, 4] We do not have the original complaint before us, but the record indicates that the case went to trial on such issues as were created by the stipulation that all the "material facts" of plaintiff's "Amended and Supplemental Complaint for Divorce," should be deemed denied. This complaint, framed in four counts, one alleging extreme cruelty, concluded with a prayer that the defendant be required to pay a sum to the plaintiff "temporarily and permanently for the support and alimony of plaintiff and the minor children of the parties"; that she be given all the community property; and then, after some other requests, concluded with the usual prayer "for such other and further relief as may to the Court seem just and equitable." But she failed to pray specifically for a divorce. Relying upon the words of Section 580, Code of Civil Procedure, that "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint," the plaintiff now contends that because of her neglect specifically to pray for a divorce, the court had no jurisdiction to grant her one. Starting with this premise she proceeds to argue that the decree should be interpreted as a judgment relating merely to the property rights of the parties, and hence is a judgment which may not be modified. We find that this argument fails to convince because its first premise is faulty. Reading section 580 in the light of its purpose, we have no hesitation in concluding that the trial court was not without jurisdiction to decree to the plaintiff the divorce for which she plainly complained and as plainly, albeit silently, prayed. See Horton v. Horton, 1941, 18 Cal.2d 579, 582, 116 P.2d 605, and Parker v. Parker, 1928, 203 Cal. 787, 792, 266 P. 283. Not having been attacked by appeal or otherwise directly the interlocutory decree and final judgment must be accepted as

they are; that is, as judgments granting a divorce and, as one incident thereto, making a disposition of the property of the parties.

[5, 6] Arguing further in support of her main thesis, plaintiff contends that the provision that she receive $120 per month from the defendant was a term of a property settlement, approved by the court and made a part of its judgment, and even if it be a divorce judgment the part referring to the monthly payments is not subject to change. In expressing our approval of the trial court's implied disapproval of this contention we note, first of all, that there was never a settlement agreement between the parties determining their respective contractual rights and obligations and providing how their properties were to be held. The "settlement" in this case took the form, not of a contract executed by the parties either personally or by their attorneys-in-fact, but of a stipulation made and filed in the case by their attorneys at law. This fact is not determinative of the matter, but is persuasive as to the intent of the parties. The intent of the parties, and the intent of the court, we may gather from the stipulation and from the provisions of the decree. The stipulation is somewhat lengthy, dealing with several properties, and we shall note only a few of its provisions. After declaring that the "88th Street property" was owned by the parties as joint tenants, and that it was encumbered by a deed of trust executed by the defendant to secure a note, with an unspecified balance remaining unpaid, the stipulation contained these provisions:

"VII. Parcel J: It is the intention and agreement of the parties among other facts herein contained, and as the consideration hereof, they stipulate and agree as to the contents hereof and the division of the property, that the defendant pay in full the total unpaid amount owing on the deed of trust under the terms and conditions and provisions of the promissory note and deed of trust now on record in the Office of Los Angeles County Recorder and/or any substitution of the deed of trust in lieu thereof under the same provisions as aforesaid deed of trust to plaintiff, as a matter of convenience for the purposes herein. By reference herein to said aforesaid deed of trust is meant to be the deed of trust on the 88th street property.

"VIII. That the defendant pay plaintiff the sum of $120.00 per month, and said $120.00 shall be paid in two installments of $60.00, first installments of $60.00 to be paid on the 1st day of November, 1940, and $60.00 on the 15th day of November, 1940, and $60.00 on each and every 1st and 15th day of each calendar month until the mortgage or deed of trust against said 88th street property is fully paid; that when the payment of the said mortgage or deed of trust against said property is paid in full, then in that event the said order is hereby reduced to the extent of and by the sum of $27.50 per month, to wit: $92.50 per month, as alimony and for support of the said minor children of plaintiff and defendant; and subject to the further order of the court.

"IX. All payments, unless herein otherwise provided for shall be made payable through the Court Trustee.

"X. That in consideration of defendant paying to plaintiff the alimony and support for the minor children and the unpaid part of the note and deed of trust * * * [on the 88th Street property] the plaintiff has agreed to the contents hereof and to the amount of alimony and support to the two children and as to the division of property is in consideration of the defendant's undertaking and promises herein contained and no less."

In the introductory paragraph of the interlocutory decree we find this recital, among others: "that the plaintiff and defendant, by and through their respective counsel, have stipulated that the court may render its order, judgment and decree in as to the property of the parties hereto; alimony and support and custody of the minor children; attorney's fees and court costs; * * *" Later on in the decree we discover that: "It is further Ordered, Adjudged and Decreed that the orders of the above entitled court in the above entitled cause heretofore rendered be and are hereby modified insofar as the alimony and support and custody of said plaintiff and defendant's minor children are concerned, and shall conform with the provisions of this decree * * *."

[7] At this point we find the statement and the sentiment expressed in Puckett v. Puckett, supra, 1943, 21 Cal.2d 833, 841, 136 P.2d 1, 5, quite pertinent: "The essential issue to be determined is

whether or not the agreement was a property settlement agreement, and the monthly payments ordered by the decree in effect and essence, a phase of the property settlement rather than merely alimony. It would be better practice to have that determination clearly and concisely made by the trial court when it renders the decree of divorce. Considerable confusion and uncertainty could be avoided in that fashion." The trial judge, who was responsible for the interlocutory decree in this case, did not determine the meaning of, but slavishly followed, the ambiguous provisions of paragraph VIII of the "settlement" upon which plaintiff relies, and by reference adopted all other provisions of the stipulation, "so far as it may be consistent herewith," with the result that its confusion and uncertainty were reproduced in the decree. This placed the duty of interpreting the decree upon the trial judge who was asked to modify its terms.

[8] It is clear, first of all, that the parties, speaking through their counsel, intended that the court should provide for alimony and child support in the decree it was to make, and the court in the decree it made meant to so provide. The only provision of the decree which can be construed as carrying out this mutual intent is the paragraph which we quoted, the one that corresponds to paragraph VIII of the stipulation. True, these paragraphs do not characterize the payment of $120 per month as "alimony," but this does not affect its character. Remondino v. Remondino, 1940, 41 Cal.App.2d 208, 215, 106 P.2d 437.

[9] Read literally, the decree might be said to require the defendant to pay the $120 per month in addition to the requirement of the stipulation, contained in the decree by reference, that he pay off the indebtedness secured by the trust deed. By this interpretation the whole sum (of $120) would be for alimony and child support. The fact, however, that the $120 per month was to be paid the plaintiff "until the mortgage or deed of trust * * * is fully paid," and that then the amount is to be reduced, not increased, leads to the inference that the "mortgage" was to be paid off by the defendant's payments to the plaintiff. If the whole $120 was to be applied on the encumbrance on the home place, then the defendant had already satisfied his obligation by the time the motion to modify the sum for alimony and child support was made. The interpretation to be given the uncertain provision which is most reasonable, because of the figure of $27.50 per month and because, in connection with the hearing of the motion, it appeared to be the practical construction placed upon it by the parties themselves, is that $27.50 of the $120 was to enable the plaintiff to make the monthly payments due on the encumbrance, the balance was for the alimony and child support that the parties, and the court, wished to make provision for. The $27.50, then, would appear to be a part of the "property settlement" ordered by the court, and it is not subject to the further order of the court. The balance of the $120 is subject to a further order, however, because the provision of the judgment requiring that it be paid does not appear to be a vital part of the division of the property, with its attendant financial considerations, but appears rather to be an amount stipulated by the parties and accepted by the court as a proper sum to be paid for the support of the wife and children. The conclusion that the power given by section 139, Civil Code, was operative in this case, appears to us to be the proper conclusion to hold to.

[10] On still another theory the order may be upheld. We have seen that the parties may, by a contract which becomes a part of a judicial decree, bind the court so that it is not free to change the order for alimony as changed conditions warrant. When it comes to making provision for the support of their children, however, a different result is reached. "* * * a decree of divorce providing for the custody and support of a minor child may be modified as circumstances require, even though it is based upon an agreement or stipulation of the parties. [cases cited.]" Puckett v. Puckett, supra, 21 Cal.2d 833, 839, 136 P.2d 1, 5. Plainly a part of the $120 monthly sum was to enable the plaintiff to support the two children placed in her custody; changed conditions authorized the court to change the amount to be paid her.

[11-14] The first task of the judge who made the order from which the appeal was taken was to interpret the interlocutory decree to determine whether or not its paragraph respecting the payment of $120 per month was subject to modification. As the decree followed closely the wording of the stipulation, it was reasonable to interpret it as the parties to the stipulation must have meant it to be understood.

Paragraph VIII of the stipulation and the corresponding paragraph of the decree each closed, as we have seen, with the words "and subject to the further order of the court." The stipulation, it is quite evident, was drafted by plaintiff's former counsel, and its ambiguities and uncertainties should be resolved in the defendant's favor. But be this as it may, the more reasonable construction to place upon the stipulation is that the parties meant the provisions respecting the payment of $120 per month to be subject to modification. The amount of the encumbrance on the 88th Street property does not appear in the record, but we may accept the figure of $2,400 as a minimum, from the statements in the briefs of both parties. Wangenheim v. Garner, 1919, 42 Cal.App. 332, 336, 183 P. 670. An indebtedness of $2,400 with interest as low as 5%, and it may have been more, payable at the rate of $27.50 per month, would run for some nine years. Before that period ran out at least one, possibly two, of the children for whose support a part of the $120.00 per month was intended, would become of age. Nine years is a long period to cover in advance, by a fixed agreement for alimony and child support, no matter what the changes in circumstances may be. The interpretation which we may infer was placed upon the decree by the trial judge whose order we are reviewing, that is, that the paragraph respecting the payment of $120.00 per month was expressly made "and subject to the further order of the court," we find not only a reasonable one but more reasonable than that for which the plaintiff contends.

[15] At the hearing on the order to show cause it appeared that the plaintiff was earning over $120 per month, and that Elsie Marie, who was living with her mother, was earning more than $140 per month. The boy, Arthur, whose custody had been given to the plaintiff, was living with the defendant, and the court ordered a change in the custody order to conform to the fact. In the premises, there was proof of a change in conditions which warranted a change in the amount to be paid the plaintiff thereafter, until further order. Meek v. Meek, 1942, 51 Cal.App.2d 492, 494, 125 P.2d 117.

The order appealed from is affirmed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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62 Cal.App.2d 169

SHANNON v. McKINLEY et al., Constituting Board of Civil Service Commissioners of City and County of San Francisco.

No. 12387.

District Court of Appeal, First District, Division 2, California.

Jan. 4, 1944.

1. Municipal corporations ⇐63(1), 217(5)

City charter provision that civil service commission shall announce in examination scope circular the next lower rank or ranks from which promotion will be made vests in commission a wide discretion, and court should not interfere with such determination unless it clearly appears that commission has abused its discretion.

2. Municipal corporations ⇐213

In proceeding involving validity of civil service commission's action regarding promotion examination, evidence did not sustain finding that purpose of fixing salary range of special instructor in municipal railway service below that of inspector was to discourage inspectors from taking examination and arbitrarily to reduce position of special instructor to rank lower than that of inspector.

3. Municipal corporations ⇐213

Under city charter provision that civil service commission shall announce in examination scope circular, the next lower rank or ranks from which promotion will be made, where salary range for special instructors in municipal railway system was set at $165 to $190 per month and salary range of inspectors was from $165 per month to $200 per month, and motorman and conductors were paid on hourly basis, commission did not abuse its discretion in declaring that motorman and conductors were within "next lower rank or ranks", and that they in addition to inspectors were eligible for examination for special instructors.

See Words and Phrases, Permanent Edition, for all other definitions of "Lower Rank or Ranks".

◆

Appeal from Superior Court, City and County of San Francisco; Thomas M. Foley, Judge.

Proceeding by Thomas Shannon against Howard M. McKinley and others, as members of and constituting the Board of Civil Service Commissioners of the City and County of San Francisco, and another for a writ of mandate.

Judgment for petitioner, and Howard M. McKinley and others, as members of and constituting the Board of Civil Service Commissioners, and another appeal.

Reversed.

John J. O'Toole, City Atty., and Norman Sanford Wolff, Deputy City Atty., both of San Francisco, for appellants.

Edmund G. Brown and Harold C. Brown, both of San Francisco, for respondent.

SPENCE, Justice.

Petitioner, a civil service employee holding the rank of inspector in the municipal railway system in San Francisco, sought a writ of mandate to compel the civil service commissioners to abandon certain pending proceedings for a promotional civil service examination for the purpose of creating an eligible list for the rank of special instructor and to compel said commissioners to conduct a promotional civil service examination for that purpose but limited to those, including petitioner, who held rank of inspectors. The trial court sustained the contentions made by petitioner and entered its judgment ordering the writ of mandate to issue. Respondents appeal from said judgment. In order to avoid confusion, we will hereinafter refer to petitioner and respondent as Inspector Shannon and to the respondents and appellants as the commission.

It was the theory of Inspector Shannon (1) that the provisions of the charter of the City and County of San Francisco made it the mandatory duty of the commission to limit the proposed promotional examination to those holding the rank of inspector and (2) that if the charter conferred any discretion upon the commission in designating "the next lower rank or ranks" from which the promotion would be made, then the commission abused its discretion in designating the ranks of motorman and conductor, as well as the rank of inspector, as such ranks. The trial court's findings of fact and conclusions of law were in accord with Inspector Shannon's theories. On the appeal, the commission attacks both said findings of fact and conclusions of law but as the questions presented are primarily questions concerned with the proper construction of the charter, we will first set forth the pertinent charter provisions.

Section 140 of the charter provided in part, "There is hereby established a civil service commission which is charged with the duty of providing qualified persons for appointment to the service of the city and county. All appointments in the public service shall be made for the good of the public service and solely upon merit and fitness, as established by appropriate tests, without regard to partisan, political, social or other considerations."

Section 141 reads in part, "The civil service commission shall be the employment and personnel department of the city and county and shall determine appointments on the basis of merit and fitness, as shown by appropriate tests. The commission shall classify, and from time to time may reclassify, in accordance with duties and responsibilities of the employment, and training and experience required, all places of employment in the departments and offices of the city and county not specifically exempted by this charter from the civil service provisions thereof, or which may be created hereafter by general law and not specifically exempted from said civil service provisions. * * * The civil service commission shall be the judge of such classification."

Section 146, which is the main section under consideration, provided in part, "Whenever it deems it to be practicable, the Commission shall provide for promotion in the service on the basis of such examinations and tests as the Commission may deem appropriate, and shall, in addition, give consideration to ascertained merit and records of city and county service of applicants. The Commission shall announce in the examination scope circular the next lower rank or ranks from which the promotion may be made. All promotions in the police and fire departments, respectively, shall be made from the next lower rank on the basis of examinations and tests, seniority of service and meritorious public service being considered."

The commission adopted a resolution creating a new classification called "Special Instructor" and defined the duties as follows: "S56. Special Instructor, Municipal Railway, Under the director of the Instructor, Municipal Railway, gives specialized instruction to motormen in the efficient use of equipment, the economical use of power, and accident prevention;

gives instruction to conductors on methods of assisting motormen in power saving and accident prevention; checks the performance of probationary motormen; as required makes minor emergency repairs and adjustments to cars in service; makes detailed reports concerning the instruction program." The salary range for "Special Instructor" was set at $165 to $190 per month. By the same resolution, the commission provided for a promotional examination and further provided, "Those eligible to participate in this examination hereby deemed by the commission to be members of the next lower rank, are all civil service employees of the city and county who on the beginning date of this examination hold permanent civil service appointment in a position defined by the Civil Service Commission as a regular position and have served their probationary period in such position in the Public Utilities Commission in the class of conductor, motorman or inspector Municipal Railway." Prior to this action by the commission, the inspectors, whose salary range was from $165 to $200, had not only requested the commission to declare the inspectors eligible to take the examination, but had requested that the inspectors be declared to be the only persons eligible. The commission, however, declared by its resolution that motormen and conductors as well as inspectors were eligible. It was this action on the part of the commission which precipitated this controversy.

[1] The commission first contends that the trial court erred in concluding that it was mandatory duty of the commission to declare only the inspectors eligible for the promotional examination for special instructors. In our opinion this contention must be sustained. Preliminarily, it may be observed that it is doubtful whether the rank of inspector may be said to be lower than the rank of special instructor. The prescribed salary ranges for the two ranks set the same minimum of $165 but the maximum for inspectors was set at $200 while the maximum for special instructors was set at $190. But at the request of the inspectors who desired to take the special instructor's examination, the commission treated the inspectors as being of lower rank by designating them as eligible to take the examination. That action on the part of the commission is not questioned by the parties in this proceeding, and we shall therefore treat the rank of inspector as lower than the rank of special instructor. The significance of the foregoing observation is that it indicates the difficulty confronting the commission in determining the priority of the various ranks for the purpose of declaring eligibility for promotional examinations. It appears probable that the realization of this difficulty prompted the framers of the charter to provide therein that "The commission shall announce in the examination scope circular the next lower rank or ranks from which the promotion will be made." We therefore believe that the charter should be construed as vesting in the commission a wide discretion in determining the priority of ranks and in further determining the ranks falling within the category of the "next lower rank or ranks"; and we further believe that the courts should not interfere with such determinations unless it clearly appears that the commission has abused its discretion.

This construction is borne out by the history of the charter provisions relating to civil service. The comparable provision of the former charter is set forth in Allen v. McKinley, 18 Cal.2d 697 at pages 699 and 700, 117 P.2d 342, at page 344. It provided in part, "All examinations for promotions shall be competitive among such members of *the next lower rank,* as established by the Commissioners, as desire to submit themselves to such examinations." (Emphasis added). This wording was changed in the new charter so as to cover *"the next lower rank or ranks"*. But while changing this phrase by adding the words "or ranks" the next sentence of the present section 146, which relates to the police and fire departments only, requires that promotions be made from *"the next lower rank."* Some weight must be attached to the change in wording in the new charter and it could not have been intended that promotions, other than those in the police and fire departments, should be limited in all cases to the "next lower rank" as provided in the old charter.

If it be conceded for the purpose of this discussion that the provisions of the old charter were mandatory, we believe it clear that the provisions of the new charter vested the commission with the discretion above indicated. Any other construction would lead to innumerable difficulties in administering the civil service laws for there are but few departments of government in which the classification of positions indicates with certainty the priority of rank as between such classifications. The specification of duties and of salary range for each classification may furnish some indication but it is entirely conceivable that the overlapping of duties and of salary ranges would prevent either or both from establishing such priority with any degree of certainty. It is further entirely conceivable that there may be many classifications which are substantially coordinate in rank. And when the charter provides that "The civil service commission shall be the judge of such classification" (sec. 141) and "shall announce in the examination scope circular the next lower rank or ranks from which the promotion will be made" (sec. 146), it would seem idle to argue that the commission is without any discretion in determining the ranks from which promotions shall be made. This view is in accord with that expressed in Allen v. McKinley, 18 Cal.2d 697, at page 704, 117 P.2d 342, at page 346, where the court, in referring to the present section 146 of the charter, said "The respondents also point out that the judgment here appealed from does not determine that the promotional examination must be limited to the eighteen General Clerks in the Tax Collector's office. The Commission, under the charter provision here involved, has wide discretionary powers in determining what groups shall be included within the class permitted to take a promotional examination, and what the qualifications of those desiring to take the examination shall be."

[2] The commission further contends that the trial court erred in concluding that the commission "abused its discretion in that it has made the examination for said class of Special Instructor promotional from the classes of conductor and motormen and has not limited said promotion examination to that of the next lower grade, to wit, Inspector". This conclusion of the trial court is closely related to certain of its findings of fact which are attacked by the commission. The trial court found that the duties of the special instructors "are the duties formerly performed by Assistant Instructors". The trial court further found "That it is true that the salary range set forth in the resolution of the Civil Service Commission for the class of Special Instructor was $165.00 to $190.00; that the purpose of fixing the salary range below that of Inspector was for the purpose of discouraging Inspectors from taking said examination and for the purpose of arbitrarily and capriciously reducing the position of Special Instructor to a rank lower than that of Inspector." It is the contention of the commission that neither said findings nor said conclusions find any support in the evidence. In our opinion, this contention must be sustained.

We find no evidence in the record to support a finding that there was ever a classification in the civil service known as "Assistant Instructor"; neither do we find any evidence to support a finding that the duties of the newly created classification of "Special Instructor" were the same as the duties of any former or existing classification; nor do we find any evidence to support a finding that the salary range for the new classification was fixed at a figure below that of Inspector "for the purpose of discouraging Inspectors from taking the examination and for the purpose of arbitrarily and capriciously reducing the position of Special Instructor to a rank lower than that of Inspector." In connection with the last-quoted portion of the findings, it is clear that if the classification of "Special Instructor" was in fact a new classification, differing in duties from all former and existing classifications, there was no "reducing" of any position.

It is perfectly clear from the evidence that about 1929 or 1930, there were two classifications in the civil service designated as "Senior Instructor" and "Instructor". The salary range for the first was $225 to $275, while the salary range for the second was $200 to $225. During the depression the instruction work "dropped off in importance" as there were very few new men hired. The second man in the instruction work left the service and in 1932 "there was only the top job with one man engaged in instruction work". In 1932, the classification was changed so as to reflect "the changes which had occurred in the organization", the classification of the one man on instruction work being changed from "S.60, Senior Instructor" to "S.60, Instructor". The salary range continued at the range formerly set for "Senior Instructor". In certain questions and answers found in the record, the words "assistant instructor" appear but it clearly appears from the testimony that this was "the class of instructor, which we have been referring to here as assistant instructor". The above-mentioned classifications of "Senior Instructor" and "Instructor" were the only classifications in the civil service at any time which were known by a name denoting duties having to do with instruction work. The duties prescribed for those positions involved the instruction of all operating personnel, including motorman, conductors and bus operators, and also the training of new inspectors. The duties prescribed for inspectors did not involve instruction of operating personnel, but under the duties prescribed for motormen and conductors, who were paid on an hourly basis, is found the following "10¢ extra while instructing New Employees as assigned by the Superintendent."

When the new classification was created it was known as "S.56, Special Instructor". It appears to have been created for a highly specialized and limited purpose involving the instruction of certain operating personnel along certain specified lines. The duties prescribed are above set forth. It clearly appears from the evidence that said duties are different from the duties prescribed for any classification previously known or existing in the civil service and we therefore conclude that the finding of the trial court to the contrary is wholly unsupported. As above indicated, the further finding of fact to the effect that the salary range was fixed "for the purpose of arbitrarily and capriciously reducing the position of Special Instructor to a rank lower than that of Inspector" is predicated upon the assumption that there was "a reducing" of a former classification rather than the creation of a new classification. It is clear from what has been said that this assumption is wholly unwarranted.

[3] We now turn to the trial court's conclusion that the commission abused its discretion in declaring that conductors and motormen were within the "next lower rank or ranks" and eligible, together with the inspectors, to take the promotional examination. In arguing that the rank of inspector was the only "next lower rank or ranks" within the meaning of the charter, counsel for Inspector Shannon encounters great difficulty, as might well be anticipated, in endeavoring to set forth the priority of rank between various classifications in the civil service. It appears that motormen, conductors and bus drivers were paid on an hourly basis rather than a daily, weekly or monthly basis and that the hourly pay of bus drivers exceeded both that of motormen and conductors. Despite this difference in salary, counsel considers all three positions as coordinate in rank. Counsel then says the "next step upward" was the rank of "Inspector" and the "next higher grade" above "Inspector" was the rank of "Instructor". But also in his brief, he states that the classification of "car dispatcher", which it appears from the record had a salary range of $190 to $210, was "a higher grade than 'Inspector' " but a lower grade than "Instructor". Certain other classifications and salary ranges appearing in the record were "Supervisor of Schedules", $200 to $225; "Claims Adjuster", $225 to $275; "Division, Superintendent", $250 to $325; "Assistant Superintendent of Transportation", $275 to $325; and "Superintendent of Transportation", $325 to $400." Bearing in mind that the salary range for "Inspector" was $165 to $200 and that the salary range for "Special Instructor" was $165 to $190 per month, it is apparent that there were many overlapping salary ranges and that, at least in the lower grades, there was no clear cut priority of rank and therefore no precise method, without the exercise of discretion, for determining the "next lower rank or ranks" for the purpose of promotional examinations. In the exercise of its discretion, the commission might well have determined that the rank of "Inspector" was not lower but higher than that of "Special Instructor" as the maximum salary was greater. In that case, the inspectors would not have been entitled to take the examination. But the commission, at the request of the inspectors, declared the inspectors to be eligible for the examination for "Special Instructors", and we see no basis for their claim of an abuse of discretion on the part of the commission in also declaring that the motormen and conductors were within "the next lower rank or ranks" and also eligible.

In discussing the above-mentioned findings and conclusions of the trial court, Inspector Shannon lays great stress upon the evidence which showed that two motormen had been temporarily assigned to the duties now prescribed for the classification of special instructor. It is undisputed that these two men were chosen for these temporary assignments because of their outstanding records in power saving and accident prevention. It is stated in the brief that the inspectors felt that the examination was "rigged" for the benefit of these two motormen. It further appears from the briefs that regardless of the difference in salary range, the inspectors felt that the position of "Special Instructor" was a "more responsible position and one which had other employment advantages" over the position of "Inspector". One of the witnesses frankly stated in one portion of his testimony that they felt that "if anybody should have an edge at all on that particular examination, it should be those particular men, the inspectors". We find nothing in the testimony stressed by Inspector Shannon or in any other testimony which supports the above-mentioned findings and conclusions of the trial court. In fact we can find nothing in the record which indicates that the commission erred in judgment in any decision which it made but, right or wrong, there is certainly nothing to show that the commission abused its discretion. The language used in the frequently cited decision in Maxwell v. Civil Service Commission, 169 Cal. 336, 146 P. 869, is particularly applicable here. It was there said at page 339 of 169 Cal., at page 871 of 146 P., "Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. They may decide a particular question wrong—but it is their question. Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere".

We conclude that a reversal is required, as we find no support for the material findings and conclusions upon which the judgment was based.

The judgment is reversed.

NOURSE, P. J., and STURTEVANT, J., concur.

WEST KEY NUMBER SYSTEM

In re LINDQUIST'S ESTATE.

UNITED STATES v. STATE et al.

Civ. 12393.

District Court of Appeal, First District, Division 1, California.

Jan. 3, 1944.

Hearing Granted March 2, 1944.

1. Escheat 🔑1

The word "escheat" has outgrown its restricted meaning under the old English feudal system and now includes personal property as well as land and is now an incident of sovereignty, not of tenure.

See Words and Phrases, Permanent Edition, for all other definitions of "Escheat".

2. Constitutional law 🔑103

A deceased veteran had no vested right to a pension under the World War Veterans' Act, since "pensions" are bounties which Congress has the right to give, to withhold, to distribute or to recall at its discretion. World War Veterans' Act 1924, § 21, as amended, 38 U.S.C.A. § 450.

See Words and Phrases, Permanent Edition, for all other definitions of "Pension".

3. States 🔑4

The laws of the United States dealing with matters within its jurisdiction are supreme and if the terms of an act are constitutional and if due process is complied with, state courts and agencies may with propriety lend their aid in their enforcement. U.S.C.A.Const. art. 6, cl. 2.

4. Wills 🔑58(1)

If not prescribed by statute, a formal contract is not required to bind one in the disposition of his property upon his death.

5. Army and navy 🔑51

Federal statute providing that in certain contingencies the unused pension given to a war veteran will revert to the Government, created a valid contract, to which no formal consent by pensioner or his guardian is required, the statute itself plus the acceptance of its benefits constituting the contract. World War Veterans' Act 1924, § 21, as amended, 38 U.S.C.A. § 450.

6. Army and navy 🔑51

The rule that the Legislature may provide that an unexpended portion of an allowance may revert or escheat to a designated governmental body applies also to pensions. Probate Code, § 1027; World War Veterans' Act, 1924, § 21, as amended, 38 U.S.C.A. § 450.

7. Insane persons 🔑73

That a veteran has been declared incompetent does not establish that acceptance of pensions from the federal government did not constitute an acceptance of contract that unexpended balance would revert to the government upon death of veteran intestate and without heirs. Probate Code, § 1027; World War Veterans' Act of 1924, § 21, as amended, 38 U.S.C.A. § 450.

8. Army and navy ⚷51
Escheat ⚷3

The state had no right to escheat funds of one who died intestate without heirs merely because funds were found within jurisdiction of the state, and where the funds represented unexpended balance of pension to war veteran which were paid to him under provision for reversion to the government upon veteran's death intestate, without heirs, the federal Government was entitled to funds remaining upon veteran's death. Probate Code, § 1027; World War Veterans' Act of 1924, § 21, as amended, 38 U.S.C.A. § 450.

9. Insane persons ⚷78

Contract terms a veteran would be compelled to make to obtain pension from federal government were equally binding upon guardian of veteran. Probate Code, § 1027; World War Veterans' Act of 1924, § 21, as amended, 38 U.S.C.A. § 450.

10. States ⚷4

A state escheat statute is based upon state sovereignty and is a direction for the devolution of property which cannot prevail over federal Constitution, or over a federal act which does not deprive one of property without due process of law. Probate Code, § 1027; World War Veterans' Act of 1924, § 21, as amended, 38 U.S.C.A. § 450; U.S.C.A.Const.Amend. 10.

11. Army and navy ⚷51

Where the United States was entitled to the return of unexpended balance of war veteran's pension upon his death intestate without heirs, the funds could not revert to the United States until the five-year period fixed by state statute had elapsed. Probate Code, §§ 231, 1027; World War Veterans' Act of 1924, § 21, as amended, 38 U.S.C.A. § 450.

◆

Appeal from Superior Court, San Francisco County; T. I. Fitzpatrick, Judge.

Proceeding in the matter of the estate of Carl A. Lindquist, also called Carl Lindquist, deceased, between the United States of America and the State of California and another. From a decree adjudging that certain funds in the estate escheat to the State of California, the United States appeals.

Decree reversed and claim of the United States approved.

Francis M. Shea, Asst. Atty. Gen., Frank J. Hennessy, U. S. Atty., and W. F. Mathewson, Asst. U. S. Atty., both of San Francisco, Cal., and Leavenworth Colby, Atty. Department of Justice, of Washington, D. C., for appellant.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent State of California.

Henry F. Boyen, of San Francisco, for respondent Katz, Public Adm.

WARD, Justice.

Appeal from a decree of the superior court of the City and County of San Francisco adjudging that certain funds in the estate of Carl A. Lindquist, deceased, escheat to the State of California.

The facts appear as follows: Lindquist, a veteran of the United States Navy, was declared incompetent and the Pacific National Bank of San Francisco was appointed guardian of his estate. Shortly thereafter the Veterans' Administration awarded him a pension under the provisions of the Act of August 13, 1935, c. 521, 49 Stat. 614, 38 U.S.C.A. § 368, in the amount of $60 a month, and this was regularly paid to the guardian. At the time of the veteran's death his estate, consisting entirely of an unexpended balance of pension payments and amounting to the sum of $1,445.87, was turned over to the public administrator, and the superior court of the State of California in and for the City and County of San Francisco sitting in probate ordered distribution of the residue thereof to the State of California as escheated property. (California Probate Code, sec. 1027.)

The main question presented is the construction of section 450 (3) of Title 38 U.S.C., 38 U.S.C.A. § 450 (3). The respondents contend that the act purports to lay down a rule of succession to property—a matter in which the federal government is without authority. The act so far as pertinent here provides as follows:

"Where any payment of compensation, adjusted compensation, pension, emergency officers' retirement pay, or insurance under any Act administered by the Veterans' Administration is to be made * * * to a person mentally incompetent, or under other legal disability adjudged by a court of competent jurisdiction, such payment may be made to the person who is constituted guardian, curator, or conservator by the laws of the State of residence of claimant, or is otherwise legally vested with the care of the claimant or his estate. * *

"Authority is granted for the payment [from funds so derived] of any court or other expenses incident to any investigation or court proceeding for the appointment of any guardian, curator, conservator, or other person legally vested with the care of the claimant or his estate or the removal of such fiduciary and appointment of another, and of expenses in connection with the administration of such estates by such fiduciaries, or in connection with any other court proceeding hereby authorized, when such payment is authorized by the Administrator. * * *

"Provided further, That any funds in the hands of a guardian, curator, conservator, or person legally vested with the care of the beneficiary or his estate, derived from compensation, automatic or term insurance, emergency officers' retirement pay, or pension, payable under said Acts, which under the law of the State wherein the beneficiary had his last legal residence would escheat to the State, shall escheat to the United States and shall be returned by such guardian, curator, conservator, or person legally vested with the care of the beneficiary or his estate, or by the personal representative of the deceased beneficiary, less legal expenses of any administration necessary to determine that an escheat is in order, to the Veterans' Administration, and shall be deposited to the credit of the current appropriations provided for payment of compensation, insurance, or pension."

The state contends that the pension was an outright, absolute and complete gift; that the statute above uses the term "escheat" in a technical sense to mean succession to property where there are no heirs; and that the statute constitutes an attempt by the federal government to regulate the laws of succession of this state as to a particular type of property. It is admitted that the federal government has no power to pass laws regulating succession to property by citizens of the states, that being a power reserved by the Tenth Amendment to the states.

The appellant contends that the word "escheat" as used in the statute does not have the technical, limited meaning urged by the respondents; that when the statute is read as a whole it has a broader meaning; that the obvious purpose, intent and meaning of the statute is that the federal government has not made the gift of a pension absolute and complete, but has retained in itself a contingent reversionary interest—that is, if the pensioner die possessed of any portion of the gift, and if he has not by will disposed of the interest, and if under the laws of the state the gift would otherwise escheat to the state, then the reversionary contingent interest of the federal government will vest.

[1] The word "escheat" under the old English feudal system relating to the lapsing or reversion of lands to the lord of the fee upon a failure of heirship has survived but outgrown its restricted meaning. The custom or practice was originally confined to land, but its scope has been enlarged to include personal property. 19 Am.Jur., p. 383, sec. 5. In the case of In re Melrose Ave. in Borough of the Bronx, 234 N.Y. 48, 136 N.E. 235, 237, the court, in an opinion delivered by Justice Cardozo, said: "Escheat, as it survives in the Constitution of New York, preserves the name but ignores the origin of its feudal prototype. In origin it was an incident, not of sovereignty, but of tenure. * * * Escheat to-day is not the privilege of one, but the collective right of all when the individual right has failed."

In the United States, a state or some governmental agency is ordinarily the beneficiary of an escheat. In Canada, a province succeeds unless the Dominion by statute provides to the contrary. "As between the country or state of domicil and the country or state in which the property is located, real property escheats to the country in which the property is found, since every sovereign state has dominion over the land within its borders. In England it has been held that the personal property of an intestate dying without heirs, located in a foreign country, escheats to that country, and not to the country of domicil of the owner, the maxim 'mobilia Sequuntur personam' not applying, because the right claimed is not in the nature of a succession. However, in the United States it has been held that the state is not entitled by escheat to unclaimed property owned by non-residents within the state." 19 Am.Jur., p. 382, sec. 3. The United States government, in dealing with objects of its bounty, by statutory provision has applied the principle of escheat. In Tax Commission of Ohio v. Rife, 11 Ohio St. 83, 162 N.E. 390, 391, involving the question of exemption from taxation of insurance payable under an act of Congress known as the World War Veterans' Act, the following is set forth: "'That the compensation, insurance, and maintenance and support allowance payable under titles II, III, and IV, respectively, * * * shall be exempt from all taxation. * * *' 43 Stats. at L. 607, 613, c. 320, § 22, June 7, 1924 (38 U.S.C.A. § 454)." "'that in cases when the estate of an insured would escheat under the laws of the place of his residence the insurance shall not be paid to the estate but shall escheat to the United States and be credited to the military and naval insurance appropriation. This section shall be deemed to be in effect as of October 6, 1917.' 43 Stats. at L. 1302, 1310, c. 553, § 303, March 4, 1925 (38 U.S.C.A. § 514)." The court said, at pages 392, 393 of 162 N.E.:

"It is to be noted that there shall be no escheat to the state of Ohio, as would be the case in the event the state statutes controlled entirely; but by the Act of March 4, 1925, the insurance shall not be paid to the estate of the insured, but shall escheat to the United States and shall be credited to the United States government life insurance fund or the military and naval insurance appropriation, as may be appropriate. * * * This right to take this property is by virtue of a contract between the United States government and the soldier, and does not arise by reason of the statutes of descent and distribution of this state, even though the government has seen fit to distribute such fund through the agency of an administrator acting under the statutes of descent and distribution of the state of Ohio.

"It is reasonable to assume that the purpose of Congress in making the payment to the administrator of the deceased soldier was for the benefit of the government, to relieve the government of the necessity of selecting and determining the next of kin of the deceased soldier to whom payment should be made, and to place this burden upon the administrator appointed in the state of the soldier's residence. The administrator becomes a mere trustee or conduit for the government to make the payments to the persons entitled to the same under the provisions of the federal law. The intestate laws do not operate upon the decedent's property, but are referred to in order to determine who shall take the proceeds of the insurance. Congress had a right to adopt the course of descent prevailing in the state of the residence of the soldier, and the proceeds of the insurance therefore pass under the federal act, the intestate laws of Ohio being adopted as a standard or guide for ascertaining the next of kin to whom payment shall be made."

[2] The deceased sailor herein had no vested right to a pension. In Abbott v. Morgenthau, 68 App.D.C. 83, 93 F.2d 242, a case quite similar to the present, accumulated pension payments made to a guardian who had signed an application for his incompetent ward's admission to a veterans' home, were involved. At page 245 of 93 F.2d, the court said: "It must be borne in mind that Felley had no vested interest or rights in the pension money. He had no vested legal right to a pension at all, for, as has been said time and time again, pensions are bounties which Congress has the right to give, to withhold, to distribute, or to recall, at its discretion. When, therefore, it is considered that Congress could annex whatever conditions it pleased whenever it pleased to the grant or the gratuity, it seems to us clear that it was competent for Congress to say, as it did say, that, if any one enjoyed the benefits of the home and was still a member of the home at the time of his death, his accumulated pension money should be distributed in a particular manner. Indeed, the provision in the act for distribution of the balance to certain limited relatives of the deceased pensioner was itself but another gratuity, and since, as we have pointed out, there is and can be no dissent to the proposition that Congress may give, withhold, distribute, or recall and change at will its gratuities, it seems beyond dispute that when it does so it is the duty of the courts to give effect to the congressional purpose." Writ of certiorari denied 303 U.S. 638, 58 S.Ct. 526, 82 L.Ed. 1098.

[3] The laws of the United States dealing with matters within its jurisdiction are supreme "and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." (U.S. Constitution, Art. VI, cl. 2.) Upon the state courts is often imposed the duty of enforcing federal laws, and in this connection they are likewise called upon to determine

their constitutionality. If the terms of an act are constitutional, and due process is complied with, state agencies, judicial or otherwise, may with propriety and to the great convenience of the federal government lend their aid in their enforcement. Laws of the United States, when constitutional, are binding upon state courts (Tax Commission of Ohio v. Rife, supra), and should not be viewed as emanating from a foreign jurisdiction. The principle of co-operation, not competition, should be followed. Miller v. Municipal Court, 22 Cal. 2d 818, 142 P.2d 297. Congress is required to establish adequate and exact standards for the practical administration and reasonable enforcement of an act, and Congress having done so, the state courts should assist and co-operate in any policy declared for all the states. Miller v. Municipal Court, supra.

That unexpended pension money, under the conditions enumerated in the statute, should be returned to its source and be used in further aid of veterans, is eminently just and equitable, and state agencies should accept the burden of aiding in the enforcement of the act unless the method of return is contrary to constitutional provision. In Beaver v. Short, D.C., 300 F. 113, the power to legislate relative to property constituting a gift from, or within the provisions of, the federal government is held to be exclusively within such government.

[4] If not prescribed by statute, a formal contract is not required to bind one in the disposition of his property upon his death. Keefe v. Keefe, 19 Cal.App. 310, 125 P. 929; Barr v. Ferris, 41 Cal.App.2d 527, 107 P.2d 269; Davis v. Jacoby, 1 Cal.2d 370, 34 P.2d 1026; Wolf v. Donahue, 206 Cal. 213, 273 P. 547.

[5] There is no doubt that if the pension statute requires the pensioner to contract that in certain contingencies the unused pension fund shall revert to the donor, that such contract is valid, and that no formal consent by the pensioner or his guardian is required, the statute itself plus acceptance of its benefits constituting the contract. United States v. Stevens, 302 U.S. 623, 58 S.Ct. 388, 82 L.Ed. 484, reversing Stevens v. United States, 1 Cir., 89 F.2d 151, is similar to the present case except that in the Stevens case in his written application for admission to a national soldiers' home the applicant agreed that upon his death all of his personal property should pass to and vest in the Board of Managers of the home. (36 Stats. 736, 24 U.S.C.A. § 136.) Basing its decision primarily upon the Tenth Amendment to the Constitution the circuit court (89 F.2d 151) had held the act to be unconstitutional and void. In United States v. Stevens, 302 U.S. 623, at page 624, 58 S.Ct. 388, 82 L.Ed. 484, the question was concisely stated as follows: "Can the United States enforce a contract executed by an ex-soldier in order to obtain admission into the National Home for Disabled Volunteer Soldiers, which contract provides that upon the death of the veteran while a member of the Home, all his personal property shall pass to the Home subject to be reclaimed within five years by any legatee or person entitled to receive the property by inheritance?" The Supreme Court there said (302 U.S. at pages 626, 627, 58 S.Ct. at page 389, 82 L. Ed. 484): "The Court of Appeals was of the opinion that the act of Congress authorizing the contract was void as an interference with the reserved rights of the state of the veteran's legal domicile when he died (Massachusetts) in that 'it was at most but an attempt to make a future testamentary disposition of McGovern's property, when such a disposition could only be effected by will'" and held (302 U.S. at page 628, 58 S.Ct. at page 390, 82 L.Ed. 484): "Nothing in the record indicates that the agreement was not fairly and voluntarily entered into between the parties, or that it was inequitable, unjust, or not upon valuable consideration. Both parties were competent to make the contract. This contract is valid and enforceable." The statutory provision in the Stevens case specified *"all personal property"*; that in the present, applies to fund derived from "compensation, automatic or term *insurance,* emergency officers' requirement pay, or *pension*" only. (Italics added.) If the federal government simply by statute can lawfully create a contract that requires all the personal property of the pensioner to be paid over in certain circumstances, it can also provide that as to the particular fund that is the subject of the gift, the donor retains a contingent interest. That is all the statute here involved attempts to do.

[6] The statute herein makes no provision for consent by the veteran; the pension, if accepted, must be held in accordance with the statutory provisions applying to a gift, bounty or periodical allowance, the

granting of such pension being sometimes referred to as part consideration of a contract of employment, or as additional payment for past meritorious service. While in California it has been held that upon the granting of a pension to an employee a vested right accrues to the recipient, this simply means that the vesting is subject to contingencies, which may cause a discontinuance of payment, such as conviction of a felony or an automatic decrease in amount (Douglas v. Pension Board, 75 Cal.App. 335, 242 P. 756; Klench v. Board of Pension Fd. Comm'rs, 79 Cal.App. 171, 249 P. 46; Jordan v. Retirement Board, 35 Cal.App.2d 653, 96 P.2d 973) if the pension statute so provides. Likewise, a legislative body may provide that an unexpended portion of an allowance may revert or escheat to a designated governmental body. United States v. Stevens, supra. This rule applies to pensions. Abbott v. Morgenthau, supra.

[7] The fact that the veteran herein had been declared an incompetent makes no difference in the determination of the issues involved. In the Abbott case, the veteran was insane and, as regards the absence of a requirement of consent, the court declared that "It is a self-executing act." In the present case the incompetent was represented by a duly appointed and qualified guardian. The receipt of the pension, a benefit to the incompetent, was one of the elements in a quasi contractual transaction which, it may be assumed, was approved by the superior court in the guardianship proceeding. The decree of distribution sets forth the appointment of the guardian, the award of the pension, the period of payment to the guardian and that the entire estate consisted of money received from the Veterans' Administration.

[8] California has no right, by virtue of its sovereignty, to escheat the funds herein merely because they are found within the jurisdiction of the state. First Nat'l Bank v. California, 262 U.S. 366, 43 S.Ct. 602, 67 L.Ed. 1030. They were derived from the United States government as an absolute gift only in the sense that the guardian might have expended the full amount had it been necessary. The gift was limited to the extent that if the veteran died intestate and without heirs, any unexpended balance reverted to the donor. There is nothing inequitable in this provision of the federal statute. As between state and federal governments, there can be no question of the justice of the federal claim.

Had the veteran in this case not been declared an incompetent he could have confided his pension to the keeping of the treasurer of a veterans' home, reserving the right to withdraw and expend it as he desired, but with an agreement on his part that if unexpended at the time of his death it should be retained by the home. In Mauck v. United States, 9 Cir., 94 F.2d 745, at page 746, using the Stevens case as authority, the court said:

"It was pointed out in the Stevens case that the statute requiring the contract did not operate to invade the reserved powers of the state over the course of intestate descent and distribution, inasmuch as the law of the veteran's domicile, Massachusetts, permitted and enforced contracts directing the distribution of the promisor's property after his death.

"Such is also the law in California. Nichols v. Emery, 109 Cal. 323, 331, 41 P. 1089, 50 Am.St.Rep. 43; Booth v. Oakland Bank, 122 Cal. 19, 54 P. 370; Treadway v. Board of Directors, 14 Cal.App. 75, 85, 86, 111 P. 111, hearing by Supreme Court denied; Monsen v. Monsen, 174 Cal. 97, 99, 162 P. 90; cf. Cal.Civ.Code, § 1624, subd. 6; Levi v. Murrell, 9 Cir., 63 F.2d 670, 671."

[9] The entrusting of an incompetent pensioner's funds to the management of a guardian appointed by a state court has been recognized by the Congress of the United States as proper. Hines v. Stein, 298 U.S. 94, 56 S.Ct. 699, 80 L.Ed. 1063. The necessity of a guardian applying for a pension on behalf of an incompetent veteran is apparent. World War Veterans' Act, 1924, sec. 21, 43 U.S.Stats. pp. 607, 613, as amended, 38 U.S.C.A. § 450. Whatever terms of a contract the veteran would be compelled to make, expressly or impliedly, in order to obtain the pension, they bind the guardian with equal force.

The objection that the incompetent veteran cannot be considered as having consented to the condition of the gift is without merit. This conclusion is strengthened when the holding in Abbott v. Morgenthau, supra, is considered, namely, that the terms of the statute became operative upon the award and acceptance of the pension, and that formal consent to reversion of the unexpended funds was not necessary.

There is nothing unreasonable in the provision that the particular funds herein shall escheat to the federal government. The reference to "funds * * * which under the law of the State wherein the beneficiary had his last legal residence would escheat to the State" is simply adopting, as regards the operation of escheat to the federal agency, the same rule that the state has adopted for itself. The method is a matter of convenience. There may be cases in which pension money would escheat to the Veterans' Administration, and other property, real or personal, owned by the decedent, would escheat to the state. Respondents' contention that the pension money was paid to the deceased or his guardian without reservation that the United States could any longer assert control over it, is not well founded when the provisions of the pension act are given due consideration.

This opinion would be unduly lengthened if each of respondents' citations should be analyzed. None of them cover facts similar to those of this case. As an example, in Spicer v. Smith, 288 U.S. 430, 53 S.Ct. 415, 77 L.Ed. 875, 84 A.L.R. 1525, in which a living incompetent veteran was involved, whose guardian used as a depositary an institution which became insolvent, it was held that the guardian was not an agent of the United States, and that federal authority is not concerned in the depositary selected by him. No question of the right of escheat upon the death of the veteran was considered.

In Carrier v. Bryant, 306 U.S. 545, 59 S.Ct. 707, 83 L.Ed. 976, the court held that bonds of the United States purchased by a guardian on behalf of an incompetent veteran with "payments of benefits" were not exempt from execution. At page 549, of 306 U.S., at page 709 of 59 S.Ct., 83 L.Ed. 976, the court simply said, quoting from Trotter v. Tennessee, 290 U.S. 354, 54 S.Ct. 138, 78 L.Ed. 358: "We see no token of a purpose to extend a like immunity to permanent investments or the fruits of business enterprises." In this respect it is interesting to observe changes in the statute as noted in Culp v. Webster, 25 Cal.App.2d Supp. 759, 70 P.2d 273, and Lawrence v. Shaw, 300 U.S. 245, 57 S.Ct. 443, 81 L.Ed. 623, 108 A.L.R. 1102.

In Christianson v. King County, 239 U.S. 356, 36 S.Ct. 114, 60 L.Ed. 327, the court determined that territorial schemes of government for Washington territory properly included provisions establishing and defining the jurisdiction of probate courts. The failure of heirs resulted in an escheat to the county, but the opinion was not based upon an agreement of the deceased that, in the absence of testamentary disposition or heirs, the property should revert to the federal government. The right of succession to estates of deceased persons is a matter for state cognizance. Referring to "escheat," the Christianson case, 239 U.S. at page 366, 36 S.Ct. at page 118, 60 L.Ed. 327, said: "In the case of the territories, Congress could have dealt with this subject if it chose, but it did not see fit to establish a rule of its own."

There is an abundance of authority, statutory and judicial, to the effect that the state has control over the disposition of the property of a deceased within its jurisdiction, and the authority to determine the right of succession, but there is no constitutional provision that federal authority may not ordain as a condition to its grant that in a given contingency property shall escheat to a federal governmental agency.

In some instances a distinction has been drawn between real and personal property —a question not necessary to discuss here. Whatever constitutional rights the state possesses, it may not decree to one party or to one governmental agency property that was obtained by donation from another if there was an agreement, express or implied, that upon certain contingencies it should revert to the donor.

[10] In determining the main question involved it must be borne in mind that the federal government has the right to grant pensions with reservations, as, for example, by providing for a reversion, as it did in the case before us. A state escheat statute is based upon state sovereignty and is a direction for the devolution of property. It may not prevail over the United States constitution or over a congressional act which does not deprive one of property interests without due process of law.

[11] A further question, not briefed but considered in the presentation of oral argument appears as follows. The United States government delegated the state government of residence of the deceased veteran to act in its probate capacity to determine intestacy and lack of kindred; it

is therefore bound by the procedural methods adopted by such state. California statutes provide that property escheats to the state as of the date of the death of a decedent, Probate Code, sec. 231, and "shall be held by the State Treasurer for a period of five years from the date of the decree making such distribution, within which time any person may appear in the superior court for the county of Sacramento and claim the estate or any part thereof." Probate Code, sec. 1027. In view of the adoption by the federal statute of the state law on the subject of heirship, under the facts of this case the property may not revert to the donor, the United States of its agency, until the five year statutory period allowed for claimant heirs has elapsed.

Congress has declared its intention that pension payments are given absolutely for the care of a veteran during his lifetime and are subject to disposal by will or distribution, also as a gratuity, to the next of kin, but it has explicitly attached as a condition of the grant the requirement that amounts not so expended or disposed of shall be returned for the benefit of other veterans.

The decree of settlement of final account and of final distribution in so far as it distributes the residue of the estate of decedent to the State of California is reversed. Subject to the provisions of section 1027 of the Probate Code of this state, and in accordance with the views expressed herein, the claim of the United States of America is approved.

PETERS, P. J., and KNIGHT, J., concur.

23 Cal.2d 336

REED v. HAYWARD et al.

L. A. No. 18577.

Supreme Court of California.

Dec. 20, 1943.

1. Wills 🔑205

A will that has not been admitted to probate may not be used as evidence of title in a person therein named as devisee.

2. Courts 🔑472(4)

Generally, the probate court has exclusive jurisdiction as to the probate and proof of wills, the contest of wills, and the production and establishment of lost or destroyed wills. Probate Code, §§ 320–323, 350–352, 361, 362, 370–385, 613.

3. Quieting title 🔑10(1)

In quiet title action, plaintiff must prevail on the strength of his own title rather than on the weakness of defendant's title.

4. Quieting title 🔑10(2)

Where complaint set up a cause of action to quiet title alleging title in plaintiff through an unprobated will which could have been admitted to probate by the time action came to trial, rule that plaintiff in a quiet title action must have title at the time of commencement of action would not thereby be violated, since title to property passes to devisees upon death of testator subject to administration. Probate Code, §§ 28, 300, 361, 362.

5. Action 🔑50(8)
Descent and distribution 🔑90(1)
Wills 🔑747

Heirs or devisees may themselves, or jointly with executor or administrator, maintain an action to quiet title to real property of the estate against any one except the executor or administrator. Probate Code, § 581.

6. Bastards 🔑16

Since the liability for support of an illegitimate child is the mutual obligation of both father and mother, an action to enforce such obligation may be maintained against the mother by the child's guardian, particularly where the father is out of the state and his whereabouts are not definitely known. Civ.Code, § 196a.

7. Pleading 🔑214(3)

On general demurrer, allegation in complaint that a named person is a guardian of a minor plaintiff must be accepted as true.

8. Bastards 🔑16

All the powers conferred by statute to enforce maintenance and support in divorce actions may be made part of judgment impressing a lien upon or making the inherited property of the mother of an allegedly illegitimate child subject to the obligation to support the child. Civ.Code, §§ 140, 196a.

9. Divorce 🔑244

Under statute relative to support and maintenance in divorce actions, the payment of permanent alimony may be secured by making the same a lien or charge on the obligor's property. Civ.Code, § 140.

10. Courts 🔑475(2)

In action by allegedly illegitimate child against his mother to compel her to support him, the mother's interest in real property of a decedent could be impressed with a lien to secure performance of obligation to support even though the estate was in process of administration, since any lien imposed would be subject to administration of the estate, and no interference with the jurisdiction of the probate court or the orderly administration of the estate would result. Probate Code, § 300; Code Civ.Proc. §§ 542, subd. 2, 561, 688; Civ. Code, § 196a.

11. Action 🔑50(10)

An action by allegedly illegitimate child against his mother to compel mother to support him and to impress a lien upon mother's interest in real estate of a decedent, and to establish a lost or destroyed will, and to quiet title to realty allegedly inherited by child under the will was maintainable in equity, and defendants claiming an interest in property described were properly joined to have priorities of rights established and determine entire controversy. Civ.Code, § 196a; Probate Code, §§ 28, 300, 361, 362; Code Civ.Proc. §§ 379, 380.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Jack Edwin Reed, a minor, by his guardian Evalyn M. Nichols, against Jean Louise Hayward (Black) and others to compel the defendant named to support the plaintiff as a child of the defendant named, to establish a lost or destroyed will, and to quiet title as against other defendants to property allegedly left to the plaintiff by the alleged will. From a judgment of dismissal upon sustaining demurrers of defendants P. E. Durkee and Monte Cly, plaintiff appeals.

Reversed.

Prior opinion, 135 P.2d 405.

John A. Jorgenson, of Los Angeles, for appellant.

P. E. Durkee, in pro. per., and Paul Angelillo, both of Los Angeles, for respondents.

CARTER, Justice.

Plaintiff, a minor seven years of age, commenced this action through his guardian, Evalyn M. Nichols. His complaint is in two counts. In the first count he alleges that said Nichols is his guardian; that he is the illegitimate child of defendant Jean Louise Hayward (Black) whom he asserts is his mother; that his father's whereabouts is unknown, except that he may be in Kansas City, Missouri; that Laura L. Dickinson was his maternal great grandmother; that said Dickinson was the owner of certain income-producing real property at the time of her death on September 18, 1940; that said Evalyn M. Nichols, an heir of Dickinson, was appointed administratrix of Dickinson's estate upon the assumption that Dickinson left no will, and now is acting as such administratrix; that defendant Hayward is an heir of Dickinson and as such became vested with an interest in the above-mentioned real property if Dickinson died intestate; that defendant Hayward has furnished no support to plaintiff, and has no means to furnish such support except out of what she may inherit from Dickinson; that defendants P. E. Durkee and Monte Cly, respondents herein, claim some interest in said real property, but that such claim is without right.

The allegations of the first count are realleged in the second count, and it is further charged that Dickinson had executed a will prior to her death which was in her possession at the time of her death; that by that will she left one-fourth of her estate to plaintiff; that Hayward discovered that will and is still in possession of it or has destroyed it.

The prayer is that Hayward be required to produce the will; that if it cannot be found and established, a lien be impressed upon one-half of the real property that has descended to Hayward by intestate succession as security for the obligation of Hayward to support plaintiff.

The demurrers of defendants and respondents Durkee and Cly were sustained without leave to amend. From the judgment of dismissal entered thereon, plaintiff appeals. It does not appear from the record what, if any, procedure has been taken with reference to defendant Hayward.

Turning first to the second count, it may be described as an action to compel the production of a will, or if it is destroyed to establish it, and to obtain protection of the interest in the real property alleged to have been acquired by a devise therein with respect to defendant Hayward, and to have such right declared superior to any claim of respondents Cly and Durkee to the property. Although it is alleged that respondent Cly is the guardian of Barbara Cly, a minor, another asserted devisee under the will, respondent Cly is not sued in his capacity as guardian. Hence, we may assume that neither of respondents has any claim or right either on his own behalf or on behalf of any other heirs or devisees of Dickinson in the property of the estate of Dickinson.

[1, 2] A will that has not been admitted to probate may not be used as evidence of title in a person therein named as devisee. Roberts v. Roberts, 168 Cal. 307, 142 P. 1080, Ann.Cas.1916A, 886; McDaniel v. Pattison, 98 Cal. 86, 27 P. 651, 32 P. 805; Castro v. Richardson, 18 Cal. 478; Estate of Clark, 94 Cal.App. 453, 271 P. 542; Estate of Christensen, 135 Cal. 674, 68 P. 112; Ahlborn v. Peters, 37 Cal.App.2d 698, 100 P.2d 542; McMillan v. Boese, 45 Cal. App.2d 764, 115 P. 37; see In re Estate of Walker, 160 Cal. 547, 117 P. 510, 36 L.R.A.,N.S., 89; Matter of Estate of Patterson, 155 Cal. 626, 102 P. 941, 26 L.R.A., N.S., 654, 132 Am.St.Rep. 116, 18 Ann.Cas. 625; 68 C.J. 876, 919; 2 Page on Wills, pp. 53–54. In Re Estate of Bassett, 196 Cal. 576, 238 P. 666; In re Estate of Johnston, 188 Cal. 336, 206 P. 628, and In re Estate of Thompson, 185 Cal. 763, 198 P. 795, the question involved was the proof of a revoking clause in a subsequently revoked will. The matter was in probate and the unprobated will was not sought to be used as a muniment of title. In Re Estate of Sloan, 7 Cal.App.2d 319, 46 P.2d 1007, a foreign will and special circumstances

were involved. See Ahlborn v. Peters, supra. A complete procedure is set forth in the Probate Code by which the superior court sitting as a probate court is the forum for the probate and proof of wills (Prob. Code, secs. 361, 362), the contest of wills (Prob. Code, secs. 370–385), the production of wills (Prob. Code, secs. 320–323, 613), and the establishment of lost or destroyed wills (Prob. Code, secs. 350–352).

As to those matters it may be said generally that the probate court has exclusive jurisdiction. See Ahlborn v. Peters, supra; McDaniel v. Pattison, supra. Hence, it would appear that plaintiff has chosen the wrong forum for the relief sought under his second count, that is, the production and establishment of a will that has been destroyed or is concealed.

[3-5] However, viewing the second count as one to quiet title as against the respondents as strangers to the estate, and as to whom it is alleged that they claim some interest in the property of the decedent, it may not be vulnerable to the demurrers. It is true that plaintiff must prevail on the strength of his own title rather than on the weakness of defendant's title. 22 Cal.Jur. 167, 168. Under the allegations contained in his second count plaintiff deraigns title through an unprobated will which, as we have seen, must be established in the proper forum, and until it is established it may not be evidence of title in him. But at the present stage of the proceeding the admissibility of evidence is not pertinent. It may well be that by the time the action comes to trial plaintiff will have had the will admitted to probate in the probate court. The general rule that plaintiff in a quiet title action must have title at the time of the commencement of his action (Rowley v. Davis, 34 Cal.App. 184, 167 P. 162; Moakley v. Los Angeles Pac. R. Co., 139 Cal.App. 421, 34 P.2d 218) would not thereby be violated because the title of both real and personal property passes to a devisee named in a will upon the death of the testator, subject to administration. Prob. Code, secs. 28, 300; Noble v. Beach, 21 Cal.2d 91, 130 P.2d 426; 26 Cal.Jur. 1020, 1047, 1048; 11B Cal.Jur. 238, 239. The heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action to quiet title to the real property of the estate against anyone except the executor or administrator. Prob. Code, sec. 581; 11B Cal.Jur. 381, 382.

[6, 7] The first count contains a cause of action by an illegitimate minor, prosecuted through his guardian, to enforce his right to receive support from his mother, defendant Hayward. Such a proceeding is recognized by section 196a of the Civil Code in the following language: "The father as well as the mother, of an illegitimate child must give him support and education suitable to his circumstances. A civil suit to enforce such obligations may be maintained in behalf of a minor illegitimate child, by his mother or guardian, or by a guardian ad litem appointed upon the written application or with the consent of his mother; provided, that such application or consent shall not be necessary if the mother is dead or incompetent, and in such action the court shall have power to order and enforce performance thereof, the same as under sections 137, 137.5, 138, 139 and 140 of the Civil Code, in a suit for divorce by a wife." Under that section the liability for support of an illegitimate child is the mutual obligation of both the father and mother. Myers v. Harrington, 70 Cal.App. 680, 234 P. 412; Kyne v. Kyne, 38 Cal.App.2d 122, 130, 100 P.2d 806. The obligation being imposed upon both of the parents of the illegitimate child, section 196a clearly authorizes an action against the mother. By the express language of that section such an action may be brought by the guardian of the illegitimate minor on his behalf. That is clearly proper procedure where the mother is the one sought to be held and the father is out of the state and his whereabouts is not definitely known. It is alleged in the complaint that Evalyn M. Nichols is plaintiff's guardian. That must be accepted as true and not subject to question on general demurrer.

[8, 9] By this action plaintiff also seeks to impress a lien upon or make the property which defendant Hayward has inherited by intestate succession from Laura L. Dickinson subject to the obligation to support plaintiff. That there is authority for subjecting such property to a lien is clear. Section 196a of the Civil Code provides that the court shall have the power to order the enforcement of the obligation to support an illegitimate child the same as under section 140 of the Civil Code. All the powers conferred by the latter section may be exercised and made a part of the

judgment in the action. See Gambetta v. Gambetta, 30 Cal.App. 261, 264, 157 P. 1141; Carbone v. Superior Court, 18 Cal.2d 768, 117 P.2d 872, 136 A.L.R. 1260; Arais v. Kalensnikoff, 10 Cal.2d 428, 74 P.2d 1043, 115 A.L.R. 163; Kyne v. Kyne, supra. Section 140 provides: "The court may require the husband or wife, as the case may be, to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter, and may enforce the same by the appointment of a receiver, or by any other remedy applicable to the case." The authorities with relation to the power of a court to assure the performance of obligations in a divorce or maintenance action are pertinent in determining its authority under section 196a. Carbone v. Superior Court, supra. Under that section (Civ. Code, sec. 140), or independently, the payment of permanent alimony may be secured by making the same a lien or charge on the obligor's property. See Kusel v. Kusel, 147 Cal. 57, 61, 81 P. 295; Gaston v. Gaston, 114 Cal. 542, 46 P. 609, 55 Am.St.Rep. 86; Tremper v. Tremper, 39 Cal.App. 62, 177 P. 868; Latterner v. Latterner, 121 Cal.App. 298, 8 P.2d 870; Willen v. Willen, 119 Cal.App. 483, 6 P.2d 554; In re Estate of Smith, 200 Cal. 654, 254 P. 567; Garcia v. Garcia, 48 Cal.App.2d 157, 119 P.2d 387; Sanguinetti v. Sanguinetti, 9 Cal.2d 95, 69 P.2d 845, 111 A.L.R. 342.

[10] Upon the premise that Dickinson died intestate and defendant Hayward is an heir, the latter's interest in the decedent's real property may be impressed with a lien to secure the performance of her obligation to support plaintiff even though the estate is still in the process of administration, subject, of course, to administration of the estate. That proposition follows from the rules that title to the property of the estate passes to the heir upon the death of the intestate (Prob. Code, sec. 300); that pending administration an heir may convey or encumber his interest in the estate (11B Cal.Jur. 827–829); that the heir's interest in personal property is subject to attachment and execution liens under appropriate restrictions (Code Civ.Proc., secs. 561, 688; In re Estate of Lind, 1 Cal.2d 291, 34 P.2d 486), and the same applies to real property (Code Civ.Proc., sec. 542, subd. 2; Noble v. Beach, supra); and that a judgment lien attaches to the heir's interest pending probate. McGee v. Allen, 7 Cal.2d 468, 60 P.2d 1026; Noble v. Beach, supra. Under the foregoing rules there is no interference with the jurisdiction of the probate court or the lawful and orderly administration of the estate, inasmuch as any lien imposed is subject to the administration of the estate and all the rights pertinent thereto. Hence, there is no valid reason why a lien may not be imposed upon the interest of defendant Hayward as an heir of Dickinson.

[11] Both counts of the complaint allege that defendants Cly and Durkee, respondents here, claim an interest in the property described therein, but that such claim is without right. Certainly in an action to quiet title and to establish a lien on real property, plaintiff may join as defendant anyone asserting an interest in the property in order that a complete determination of the controversy may be had, and the priorities of rights established. See Code Civ. Proc., secs. 379, 380; Murray v. Murray, 115 Cal. 266, 47 P. 37, 37 L.R.A. 626, 56 Am.St.Rep. 97.

For the foregoing reasons the judgment is reversed.

GIBSON, C.J., and SHENK, CURTIS, EDMONDS, TRAYNOR, and SCHAUER, JJ., concurred.

23 Cal.2d 501

FRIDAY v. STATE BAR.

L. A. 18710.

Supreme Court of California.

Dec. 27, 1943.

1. Attorney and client 🔑53(2)

Evidence justified the committee's finding that petitioner, as an attorney, solicited employment from a casual acquaintance, who was then represented by another attorney, to collect a claim against a decedent's estate, and warranted petitioner's suspension from practice for six months. St. 1939, p. 355, §§ 6076–6078.

2. Attorney and client 🔑38, 44(1)

The Board of Governors of the State Bar has no authority to recommend discipline of an attorney for lack of legal learning, either as a general charge or as the gravamen of a charge of specific misconduct with relation to a client. St.1939, pp. 347–361, §§ 6000–6154.

3. Attorney and client ⚷32

The oath of an attorney requires him to perform his duties to the best of his individual ability, not according to the standard of ability required of lawyers generally in the community. St.1939, p. 354, § 6067.

4. Attorney and client ⚷38, 44(1)

In the absence of negligence constituting a violation of his oath, an attorney's mere ignorance of the law in conducting his client's affairs in good faith is not a cause for discipline, nor does an act committed because of mere ignorance constitute "moral turpitude". St.1939, pp. 354, 357, §§ 6067, 6103.

See Words and Phrases, Permanent Edition, for all other definitions of "Moral Turpitude".

5. Attorney and client ⚷61

The power of the Board of Governors of the State Bar to make recommendations is limited to those of disbarment, suspension, or reproval, and does not include power to recommend that an attorney, suspended for six months because of solicitation of employment, be required to pass the examination given to attorneys coming from other states. St.1939, pp. 347–361, §§ 6000–6154; pp. 348, 352–355, §§ 6010, 6046, 6060, 6062, 6076–6078.

6. Attorney and client ⚷58, 61

Though an attorney may not practice law while suspended or disbarred, the statute does not require that his name be stricken from the roll of attorneys, except in the case of disbarment, and at the end of a period of suspension he may again practice without any order of reinstatement. St.1939, p. 359, § 6117.

7. Attorney and client ⚷61

The Supreme Court will not require an attorney, before resuming practice after suspension, to pass the examination given to attorneys coming from other states, especially in case of a six months' suspension on a charge of soliciting legal business.

8. Attorney and client ⚷44(1)

The Supreme Court will not impose disciplinary measures for specific transactions between an attorney and client, where the charge of misconduct consists of nothing more than a lack of that degree of legal acumen which the court might think an attorney should possess.

9. Attorney and client ⚷53(1), 61

To require an attorney to pass an examination, either after a charge of lack of legal ability, or as a condition to the resumption of practice after suspension for some specific misconduct, would be discriminatory and unfair, since such a charge might be made by any disgruntled client, and such a condition would lack the essential pertinency to the misconduct involved.

10. Attorney and client ⚷38

Some specific act of unmoral conduct by an attorney must be the basis of discipline

◆

In Bank.

Proceeding by Richard C. W. Friday, petitioner, against the State Bar of California, to review a recommendation that petitioner be suspended from the practice of law for six months and that he be required to pass an examination before resuming practice.

Petitioner suspended from the practice of law for six months.

Richard C. W. Friday, of Los Angeles, in pro. per., for petitioner.

Philbrick McCoy, Norman S. Sterry, and Gibson, Dunn & Crutcher, all of Los Angeles, for respondent.

CARTER, Justice.

The Board of Governors of the State Bar recommends the suspension of petitioner from the practice of law for six months and that, before he may be permitted to resume practice, he be required to take and pass the examination given to attorneys from other states seeking admission to practice in this state.

[1] The local administrative committee found that petitioner solicited employment in his professional capacity from Jean Mackenzie, who at the time was represented by another attorney.

Jean Mackenzie had a claim for $639 against the estate of Gilbert E. Gould, deceased, and possibly against one of the heirs of the deceased. In April, 1942, she consulted Mr. Theodor Ira Kowan, an attorney at law, with reference to the claim and employed him to collect it for her. The claim was prepared by Kowan, signed by Mrs. Mackenzie and filed by Kowan in the estate proceeding. It was stated therein that Kowan was attorney for Mrs. Mackenzie, the claimant. According to the testimony of Mrs. Mackenzie, she met petitioner on the street about the middle of June, 1942, and he spoke to her about her claim against the estate; that a few days thereafter he sent her a postal card, the contents of which she remembered although the card was lost, in which he stated: "I have looked into your case on the records. Just twenty-four hours to save your case. Come to my office at once." She went to petitioner's office and was advised that he would charge $35 to collect the claim, that her lawyer (Kowan) had done nothing on the case, was not alert or active in the case, and that she should pay him $10. A few days thereafter, she called at his office again, paid him $10 and signed a complaint prepared by petitioner for instituting an action on the claim. The verification by Mrs. Mackenzie bears the date of and the action was filed by petitioner June 16, 1942. On June 25 and 27, 1942, petitioner sent cards to Mrs. Mackenzie discussing the claim, in the former of which he said he had again further examined the probate file in the Gould estate. Mrs. Mackenzie then consulted Kowan with reference to the matter. The latter questioned petitioner concerning how he came into the case, first by telephone, and petitioner refused to discuss the matter. In response to a letter from Kowan, petitioner suggested that Kowan discuss the matter with the "man in the moon." Thereafter petitioner at first refused but later consented to the substitution of Kowan as attorney in the action on the claim. Thereafter petitioner commenced an action against Kowan and Mrs. Mackenzie for attorney's fees allegedly due him for his services in connection with the claim.

Mrs. Mackenzie testified that she advised petitioner that she was represented by Kowan before he filed the action on the claim. The record shows:

"Q. In any of those conversations you had with Mr. Friday did you explain to him that you had Theodor Ira Kowan as your attorney or not? A. I explained to him in his office one day that I already had an attorney, when he first asked me for the case.

"Mr. Drumm: Q. Can you state definitely whether your conversation with him with regard to Mr. Kowan was prior or subsequent to the signing of the complaint in his office? A. It was prior because when he asked me for money I told him that I had already paid a lawyer a retaining fee and I had engaged this lawyer. I felt guilty about paying him anything, and I told him I had a lawyer."

Petitioner testified that he examined the probate file and the claim filed therein by Kowan about May 30, 1942, and about three times between May 28, 1942, and the commencement of the action thereon by him on June 16, 1942; and that he saw Kowan's name thereon as attorney for Mrs. Mackenzie.

The foregoing evidence clearly indicates that the local administrative committee was justified in its finding. Petitioner urges that Mrs. Mackenzie consulted several other lawyers and the public administrator; that she came to him concerning the claim; that a substitution of attorneys was not necessary on the probate claim; and that Mrs. Mackenzie was satisfied with his services. It also appears that Mrs. Mackenzie had a casual acquaintance with petitioner before the occurrence of the instances here related. Nevertheless, the evidence clearly indicates that petitioner solicited the legal business from Mrs. Mackenzie and continued to press his representation of her, even to the point of commencing the action on the claim although he knew that Kowan was representing her in the matter. He did not contact Kowan in regard to the matter, or suggest to Mrs. Mackenzie that she discharge him. He represented that Kowan was not protecting her interests, whereas the answer filed by the representative of the Gould estate to the action filed by Kowan on the claim concedes the validity of all the procedural steps. The case presented has factors additional to those present in Ewell v. State Bar, 2 Cal.2d 209, 220, 40 P.2d 264, 269, where it was said: "We are of the view, however, that the accused should not have relied merely upon the word of Rutherford as to whether an attorney had been provided for him in view of the fact that an attorney had represented him at the preliminary. Although it does not so appear from the record in express language, it should have occurred to the accused that it was likely that arrangements for retaining Mr. O'Donnell to represent Rutherford at subsequent proceedings had not been concluded and that it was because of pending negotiation with Miss Corville that Mr. O'Donnell had not made definite announcement as to whether he would continue as his attorney. In other words, the accused should, under the circumstances, have communicated with Mr. O'Donnell and obtained definite information on the subject before he assumed to advise Rutherford. His act no doubt constituted an infraction of the rules providing for the improvement of the practice of the law."

For the foregoing reasons petitioner should be suspended from the practice of law for six months, as recommended.

[2-4] There is nothing in the State Bar Act conferring authority upon the board of governors to recommend discipline for lack of legal learning, as a general charge. Nor does the board have power to recommend the discipline of an attorney for a deficiency in legal knowledge when such deficiency is the gravamen of the charge of specific misconduct with relation to a client. The only cause for discipline which would appear to be a basis for such a charge is a violation of the oath taken by the attorney, or of his duties as such attorney. Business and Professions Code, sec. 6103, St.1939, p. 357. The oath of an attorney pledges him "faithfully to discharge the duties of any attorney at law to the best of his knowledge and ability." Business and Professions Code, sec. 6067. In other words, he must perform his duties to the best of his individual ability, not the standard of ability required of lawyers generally in the community. Mere ignorance of the law in conducting the affairs of his client in good faith is not a cause for discipline. The nearest approach to such conduct is negligence as a ground for discipline when the neglect is so serious as to constitute a violation of his oath as an attorney. See Trusty v. State Bar, 16 Cal.2d 550, 107 P.2d 10; Marsh v. State Bar, 210 Cal. 303, 291 P. 583; Marsh v. State Bar, 2 Cal.2d 75, 39 P.2d 403; Waterman v. State Bar, 8 Cal.2d 17, 63 P.2d 1133; Stephens v. State Bar, 19 Cal.2d 580, 122 P.2d 549; Bruns v. State Bar, 18 Cal.2d 667, 117 P.2d 327. Conduct of that character, however, embraces more than mere ignorance of the law, as is evident from its nature. Certainly an act committed because of mere ignorance does not constitute moral turpitude.

[5, 6] A recommendation that petitioner be required to pass the examination given to attorneys admitted to practice in other states as a condition to their admission in this state before he may resume practice at the end of the six months' suspension period, is a matter of serious import. The State Bar Act, Business & Professions Code, secs. 6000-6154, does not authorize the Board of Governors of the State Bar to make such a recommendation. The board has the powers and duties conferred by the State Bar Act. Business & Professions Code, sec. 6010. It may formulate and enforce rules of professional conduct with the approval of the Supreme Court. Business and Professions Code, sec. 6076. For a willful breach of such rules a member of the State Bar may be disciplined by *reproval* or *suspension* from the practice of law for not exceeding one year. Business and Professions Code, sec. 6077. The board, for any of the causes set forth in the laws of the state, has power to recommend to the Supreme Court *disbarment, suspension, or private or public reproval.* Business and Professions Code, sec. 6078. The clear indication from these provisions is that the board has no power to recommend other than disbarment, suspension or reproval. Other provisions of the act authorize the giving of examinations bearing upon the legal learning and qualifications of an attorney as a basis for a recommendation, Business and Professions Code, secs. 6046, 6060, 6062, but they deal with admission to practice in this state in the first instance. The board has power to make recommendations with regard to reinstatement of attorneys after disbarment. Business and Professions Code, sec. 6078.

While an attorney shall not practice law while suspended or disbarred, the statute does not require that his name be stricken from the roll of attorneys except in the case of disbarment. Business and Professions Code, sec. 6117. At the end of the period of suspension, he may again practice without any order of reinstatement.

[7, 8] Respondent argues, however, that regardless of what may be the authority of the board of governors, this court has the power to require the passing of the examination as a prerequisite to resumption of practice after suspension. A requirement that an attorney pass an examination to test his knowledge of the law once he has been admitted to practice in this state might arise in three situations, namely, that he could be disbarred upon a charge that he lacks the necessary legal qualifications; that he could be compelled to pass the examination before being entitled to resume practice after his suspension; and that passing such an examination is a prerequisite to reinstatement after disbarment. While it has been said that this court has inherent power in the matter of disciplining

attorneys and legislative enactments are in aid of and not a limitation upon that power (In re Lavine, 2 Cal.2d 324, 41 P.2d 161, 42 P.2d 311; Johnson v. State Bar, 4 Cal.2d 744, 52 P.2d 928), it is significant that the Legislature has not seen fit to require an examination in any of those above-mentioned circumstances. Assuming that this court has the power to compel periodic examinations of persons admitted to practice, or to require the passing of an examination upon a general charge of lack of legal attainments unrelated to conduct involving a particular client, it should certainly not be exercised in a case such as this where the charge is solicitation of legal business and the discipline a six-months' suspension from practice. Nor will it impose disciplinary measures for specific transactions between an attorney and client, where the charge of misconduct consists of nothing more than a lack of that degree of legal acumen which this court might think an attorney should possess. The same conclusion must be reached in regard to imposing the requirement as a condition to resumption of practice after suspension whatever may have been the cause for such suspension. Any other conclusion would be arbitrary and would result in neither credit to the bar nor benefit to the public. It cannot be doubted that erudition in law on the part of the legal profession is something to be fostered and achieved. Yet the interests of the public and the profession will not be served by a policy which disturbs the stability and dignity of the profession or makes insecure the position of the members thereof. Attorneys who have been admitted to practice in this state presumably have been found to possess those educational and intellectual attainments necessary for the protection of the public. Since the organization of the bar as an integrated group, careful and comprehensive measures have been taken to insure the admission to practice of only those persons who are duly qualified. Prior to that time a procedure was followed which was less elaborate but which embraced the factor of personal contact not now possible because of the number of applicants seeking admission. See In re Investigation of Conduct of Examination for Admission to Practice Law, 1 Cal.2d 61, 68, 69, 33 P.2d 829.

[9] It would be discriminatory and unfair to require the passing of an examination as a prerequisite to continuation in practice of those admitted to practice, either on a charge of lack of legal ability or as a condition to the resumption of practice after suspension. To impose that obligation upon those few attorneys who were so unfortunate as to have such a charge made against them, or have erred in their conduct, but not upon others, would result in destroying the dignity of the profession and undermining the confidence of the public therein. Every disgruntled client whose case was lost would be inclined to charge that his counsel lacked ability, when it is obvious that there are two sides to every case. One side is wrong either because the trier of fact was not convinced or the legal theory relied upon was incorrect. Merely because an attorney has been disciplined for some infraction of the rules by which he must abide is no reason for assuming that he is not a qualified and efficient lawyer. Erring morally or by breach of professional ethics does not necessarily indicate a lack of knowledge of the law.

[10] It is urged that the admission to practice is based upon a finding of a good moral character as well as the necessary legal ability, and disciplinary measures may be taken for the loss of the former. There is a substantial difference. A good moral character is a general but it is not an invariable quality. Events and conditions subsequent to admission may so influence an individual that he will commit an act or a series of acts which are subject to condemnation. Whether he possesses the proper moral character at the time of his admission is largely a matter of opinion, and the course of his future conduct is a matter of the intrinsic strength of his moral fiber, a condition which is not possible of exact measurement. Some specific act of unmoral conduct must be the basis of discipline. In respect to legal learning it is assumed that once he is found to possess it he continues to have it. As we have seen, no mere charge of an act or a series of acts showing ignorance of the law is ground for discipline. Nor should the requirement of passing an examination be imposed where he has been disciplined for some specific improper conduct.

It is suggested that this court has imposed conditions as a prerequisite to the resumption of practice after suspension, referring to In re Tyler, 71 Cal. 353, 12 P. 289, 13 P. 169, and In re Soale, 31 Cal. App. 144, 159 P. 1065, involving the condition of restoration of clients' funds, and In re Philbrook, 105 Cal. 471, 38 P. 511, 884, 45 Am.St.Rep. 59, imposing a suspension for three years and until further order of the court. Whatever may be the propriety of those conditions, a matter upon which we express no opinion, it does not follow that the passing of an examination may be imposed as such a condition. Such a condition is neither fair nor reasonable and lacks the essential pertinency to the misconduct involved.

There have been cases in which it has been intimated that an applicant for reinstatement after disbarment may be required to pass an examination before he may be restored to practice. In re Stevens, 197 Cal. 408, 241 P. 88, involved an application for reinstatement after disbarment. It was held that although an application for reinstatement was in some respects the same as an application for admission in the first instance, the statutory law on the latter subject did not control; that it had not been the practice theretofore to require reexamination of the applicant's mental qualifications, citing In re Application of John S. Delancey and In the Matter of Hatch, reported in the Minutes of the Supreme Court of August 9, 1920, and September 20, 1920, respectively; Danford v. Superior Court, 49 Cal.App. 303, 193 P. 272; Bar Ass'n of S. F. v. Cantrell, 53 Cal.App. 758, 200 P. 968; In re Hahn, 56 Cal.App. 702, 206 P. 473; In re Stevens, 63 Cal.App. 682, 219 P. 1014; and In re O'Connell, 64 Cal.App. 673, 222 P. 625. In commenting upon Danford v. Superior Court, supra, the court stated (In re Stevens, supra, 197 Cal. at page 424, 241 P. at page 94): "The Danford Case holds, as already indicated, that an application for restoration must be treated as an application for original admission, and as such must be addressed to the court having jurisdiction to admit to practice in the first instance. Our conclusion is that the Danford Case is in *error* in two particulars—first, in holding that such an *applicant is in the same position as one seeking original admission;* and second, in declaring that this principle was laid down in the Mash Case. [In re Mash, 39 Cal. App. 548, 179 P. 897.] *It follows that the implication of the Danford Case that the applicant for restoration to practice must submit to a re-examination is also erroneous.* In any event, it is proper to say that *we are not prepared, in the absence of legislative expression, to accept the conclusion that every applicant for restoration to practice must submit to a re-examination as to his mental qualifications.* No adequate reason occurs to us for making the rule invariable. The law is interested in the regeneration of erring attorneys, and in the enforcement of a sound discipline its disposition ought not to be to place unnecessary burdens upon them." (Emphasis added.) While the court goes on to say that the question of re-examination upon reinstatement rests in the sound discretion of the court, we believe that holding should be limited to the bare proposition that the court has such power, but that it will not be exercised except possibly in rare or unusual cases. But even conceding that the re-examination of a disbarred attorney may be required in proper cases, no such requirement should be invoked in cases of mere suspension of an attorney from practice, as a suspended attorney is still a member of the bar, but his right to practice is suspended for a limited period. When such period expires he may resume practice without obtaining an order of this court or other authorization permitting him to do so.

In view of the conclusion herein reached it is not necessary to review the claim that petitioner's conduct indicates a lack of the requisite mental qualifications. Suffice it to observe that his conduct during the hearing before the local administrative committee was far from commendable. It approached, if not reached, an attitude of contempt. It was rude and unbecoming of a member of the legal profession. While petitioner's written presentation of his case and his correspondence are barely comprehensible at times, it may well arise from an unusual or odd sense of humor, "wise-cracking," and extreme facetiousness, rather than a lack of knowledge of the law.

Petitioner is suspended from the practice of law for six months, this order to become effective thirty days from the filing of this decision.

SHENK, CURTIS, and SCHAUER, JJ., concurred.

TRAYNOR, Justice.

I concur in the judgment.

GIBSON, Chief Justice.

I concur in the conclusion that petitioner should be suspended from the practice of law for a period of six months, based on evidence showing solicitation of business.

I also concur in the conclusion that it is improper to require that petitioner's suspension be continued beyond such six months' period and until such time as he shall have taken and passed the examination given to attorneys from other states seeking admission to practice here. Although an attorney may not practice law while suspended, the statute does not require that his name be stricken from the roll of attorneys. State Bar Act, sec. 6117. St.1939, p. 359. He at all times remains a member of the bar though under temporary disability. At the end of the definite period of suspension petitioner would be entitled to again practice law without further order of this court or any other body. This conclusion, of course, is directed to the factual situation presented by a suspension as distinguished from a disbarment. Upon disbarment the name of the attorney is required to be stricken from the roll of attorneys. State Bar Act, sec. 6117. He ceases to be a member of the bar, and the disability resulting from disbarment is complete and permanent unless removed by an order of this court directing reinstatement. It is unnecessary in this proceeding to express any view as to the cases in which this court, under its inherent power, might require an examination as to legal learning of disbarred attorneys seeking reinstatement. See In re Stevens, 197 Cal. 408–425, 241 P. 88.

EDMONDS, J., concurred.

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23 Cal.2d 511

CAMINETTI, Insurance Commissioner, v. EDWARD BROWN & SONS et al.

S. F. No. 16724.

Supreme Court of California.

Dec. 27, 1943.

Rehearing Denied Jan. 24, 1944.

1. Appeal and error 🔑607(1)

Order in so far as it terminated proceedings in preparation of a transcript on appeal was proper, where it appeared on appellant's own showing that reporter's health had been such as to preclude possibility of his completing the transcript and that his death thereafter made preparation of the transcript impossible.

2. Appeal and error 🔑978(1)
New trial 🔑93

Trial court has wide discretion in passing on motion for new trial on ground of the death or disability of reporter, and its action thereon must not be disturbed unless it is clearly shown that trial court abused such discretion. Code Civ.Proc. § 953e.

3. Appeal and error 🔑607(1)

Appellant has duty of taking all necessary steps to insure prompt filing of a transcript by the reporter, and it is not sufficient merely to file a notice of appeal, requesting transcript and arranging for compensating the reporter.

4. Appeal and error 🔑607(1)
New trial 🔑96

If appellant is not sufficiently diligent in taking necessary steps to insure prompt filing of transcript by reporter, trial court may not only deny a motion for new trial on ground of the death or disability of reporter, but may terminate the proceedings for preparation of the transcript. Code Civ.Proc. § 953e.

5. Appeal and error 🔑607(1)
New trial 🔑96

Trial court did not abuse its discretion in terminating proceedings for preparation of transcript on appeal and denying appellant's motion for new trial, where there was undue delay in preparation of the transcript and appellant did not exercise diligence required to guard against contingency that reporter would be unable to complete the transcript. Code Civ.Proc. § 953e.

6. Appeal and error 🔑628(2)

That reporter failed to prepare transcript on appeal within required time, owing to press of other business, was not a valid excuse.

7. Appeal and error 🔑628(2)
Mandamus 🔑57(1)

Appellant could have procured filing of transcript on appeal by reporter within time allowed by making a demand on the reporter to complete it and by securing an order of court or petitioning for writ of mandate to compel reporter to do so.

8. Appeal and error 🔑624

Appellant could not rely upon void orders extending time to prepare transcript which had been obtained by reporter's transcriber, where appellant was put on notice that such orders were obtained in violation of statute in that his attorney was told that orders were being obtained but never received any affidavits that were a condition to such orders. Code Civ.Proc. § 953a.

9. New trial ⚷96

Appellant, upon moving for new trial on ground that he was unable to obtain transcript on appeal because of death of reporter, could not rely upon void orders purporting to extend reporter's time for filing of transcript, where neither parties saw orders until about date of appellant's motion for new trial, and for a considerable part of the time there were no orders, valid or invalid, in effect. Code Civ.Proc. § 953a.

10. Appeal and error ⚷933(1)

Every presumption favors fairness and regularity of proceedings of trial court leading to the judgment and to denial of motion for new trial.

11. Appeal and error ⚷690(3)

Supreme Court would not consider appellant's point that trial court erred in construing and applying to facts of the case a certain statute, in absence of a record showing that such statute was involved on the trial.

12. Appeal and error ⚷628(1)

Appellant's failure to take proper steps to perfect his appeal was not excused by respondents' failure to take proper steps to protect their cross-appeal.

CARTER, SHENK, and SCHAUER, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; Benjamin C. Jones, Judge.

Action by A. Caminetti, Jr., as Insurance Commissioner, etc., against Edward Brown & Sons and others to recover a certain sum and interest, wherein the defendants filed a cross-complaint. From an order terminating proceedings in preparation of a transcript on appeal and denying plaintiff's motion for a new trial, the plaintiff appeals.

Affirmed.

Prior opinion, 133 P.2d 84.

Hester W. Webb, of San Francisco, for appellant.

Arthur B. Dunne, Elden C. Friel, and Dunne & Dunne, all of San Francisco, for respondents.

TRAYNOR, Justice.

A judgment in favor of respondent was entered on November 25, 1939. On January 29, 1940, the court entered its order amending the findings, conclusions, and judgment and denying appellant's motion for a new trial. On February 16, 1940, appellant filed a notice of appeal and a request for a transcript and personally arranged with the stenographic reporter for his compensation. On February 17, 1940, respondent also filed notice of appeal and a request for a transcript. On June 11, 1941, the appellant filed a notice of intention to move for a new trial, and respondent filed a notice of motion to terminate proceedings for preparation of the transcript. On July 19, 1941, the court entered its order denying appellant's motion for new trial and granting respondent's motion to terminate proceedings. The present appeal is from that order.

[1] There can be no criticism of the order insofar as it grants the motion to terminate proceedings. On appellant's own showing at the hearing on the motion, the reporter's health was such as to preclude the possibility of his completing the transcript. His death thereafter made the preparation of a transcript impossible. See Wynecoop v. Superior Court, 17 Cal. 2d 657, 111 P.2d 332.

[2] Appellant's motion for new trial was made pursuant to section 953e of the Code of Civil Procedure and was based upon the impossibility of obtaining a transcript because of the disability of the reporter. It is settled that the trial court has a wide discretion in passing on a motion for new trial under section 953e and that its action thereon must not be disturbed unless it is clearly shown that the trial court abused this discretion. Smith v. Orange Belt Supply Co., 58 Cal.App.2d 848, 137 P.2d 845; Moore v. Specialty Oil Tool Co., 128 Cal.App. 662, 18 P.2d 82; Conlin v. Coyne, 19 Cal.App.2d 78, 64 P.2d 1123; Kroeker v. Jack, 51 Cal.App.2d 272, 124 P.2d 619; see Comey v. Comey, 8 Cal. 2d 453, 66 P.2d 148.

[3-5] It is not sufficient, as appellant contends, to file a notice of appeal, request

a transcript and arrange for compensating the reporter. It is the duty of the appellant to take all necessary steps to insure the prompt filing of a transcript by the reporter. If he is not sufficiently diligent in this regard the trial court may not only deny a motion for new trial under section 953e of the Code of Civil Procedure (Smith v. Orange Belt Supply Co., supra; Moore v. Specialty Oil Tool Co., supra; Conlin v. Coyne, supra; Kroeker v. Jack, supra; see Comey v. Comey, supra) but may terminate the proceedings for preparation of the transcript. Wood v. Peterson Farms Co., 131 Cal.App. 312, 21 P.2d 468; O'Banion v. California C. P. Growers, 109 Cal.App. 328, 292 P. 975; Smith v. Jaccard, 20 Cal.App. 280, 128 P. 1023, 1026; Davis v. Alioto, 122 Cal.App. 740, 10 P.2d 467; Sherriffs v. Scott, 109 Cal. App. 438, 292 P. 1088; Clemmens v. Clemmens, 13 Cal.App.2d 651, 57 P.2d 529; Shutz v. Western, etc., Distributors, 24 Cal. App.2d 659, 76 P.2d 135; Western Concrete Pipe Co. v. Grabovich, 118 Cal.App. 367, 5 P.2d 71; Taft v. Security-First Nat. Bank, 139 Cal.App. 228, 33 P.2d 683; Harris v. Burt, 47 Cal.App. 480, 190 P. 1058. There is ample evidence in the present case to support the trial court's holding that there was undue delay in the preparation of the transcript and that appellant did not exercise the diligence required to guard against the contingency that the reporter would be unable to complete the transcript.

[6, 7] There was no evidence of disability that would have prevented the reporter's preparing the transcript between February 16, 1940, when the appellant filed notice of appeal and request for transcript, and September 15, 1940, when the reporter suffered a heart attack. Appellant seeks to justify the delay on the ground that the reporter was engaged in reporting the case of Pacific States Savings & Loan Assn. v. Evans, and did not have an opportunity to prepare the transcript in the present case. There is no evidence that the reporter could not have prepared the transcript between the date appellant filed his request therefor and the date on which the reporter commenced reporting the Pacific States case. Furthermore, it appears that there were other competent court reporters available at the time, but it is not shown that appellant or his attorney requested the reporter to get another reporter to take his place in the Pacific States case. Moreover, despite this engagement, the reporter had an opportunity to prepare the transcript, for there was a recess in the Pacific States case from April 11, 1940, until July 16, 1940, and there is no evidence to show why he did not prepare it during that period. In any event it is not a valid excuse that the reporter did not have the time, owing to the press of other business, to prepare the transcript. O'Banion v. California C. P. Growers, 109 Cal.App. 328, 329, 292 P. 975; see Laumann v. Conner, 12 Cal.App.2d 631, 55 P.2d 1225. As pointed out in Harris v. Burt, 47 Cal.App. 480, 482, 190 P. 1058, appellant could have procured the filing of the transcript by making a demand on the reporter to complete it and by securing an order of court or petitioning for writ of mandate to compel him to do so. Appellant did not at any time call the attention of the court to the delay, nor did he take any action to persuade or compel the reporter to prepare the transcript. Instead, he let the matter drift until the reporter became unable to do so. Finally, after the reporter became permanently disabled there was an unexplained delay of over eight months before appellant served and filed his notice of intention to move for a new trial under the provisions of section 953e of the Code of Civil Procedure. Appellant's claim of diligence rests principally upon the fact that his attorney communicated with the reporter's transcriber. What authority the latter had does not appear, but in any event, the appellant, after learning from these communications of the reporter's inactivity, did nothing to expedite its preparation.

[8] Appellant relies upon the advice given his attorney by the reporter's transcriber that orders extending the time to prepare the transcript had been obtained and all necessary orders further extending time would be obtained by the reporter and the transcriber. From March 7, 1940, when the transcript was due, until June 25, 1941, the reporter's transcriber procured orders from various superior court judges extending the time for the reporter to prepare and file the transcript. Each of these orders was obtained in violation of section 953a of the Code of Civil Procedure, providing that "The stenographic reporter shall not postpone the filing of the transcript except upon order of the court, upon affidavits filed with the court by the reporter, stating facts and not conclusions, which affidavits before any continuance is granted shall be served upon the attorneys appear-

ing in said cause * * *." No affidavits were ever made, served, or filed, and no notice was ever served on or mailed to respondents or their attorneys. There were, moreover, several periods of time, varying from two or three days to one hundred and twenty-seven days, during which there was no protecting order. Appellant was put on notice that such orders were obtained in violation of section 953a, for his attorney was told that orders were being obtained, but never received any affidavits that are a condition to such orders. Under these circumstances appellant cannot rely on the derelictions of court officers. See 4 C.J.S., Appeal and Error, § 869, p. 1374.

[9, 10] Appellant contends that he had the right to rely upon void orders extending the reporter's time, citing California Nat. Bank v. El Dorado Lime, etc., Co., 200 Cal. 452, 253 P. 704, and Lewith v. Rehmke, 217 Cal. 563, 20 P.2d 687, which involved bills of exceptions and relief under section 473 of the Code of Civil Procedure. In the present case there was not only no attempt to obtain relief under section 473 but the time limited by that section expired long before appellant made any application to the court. Moreover, appellant did not rely on any order, for neither party saw the orders until about the date of appellant's motion, and for a considerable part of the time there were no orders, valid or invalid, in effect. Even if the showing made was sufficient to justify an order denying a motion to terminate proceedings, had the reporter been able to complete the transcript, it is not sufficient to show an abuse of discretion by the court in denying a motion for new trial. Every presumption favors the fairness and regularity of the proceedings of the trial court leading to the judgment and to the denial of the motion for new trial. There is certainly no abuse of discretion by a trial court in refusing to deprive the respondent of his judgment when the appellant by taking the necessary steps for the prompt filing of the transcript could have avoided the contingency that makes its preparation impossible.

[11] Appellant's contention that the trial court in the basic action erred in construing and applying to the facts of the case the provisions of section 2344 of the Civil Code was not made on the hearing of his motion in the trial court. The affidavit in support of the motion declared that "The legal questions to be determined on appeal depend wholly upon the facts established at the trial, and it is therefore necessary that the reporter's transcript of the trial be had." There was no showing made as to the nature of the testimony, and no indication that there was any merit in an appeal. In the absence of a record showing that section 2344 of the Civil Code was involved on the trial any discussion of that section is inappropriate. See Town of St. Helena v. Merriam, 171 Cal. 135, 137, 152 P. 299.

[12] Appellant contends that since respondents filed a cross-appeal they were as responsible as appellant for the delays in the preparation of the transcript. Appellant, however, was the moving party in the trial court on the present appeal. His failure to take the proper steps to perfect his appeal in the basic action is in no way excused by the failure of respondents to take proper steps to protect their appeal when they are not seeking relief. Each party must act with diligence to perfect his own appeal. Dorcy v. Brodis, 153 Cal. 673, 675, 96 P. 278.

The order appealed from is affirmed.

GIBSON, C. J., and CURTIS and EDMONDS, JJ., concurred.

CARTER, Justice (dissenting).

I dissent. The question, as the majority opinion states, is whether the trial court abused its discretion in refusing to grant appellant a new trial under section 953e of the Code of Civil Procedure upon the ground that the death of the reporter made it impossible to secure a reporter's transcript. In concluding that the record fails to show an abuse of discretion, the majority have, in my opinion, countenanced a procedure and application of the statute which render it meaningless and ineffective.

In January, 1936, in the course of liquidation of Union Indemnity Company, an insolvent Louisiana corporation, this action was instituted by the Insurance Commissioner of this state to recover certain sums for the company from its agent, defendant Edward Brown and Sons, a corporation, and the members of that firm. The defendants answered and also cross-complained, alleging a number of claims for amounts due them from the company. In October, 1938, the cause came to trial on issues joined by amended pleadings, the court by stipulation sitting without a jury.

On November 25, 1939, judgment was entered decreeing that plaintiff take nothing, but that defendants recover $39,267.31 on their cross-complaint. On January 29, 1940, a motion for new trial was denied, but the order of denial contained a provision disallowing a $15,000 item to defendants. The findings and conclusions were modified accordingly, and the judgment in favor of defendants was thus reduced to $24,267.31.

On February 16, 1940, plaintiff filed notice of appeal from the judgment as modified, and a request for a transcript. On the following day, February 17th, defendants filed notice of appeal from every part of the judgment adverse to them denying relief prayed for by their cross-complaint and disallowing items claimed, including the $15,000 item which was stricken from the judgment at the time of ruling on the motion for new trial.

On June 11, 1941, plaintiff gave notice of a motion for an order setting aside the judgment and granting a new trial on the ground, among others, that owing to the illness of the court reporter it would be impossible to get a reporter's transcript. An affidavit of counsel filed in support of the motion avers that the following efforts were made to procure the transcript: That at the time of filing the request for a transcript, counsel personally arranged with the official court reporter, who reported the trial, and with his transcriber, for their compensation. In March, 1940, at the request of the transcriber, counsel went to the city hall and identified the papers which were to be included in the clerk's transcript. She was advised by the transcriber that the reporter was reporting the trial of Pacific States Savings & Loan Society v. Evans and would be unable to prepare the transcript until he finished that work. She was further advised by the transcriber that orders extending the time of the reporter for preparing the transcript had been obtained, and that all necessary orders would be taken care of by the reporter or his assistants.

Counsel further avers: "Each month thereafter and until October, 1940, I communicated with [the transcriber] and was told by her that [the reporter] was still engaged in the Pacific States case and that court orders extending his time to file the transcript had been obtained and filed."

In October, 1940, affiant was advised by the transcriber that the reporter had suffered a severe heart attack on September 14th and was confined to the hospital and that she was protecting the time for filing the transcript by orders of court.

From time to time thereafter affiant was advised that the reporter was still in the hospital and was unable to carry on any work or even read his mail. In February, 1941, she was advised by the transcriber that the reporter was still very ill and that it might be some time before he could return to work; also that the required court orders were being obtained.

In April, 1941, the transcriber telephoned affiant advising her that because of the reporter's ill health he would be unable to complete the transcript. Affiant relayed this information to opposing counsel by telephone and asked them to arrange with her as to the course to pursue. Thereafter, they did not communicate with her, so in May she telephoned the transcriber. She was advised that the reporter would never be able to complete the transcript and she later learned that he had passed away.

Meanwhile, and on June 5th, she again telephoned opposing counsel and asked them for a stipulation for a new trial. They promised to let her know. However, she learned that the judge who tried the case was coming to town, and so, on June 11th she gave notice of motion to vacate the judgment and for a new trial pursuant to section 953e of the Code of Civil Procedure.

Her affidavit in support of the motion showed, in addition to the averments already mentioned, that there had been procured through the office of the reporter more than fifteen different court orders extending his time, two of which purported to be retroactive, so that the period of delay was substantially covered by protective orders. However, the orders were defective. No affidavits were served or filed in conformity with the requirement of section 953a of the Code of Civil Procedure that "The stenographic reporter shall not postpone the filing of the transcript except upon order of the court, upon affidavits filed with the court by the reporter, stating facts and not conclusions, which affidavits before any continuance is granted shall be served upon the attorneys appearing in said cause * * * unless the court shall otherwise order, prior to the making of said order of continuance."

On June 11, 1941, defendants gave notice of motion to terminate proceedings for the preparation of a transcript on appeal on the ground of unreasonable delay of plaintiff in procuring a transcript, lack of diligence, and failure of the reporter to serve and file affidavits to support the orders extending time. This notice was supported by an affidavit of defendants' counsel pointing to the expense and inconvenience of a retrial, the prejudicial effect of the delay, and the likelihood that the personal recollections of witnesses would be less distinct with passing time.

Upon a full hearing of plaintiff's motion to vacate the judgment and for a new trial, and defendants' motion to terminate proceedings, the trial court denied plaintiff's motion and granted that of defendants, giving as his reason that although there is no limit on the time within which a reporter may prepare a transcript, nevertheless undue delay may be grounds for refusal to grant a new trial, and that here plaintiff showed a lack of diligence and failed to take proper steps to guard against the contingency which happened, the inability of the reporter to complete the transcript. Plaintiff appealed from this ruling.

In this State the jurisdiction of the court to grant a new trial is limited strictly to the statutory grounds, and as prior to 1931 there was no statute dealing with the effect of death or incapacity of the reporter, a new trial could not be had on that ground. This is contrary to the rule in many jurisdictions where, on death of the reporter, a new trial is granted as a matter of course, or of right. Diamond v. Superior Court, 1922, 189 Cal. 732, 210 P. 36, and authorities there reviewed; 25 Cal.Law Rev. 114; Moore v. State, 59 Okl.Cr. 372, 61 P.2d 1134, 107 A.L.R. 603; Shute v. Big Meadows Inv. Co., 45 Nev. 99, 198 P. 227, 16 A.L.R. 1158; State v. Ricks, 32 Idaho 232, 180 P. 257, 13 A.L.R. 102; People v. Keefe, 254 App.Div. 683, 3 N.Y.S.2d 473; Navarro v. State, 141 Tex.Cr. 196, 147 S.W.2d 1081; Pacific Greyhound Lines v. Burgess, Tex.Civ.App., 118 S.W.2d 1100; State v. District Ct., 107 Mont. 30, 79 P.2d 665; 39 Am.Jur., p. 199, secs. 201-2.

In 1931, section 953e was added to the Code of Civil Procedure (Stats.1931, p. 410). It provided: "When it shall be impossible to have the phonographic report of the trial transcribed by a stenographic reporter as provided by section 953a of this code because of the death or other disability of a reporter who participated as a stenographic reporter at the trial, the court or a judge thereof shall have power to set aside and vacate the judgment, order or decree from which an appeal has been or is to be taken and to order a new trial of the action or proceeding."

In the first case construing this statute, its provisions and particularly the phrase "shall have power," were declared to be not mandatory but merely to repose in the trial court a "wide discretion" in the matter of granting or denying new trials on the stated ground. Moore v. Specialty Oil Tool Co., 128 Cal.App. 662, 664, 665, 18 P.2d 82. See to the same effect Conlin v. Coyne, 19 Cal.App.2d 78, 64 P.2d 1123; Comey v. Comey, 8 Cal.2d 453, 66 P.2d 148; Kroeker v. Jack, 51 Cal.App.2d 272, 124 P.2d 619; Smith v. Orange Belt Supply Co., 58 Cal.App.2d 848, 137 P.2d 845.

This construction of the statutory language is obviously a sound one, for to put an absolute compulsion upon the trial court to grant a new trial on a mere showing that death or disability of the reporter has made the preparation of the transcript impossible would be to work a gross injustice in many cases. Every presumption is in favor of the fairness, impartiality, and regularity of the proceedings in the trial court leading to judgment. A verdict or judgment is presumptively right until it is shown to be wrong. Thus to deprive a party of his judgment and the intendments in its support, and to force him to re-establish his claim in every case where there is a mere showing of incapacity or death of the reporter, without any consideration of the facts, of the diligence or lack of diligence shown by the appellant in aiding the timely procurement of a transcript, of the possibility of agreeing on a bill of exceptions or statement of facts, or of the indications of merit or lack of merit in the appeal, would be just as unfair as to automatically deny a new trial to every appellant who has been deprived of his appeal because of the impossibility of securing a record. Diamond v. Superior Court, supra; Alley v. McCabe, 147 Ill. 410, 35 N.E. 615; Stenographer Cases, 100 Me. 271, 61 A. 782. A showing of the death of material witnesses or other exceptional circumstances making it impossible for the prevailing party to prove his case on a re-trial might be considered by a trial judge, in the exercise of a sound discretion, to overbalance the hardship worked on the appellant by deprivation of his appeal on a full record. In some cases denial of relief by way of a new trial has properly been grounded upon a showing that appellant himself obstructed the timely preparation of the transcript. In others an appeal on the judgment roll or upon a bill of exceptions has been found to afford sufficient relief.

But aside from these exceptional cases there will be found a vast number in the ordinary run where the deprivation of an appeal on a full transcript without fault on the part of appellant, but by reason of death or incapacity of the reporter, and the denial of relief by way of a new trial, will work a hardship and injustice too great to be countenanced; cases where the success or failure of the appeal depends wholly upon a complete presentation of the facts established at the trial; cases where the re-trial may be had without material damage by delay to the rights of the respondent; and cases where the showing made in support of the motion for new trial is sufficient to indicate that the appeal may be meritorious, or at least that the points presented by the appeal are such as to entitle the appellant to a hearing on the merits.

The policy of the law is always to favor, wherever possible, a hearing of an appeal on the merits. California Nat. Bank v. El Dorado Lime, etc., Co., 200 Cal. 452, 253 P. 704; Waybright v. Anderson, 200 Cal. 374, 253 P. 148; Manning v. Gavin, 14 Cal.2d 44, 92 P.2d 795; Wood v. Peterson Farms Co., 214 Cal. 94, 3 P.2d 922; Banta v. Siller, 121 Cal. 414, 53 P. 935; Labarthe v. McRae, 35 Cal.App.2d 734, 97 P.2d 251. It is just as essential that an appellant be protected in his right to have his appeal heard on the merits as that a respondent be given the benefit of the presumptions and intendments supporting his judgment. Moreover, a retrial gives both parties another chance, whereas a denial of it absolutely forecloses the appellant.

There can therefore be no question that section 953e has been properly construed to repose in the trial court a wide discretion in passing upon motions for new trial made on the stated ground. But this discretion, although a "wide" one, is not unlimited, arbitrary, or unrestricted; it must be exercised according to settled rules. In commenting on the danger of investing judges with an unlimited discretion, Lord Camden, one of the greatest and purest of the English jurists, said: "The discretion of a judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends on constitution, temper and passion. In the best it is oftentimes caprice; in the worst, it is every vice, folly and passion to which human nature can be liable." State v. Cummings, 36 Mo. 263, *278*; 12 Words and Phrases, Perm.Ed., p. 588.

Discretion in granting a new trial, has been defined as "an honest attempt, in the exercise by the judge of his duty and power to see that justice is done, to establish a legal right" (Johnson v. Grayson, 230 Mo. 380, 130 S.W. 673, 676); it means a "legal discretion * * * to be exercised in discerning the course prescribed by the law, according to principles ascertained by adjudged cases. * * * Judicial power is not exercised for the purpose of giving effect to the will of the judge, but always for the purpose of giving effect to the will of the law." Belt v. Morris, 168 Okl. 528, 34 P.2d 581, 584. It is not capricious, arbitrary, wilful, vague, fanciful, but is legal and regular, directed by reason and conscience. In passing upon a motion for new trial grounded upon the impossibility of securing a reporter's transcript, the court cannot be motivated by his personal inclination to see his own adjudication prevail over appellant's right to have it tested by appeal on the merits. The exercise of the discretion may be, and is to a very great extent, regulated by usage, or by principles which courts have learned by experience will, when applied to the great majority of cases, best promote the ends of justice; but it is still left to the court to determine whether a case is exactly alike in every color, circumstance, and feature to those upon which the usage or principle is founded, or in which it has been applied. State v. Hultz, 106 Mo. 41, 16 S.W. 940, 942; 12 Words and Phrases, Perm.Ed., pp. 588–591, 603.

In this state, in defining "discretion," it is said in Sharon v. Sharon, 75 Cal. 1, 48, 16 P. 345, 366, that "The discretion of the court below is a legal discretion, to be reasonably exercised. 'Abuse of discretion' * * * does not necessarily imply a willful abuse, or intentional wrong. In a legal sense, discretion is abused whenever, in its exercise, a court exceeds the bounds of reason, all the circumstances before it being considered."

It is thus apparent that the peculiar facts and circumstances of each individual case must be carefully considered in determining whether discretion has been properly exercised. In the present case, after reviewing the trial court's ruling in the light of the applicable rules and of all of the circumstances shown by the record, I cannot but conclude that the denial of appellant's motion for new trial was unreasonable and constituted an abuse of discretion.

In initiating his appeal, appellant did all things required of him by statute, Code Civ.Proc., secs. 953a, 953b. Counsel (1) filed notice of appeal; (2) requested preparation of a transcript; (3) arranged to compensate the court reporter; and (4) accompanied the transcriber to the City Hall and identified the papers which were to be included in the clerk's transcript. She then made periodic inquiries as to the progress of the work. Under the circumstances, she stood to gain nothing by unduly harassing the reporter, making formal demand upon him, or trying to force him to transcribe by securing a court order or writ of mandate. No time limit is prescribed for the filing of a transcript (Hohnemann v. Pacific G. & E. Co., 31 Cal.App.2d 692, 694, 88 P.2d 748), and after appellant had taken the initial steps required by statute, the duty rested upon the reporter, who acts as an officer of the court in the performance of his ministerial functions (sec. 269, Code Civ.Proc.; 7 Cal.Jur. sec. 55, p. 653; Pratt v. Browne, 135 Cal. 649, 653, 67 P. 1082), to proceed with the work and to secure, if necessary, protective orders extending his time, supported by affidavits properly served and filed, sec. 953a.

In her dealings with the reporter, appellant followed the prevailing custom, and cannot be charged with lack of diligence in relying upon the assurances from the reporter's office that extensions of time were being secured. The transcriber testified that she had been in that work since 1930, and "that this was the way all extensions had been obtained during that time, and to her knowledge and in her experience she had never presented an affidavit." Another transcriber in the reporter's office asked appellant's counsel from time to time not to "press the matter" or attempt to communicate with the reporter personally, as "he was in such a mental condition that anything might upset him." Up to April, 1941, counsel had no definite information of the seriousness of the reporter's illness. Certainly after appellant's counsel having done all things required by statute on her part to be done, appellant should not be penalized for the dereliction of the court officer.

No request or suggestion was made by respondent that appellant take any action against the reporter. It is doubtful that such action could have been successfully taken in view of the work being done by the reporter on another case which delayed his starting the transcription. There was no duty or obligation on the part of either party to procure the orders extending time. This duty rested solely upon the reporter. It is a matter of common knowledge that in smaller counties having only one reporter, the preparation of transcripts is often delayed for months where the reporter is engaged in reporting other cases or where he has other transcripts to prepare in cases which have been previously appealed, and the practice in such cases is always for the litigants to cooperate with the reporter and not to insist upon his attempting the impossible or requiring him to do more than his endurance will permit. Under such circumstances, if the reporter should die or become disabled, and the trial court should hold that appellant was negligent in not applying for a writ of mandate or taking some other coercive steps to force the preparation of the transcript, the action of the court would be clearly arbitrary and unwarranted and would constitute an abuse of discretion.

Such is the present case, for here, as already stated, the trial court expressly based his denial of a new trial upon the ground that "Diligence is required at all stages of the proceeding unless waived by the opposite party. In the present case it cannot be said that the reporter was diligent in the preparation of the transcript, or that the plaintiff took the proper steps to guard against the contingency which has happened, to wit, the inability of the reporter to complete the transcript. It does not appear that a sufficient showing has here been made to warrant the setting aside of the judgment and the granting of a new trial. * * *" C.T. p. 31. This shows clearly that the trial court erroneously charged appellant with the court officer's dereliction of duty, and based his ruling on that ground.

The question of whether discretion has been soundly exercised depends, as already stated, in each case upon the particular circumstances. All of the cases cited in the majority opinion are clearly distinguishable from the present case because of differences in the factual situation. In support of the statement, "In any event it is not a valid excuse that the reporter did not have the time, owing to the press of other business, to prepare the transcript," the majority opinion cites three cases. O'Banion v. California C. P. Growers, 109 Cal.App. 328, 329, 292 P. 975; Laumann v. Conner, 12 Cal.App.2d 631, 55 P.2d 1255; Harris v. Burt, 47 Cal.App. 480, 482, 190 P. 1058, 1059.

The O'Banion case involved an appeal from an order terminating proceedings. Due to the press of business the reporter forgot to prepare the transcript. The court said this was no excuse, but did not say that an impossibility to get the work out due to reporting another case would not be a valid excuse. In the present case appellant's frequent inquiries left the reporter no chance for forgetting the matter.

The Laumann case involved the effect of the reporter's loss of his notes. The trial court was without jurisdiction to grant a new trial because at that time loss of notes was not a statutory ground of new trial. This omission in section 953e has been remedied by a 1943 amendment enlarging its scope. Stats.1943, ch. 1017, sec. 1.

The Harris case involved the dismissal of an appeal. The reporter wrote appellant naming the amount of his fee and stating, "If you wish me to go ahead with the work, upon prepayment of my fees, I will do so promptly." Appellant did not reply and the reporter heard nothing until he was informed of the making of the motion to dismiss the appeal because of the appellant's laches in securing a transcript. The appellant's lack of diligence was properly held to support the order of dismissal.

More in line with the situation in the present case is California Nat. Bank v. Lime, etc., Co., supra, where the appellants were relieved from default under the remedial provisions of section 473 of the Code of Civil Procedure, even though they had mistakenly relied upon void orders extending their time for preparation of a bill of exceptions. See, also, Lewith v. Rehmke, 217 Cal. 563, 20 P.2d 687. At an early date it was recognized in this state, as in other jurisdictions, that an appellant should not be deprived of his constitutional right of appeal through the fault of officers of the court. Stark v. Barnes, 1852, 2 Cal. 162; Lovell v. Deyoe, 16 Cal.2d 650, 107 P.2d 385; Lovell v. Griffin, 51 Cal.App.2d 322, 124 P.2d 615. In Lovell v. Deyoe, dismissal of an appeal for failure to timely file a transcript was denied on the ground that appellant had substantially complied with requirements and the delay was due to the derelictions of officers of the lower court. See, also Continental Bldg. & Loan Ass'n v. Mills, 44 Neb. 136, 62 N.W. 478–480; Sanders v. Nightengale, 109 Neb. 667, 192 N.W. 200–202; California Gulch Placer Mining Co. v. Patrick, 37 Idaho 661, 218 P. 378, 379; Lipsey v. Crosser, 62 S.D. 160, 252 N.W. 23–25; Brinsfield v. Mather, 166 Md. 473, 171 A. 357–359.

The five other cases mainly relied upon in the majority opinion are also distinguishable on the facts. In Moore v. Specialty Oil Tool Co., supra [128 Cal. App. 662, 18 P.2d 83], it was contended on an appeal on the judgment roll that a new trial should have been granted under section 953e because of the death of the official reporter who had reported a portion of the testimony given during the early part of the trial and the inability of the other reporters to read his shorthand notes. A transcript purporting to contain a full and correct record of the proceedings, with the exception of that portion reported by the deceased, was presented to the trial judge. Objections to its certification were sustained. Specialty Oil Tool Co. v. Ames, 117 Cal.App. 283, 3 P.2d 977. Thereafter appellant made his motion for new trial under section 953e. In approving the denial of the motion the appellate court said: "In the instant case the trial court had heard all the evidence produced during the trial, and upon the evidence thus presented had arrived at a decision. It would be anomalous, at least, to anticipate that the court should arrive at a different result upon a retrial where, so far as appears, the evidence would be identical with that which had theretofore been presented. Under the circumstances disclosed by the record, we are of the opinion that no abuse of discretion was committed by the trial court in denying appellant's motion for a new trial."

In Conlin v. Coyne, supra [19 Cal.App. 2d 78, 64 P.2d 1125] as in the Moore case, there was a partial transcript. The reporter died, the file was destroyed, but 655 folios of evidence were available. In affirming the order denying a new trial under section 953e, the appellate court said: "No effort appears to have been made to prepare a record by bill of exceptions prior to the application for a new trial. The trial judge evidently was of the opinion that such a bill of exceptions could be formulated. Opposing counsel were not shown to be unwilling to lend their assistance to the court in the matter. The trial judge was there to aid in the settlement of a sufficient and proper bill of exceptions and that is an ancient and approved method of presenting a record on appeal. Counsel merely assumed that it could not be done, but aside from the expressions of their belief in the matter, they made no showing that it was impossible or impracticable to do it. As a general rule, and quite contrary to the views of counsel who made the motion, it is quite unnecessary to have all of the testimony incorporated in a record on appeal. If it was necessary in this case, the affidavits did not show the necessity. There can be no doubt whatever that inability to obtain a transcript of the trial proceedings would in some cases present an insurmountable obstacle to the preparation of a proper record, but a very wide discretion must be accorded the trial judge in determining what can and what cannot be done in this respect where a complete transcript is not available. * * * The ruling of this court must be that no abuse of discretion appears to have been committed in denying the motion for a new trial made under section 953e."

In Kroeker v. Jack, supra, the opinion does not detail the facts upon which the exercise of discretion was based but it indicates that the situation was similar to that in Conlin v. Coyne, supra.

Smith v. Orange Belt Supply Co. [58 Cal.App.2d 848, 137 P.2d 846], also presents a situation where a partial transcript was available, and "It might well be that the 66 folios of testimony which had been transcribed contained evidence sufficient to support the judgment, in which event the untranscribed testimony could only raise a conflict. Nothing is said in the affidavit concerning the nature of the testimony which had been transcribed, and there is no attempt to show that the evidence was in fact insufficient to support the judgment. While the affidavit alleges that the former counsel for appellant 'is not available' for any assistance in the preparation of a record, the showing that no such assistance could have been had by timely effort is not too strong."

Lastly, Comey v. Comey, supra [8 Cal.2d 453, 66 P.2d 148] was presented to this court under a procedure known as "motion to dismiss or affirm" formerly employed to dispose of appeals which were clearly non-meritorious. The brief opinion states no more than that there was no abuse of discretion.

The present record discloses facts and circumstances entirely different from those of the above cases. Here the trial consumed nine days. The reporter, under pressure of appellant's frequent inquiries, dictated several cylinders. He did this while, as is customary in San Francisco, another reporter was relieving during his off-shift from the case he was reporting. In all, in addition to the clerk's transcript, appellant was able to get from the transcriber only about 188 pages of reporter's transcript, or about two and one-half days of the nine day trial. This was not sufficient to permit of completion of a record in a case of this type, involving as it does a number of separate items in the nature of an accounting, so that it is "like trying half a dozen separate cases."

The affidavit of counsel in support of the motion for new trial alleges that "The legal questions to be determined on appeal depend wholly upon the facts established at the trial, and it is therefore necessary that the reporter's transcript of the trial be had." One of the legal questions referred to is stated in appellant's opening brief to be whether the trial court erroneously applied section 2344 of the Civil Code, dealing with the obligation of an agent to surrender property, to the facts of the case. Naturally on a judgment roll appeal, without presentation of the facts, an appellate court would be unable to determine whether the statute was properly applied.

The majority opinion states that "In the absence of a record showing that section 2344 of the Civil Code was involved on the trial any discussion of that section is inappropriate. See Town of St. Helena v. Merriam, 171 Cal. 135, 137, 152 P. 299." But the cited case is not helpful, and it is difficult to see how appellant, lacking a reporter's transcript, could present any stronger showing that section 2344 is involved than has been done by the presentation of the point in the opening brief and the submission of a full clerk's transcript. All of the indications are that the statute is involved, rather than the contrary.

The majority opinion also states that "There was no showing made as to the nature of the testimony, and no indication that there was any merit in an appeal." This is contrary to the record. The pleadings show the nature of the case and the issues joined for trial. The clerk's transcript also shows that the trial court, as already stated, first gave defendants judgment on their cross-complaint for $39,267.-31, but on denial of plaintiff's original motion for new trial, disallowed a $15,000 item. The very fact that the trial judge once changed his mind as to a substantial item, comprising more than one-third of the judgment, indicates that the case may have been a close one and that the points raised by the appeal, if not meritorious, are at least of sufficient substantiality to merit consideration.

In a memorandum upon denial of the original motion for new trial the trial judge stated that he was considering the "same primary question" as was presented on the trial, and as to that would not change his ruling, but that as to the item of $15,000, it appeared to be "in the nature of damage for a breach of contract and should not be allowed." The findings, conclusions, and judgment were modified accordingly. This ruling left the case in a state which was not satisfactory to either party, so that both plaintiff and defendant took separate appeals. This shows plainly that the trial court's adjudication was by no means so conclusively correct that the denial of a new trial under the conditions mentioned could be classed as a sound or reasonable exercise of discretion.

The denial of relief cannot be upheld upon any claim of injury to respondents. Respondents also appealed from the judgment. The duty to procure a transcript rested upon them just as much as it did upon appellant, and the same avenues of relief open to appellant were open to them. They might have taken steps to compel the reporter to act, or if they found the delay unreasonable, they could have sought an order terminating proceedings for preparation of the transcript. They did nothing, however, until appellant moved for a new trial under section 953e. They then noticed their own motion to terminate proceedings and opposed appellant's motion on the ground of delay, inconvenience, and extra expense involved on a retrial, and the hazard that the personal recollections of witnesses might be less distinct.

They urge that appellant, in arguing for a new trial, cannot take advantage of their failure to compel the reporter to act. This is so. But neither are they in any position to oppose the new trial on the ground that they have been damaged by the delay, for they acquiesced in that delay. The law favors early disposition of appeals (Clemmens v. Clemmens, 13 Cal.App.2d 651, 57 P.2d 529), but where both parties appeal, the duty is upon both to procure a transcript, and the appeal will not be dismissed for laches or want of prosecution where both are guilty. One cannot take advantage of the other to cut off a hearing on the merits. Tripp v. Duane, 86 Cal. 149, 24 P. 867; 2 Hayne on New Trial, p. 1512, sec. 272.

Therefore, inasmuch as the record here establishes that the incapacity of the reporter made it impossible for appellant to secure an adequate transcript, that there was no lack of diligence on his part, that his appeal presents substantial points meriting consideration, and that respondents are not entitled to claim that they have been injured by the delay, it is apparent that the denial of a new trial under section 953e constituted an abuse of discretion. This holding is in conformity with the trend of the law to be more liberal in upholding the granting of a new trial than the denial of one (39 Am.Jur. sec. 202, supra), and also with the legislative intent to liberalize the former limitations obtaining in this state, as evidenced by its 1943 amendment of 953e, enlarging that statute to embrace not only situations created by the "death or disability" of the reporter, but those created by "the loss or destruction, in whole or in substantial part," of his notes.

The order denying a new trial and terminating proceedings should be reversed and the cause should be remanded for a new trial.

SHENK and SCHAUER, JJ., concurred.

PEOPLE v. HOUGH.

Cr. 4441.

Supreme Court of California.

Dec. 27, 1943.

Rehearing Granted Jan. 24, 1944.

1. Homicide ⚷253(3)

Evidence sustained conviction of murder in the first degree as against contention that evidence at most established manslaughter, on ground that killing was done in heat of passion.

2. Homicide ⚷234(1), 252

In murder prosecution, the entire evidence should be considered in determining the guilt and degree of crime.

3. Homicide ⚷253(3)

In prosecution for murder of accused's wife who had obtained an interlocutory divorce, in determining whether offense was first degree murder or manslaughter evidence showed that accused's intent to kill his wife if she refused to return was formed at time he purchased pistol on day of killing if not long before when he was endeavoring to buy a pistol.

◆

In Bank.

Appeal from Superior Court, Los Angeles County; Leslie E. Still, Judge.

William Leva Hough was convicted of murder in the first degree after a prior conviction of a felony, and he appeals under the automatic appeal provision of Penal Code, § 1239(b).

Judgment of conviction affirmed.

Frederic H. Vercoe, Public Defender, Los Angeles County, William B. Neeley, Deputy Public Defender, and Morris Lavine, all of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and Frank Richards and Eugene M. Elson, Deputy Attys. Gen., for respondent.

CURTIS, Justice.

This is an automatic appeal taken under the provisions of subdivision (b) of section 1239 of the Penal Code from a judgment of death under an amended indictment charging the appellant with the crime of murder, after a prior conviction of a felony. The original indictment against appellant was in two counts. By count one he was charged with the murder of Inez Hough, wife of the appellant, and by count two he was charged with the murder of Frederick L. Culp. Each of said offenses was alleged to have been committed on the 13th day of June, 1942, in the county of Los Angeles. To this indictment the appellant entered a plea of not guilty to each count and not guilty by reason of insanity. At a later date an amended indictment was filed against him in which he was charged with the same two offenses and also with a prior conviction of a felony. Upon the filing of the amended indictment, the appellant withdrew his former pleas of not guilty and not guilty by reason of insanity, interposed to the original indictment. He thereafter pleaded guilty to the two charges of murder and admitted the prior conviction of a felony as alleged in the amended indictment. The court thereupon set the case for hearing to determine the degree of crime and to fix the punishment. At the conclusion of this hearing the trial judge determined the degree of the crime alleged in each count to be murder in the first degree and imposed upon the appellant the extreme penalty of the law.

The evidence produced before the trial court at this hearing is free from any serious conflict. The appellant and Inez Hough were married on February 2, 1940. He was 47 and she was 35 years of age at the time of her death. It was his fifth marriage and her second. They had known each other about six months before their marriage. They were married in El Paso, Texas, and he brought her to Los Angeles. At that time he was engaged in transporting cars from Detroit, Michigan, to Los Angeles. They first lived at the Stadler Hotel in Los Angeles, but for only a few days, when they moved to Wilmington, California. While living in this latter place, the appellant on one of his trips to the east brought his wife's mother, Mrs. Katie M. Griggs, home with him from Kansas City, Missouri, and the three lived together for some months. In the meantime the appellant had given up transportation work and returned to his former trade of welding and was employed in the shipyards at Wilmington.

During the two years and more of their married life, appellant and his wife frequently had arguments and disagreements of such gravity as to cause their temporary separations. Their differences however were at least for the time adjusted, reconciliations were effected, and they resumed their marital relations as previously carried on. The most serious of these family jars occurred in August, 1941, and deserves special mention as shedding some light upon the question involved in this appeal. They started an argument as to why she had been away when he returned from one of his transportation trips. Appellant went into the bedroom and came out with a jacket over his arm and walked over to his wife and said, "I might just as well kill her now as any time and be done with it." There was a knock at the door and the wife answered it, then ran out of the house and down the street. Appellant with a gun in his hand ran after her. His mother-in-law telephoned the police. Before the police arrived appellant returned, got in his car and followed his wife. He returned in about fifteen minutes, retired to his bedroom, and went to bed. His wife returned with the police who came in and took the gun. It was in a dresser drawer in his bedroom. After this episode the parties separated, and appellant went to live again at the Stadler Hotel in Los Angeles. Mrs. Hough continued to reside at their Wilmington home for about two months when the mother went to live with another daughter and the wife went to work at a rest home.

Even after this violent disturbance of their domestic life, appellant and his wife patched up their differences and took up their residence in Long Beach. It was then that he went to work as a welder. This was about the 1st of December, 1941, according to his testimony. He bought furniture for their apartment at a cost of about $900 and obligated himself to the extent of $700 for jewelry for his wife. However, it does not appear that in their new home they enjoyed any greater domestic felicity than had previously existed in other places where they had lived. Appellant testified that "I and my wife would argue—we would have arguments and I could not take it." Finally on Easter Sunday, which was April 5, 1942, Mrs. Hough left him. Appellant made numerous attempts to have her return to him. He even had the pastors of two of the local churches intercede with her in an endeavor to effect a reconciliation. The wife refused to be again reconciled or to live with him. She secured employment in a beauty parlor, and subsequently instituted an action for a divorce. In this action she recovered an interlocutory decree of divorce and an order to show cause why he should not be restrained from molesting her. The appellant testified that about this time and for some months previously, his health began to fail, that he had a number of fainting spells and was sent to hospitals for treatment. Only a few days on each of these occasions were spent by him in the hospitals and the doctors who attended him on these occasions were not of the opinion that his condition was as serious as he appeared to believe it to be.

Appellant returned to Los Angeles and again took up his residence at the Stadler Hotel. He there became acquainted with a Mr. Langley, from whom he purchased a .45 Colt automatic pistol on the afternoon of June 13, 1942. A few days prior to that date he had had conversations with Langley about the purchase of a pistol and stated at the time that if he had one he could get a job. Langley had one, but would not sell it to him as he needed it in his business. However, a day or so before June 13, 1942, he had acquired a second pistol and on that day sold one of them to the appellant at about 3 o'clock in the afternoon for $32.50, receiving $10 as a down payment. At the same time Langley delivered to appellant a clip containing seven loaded cartridges. At 4 o'clock of the same day, after drinking a half pint of whiskey, appellant purchased a round-trip ticket from the Pacific Electric Railway Company and left for Long Beach. He took with him the pistol he had bought from Langley and the clip containing the seven loaded cartridges. These were not in the pistol at the time he purchased it from Langley, but appellant inserted the clip with the loaded cartridges into the gun after he boarded the streetcar for Long Beach. On arriving at Long Beach he went to the location of the Y. W. C. A. building, where he knew his wife was staying and met her as she was coming out of the building. It does not appear just what the appellant did, after arriving at Long Beach before he met his wife. He must have reached Long Beach from Los Angeles between 5 and 6 o'clock, and his meeting with his wife, as she came out of the Y. W. C. A. building, was between 9 and 9:30 o'clock of the same evening. After meeting his wife, as just related, the two walked down the street toward the Pacific Electric Station, and when they were about a half block from the station the wife told appellant that she was to meet a lady friend at the station and she did not want to be seen with appellant. Thereupon the two parted.

Mrs. Hough went to the station where she met her friend, Mrs. Klaproth, who had just arrived from Wilmington accompanied by her daughter and a young man, a friend of the daughter. This meeting took place at about 9:30 p. m. as Mrs. Klaproth stated she left Wilmington on the 9:20 train. Immediately thereafter the four walked down to the Pike, a street on which is located the amusement zone of Long Beach. They walked along the Pike to a point opposite a fortune teller's concession. The two young people left the other two and went over to have their fortunes told. Mrs. Hough and Mrs. Klaproth were left standing on the sidewalk, and while there a gentleman, an entire stranger to the two ladies, by the name of Frederick L. Culp, approached and engaged them in conversation. These three then walked east along the Pike toward the 230 Club, referred to by the appellant as a saloon and situated about a half block from the fortune teller's concession. On their way there they were joined by a second gentleman, who was also an entire stranger to the two ladies, but an intimate friend of Mr. Culp. His name was John C. Parsons. The four continued their walk and entered the 230 Club. Not finding a booth near the entrance of the club, they walked along the bar to the rear of the room and entered a booth in which was located a table with a bench on either side of it. Mrs. Hough and Culp seated themselves on one of these benches and the other couple occupied the bench opposite them. Just as they were seated a waiter came in and wiped off the table and immediately after the waiter left, the appellant stepped up to the entrance of the booth in which the two couples were sitting and began shooting. He fired seven shots, five of which entered the body of Mrs. Hough and two entered the body of Mr. Culp, killing each of them instantly. Each bullet passed through the entire body of the unsuspecting victim. The appellant was overpowered by a couple of bystanders and his gun was taken from him. He was held and turned over to the police. Before he was disarmed he struck his wife on her head two or three times after he had shot her, and evidently addressing Culp, stated, "This will learn you a lesson, you son of a b——."

On the arrival of the officers the appellant was placed in their charge and taken to the police station in Long Beach. While at the police station, the appellant made the following statements to one of the police officers: "I shot that bastard for being out with my wife." "I told her if she did not come back something would happen." "I came here to kill them and, by God, I sure took care of them." "I would have shot the other man if I had not run out of ammunition." A few minutes later and while at the police station, appellant was asked by another officer whether he knew that his wife was dead and was informed that he (the officer) did not know. Appellant replied, "I hope she is because if she is not, my time is spent in vain." This officer further testified that at this same conversation "he also told me that he had told her three or four months previously that if he ever caught her running around with anybody he would kill her and, whoever it was, that he did not give a damn who it was."

The appellant took the stand and testified at the hearing. He made no denial that he had killed his wife and Culp. He admitted that he saw someone who looked like his wife enter the 230 Club, and that after entering the place, he saw his wife sitting in a booth with a man. But he did not remember aiming the gun, or pulling the trigger, or firing the gun; that he did not remember saying anything, and to quote his own language: "I don't know what happened." He disclaimed any intention of killing anyone when he walked into the place, or when he walked up to the booth in which he found his wife.

He gave as reasons for buying the revolver just before going to Long Beach and taking it with him on his trip that he might get a job as guard and because he was short of money, he thought he could pawn the gun should he need some additional money while at Long Beach. He gave no reason for paying about the last dollar he had for the gun just before his trip to Long Beach, when he thought he might need more money before his return. He further testified to the failing condition of his health, which compelled him to give up his job as welder and seek lighter employment, which the position as guard seemed to promise.

[1] The sole contention of appellant on this appeal is that the evidence produced on the hearing before the trial court for the purpose of determining the degree of the crimes and fixing the punishment is not sufficient to sustain a conviction of murder in the first degree, but on the other

hand it establishes a crime of no greater degree than manslaughter, in that it showed that the act of killing was done in the heat of passion. Appellant would limit the evidence against him to his acts and conduct between the time he first saw his wife with Culp and the time he fired the fatal shots which killed the two of them. His theory appears to be that the sight of his wife entering the club or saloon with a male companion and the two seating themselves at a table within one of the booths so inflamed his mind that he shot and killed them upon this sudden heat of passion, and not with that deliberation and intent which are necessarily elements of the crime of murder.

Were we to limit the evidence in this case as contended for by appellant, there might be some plausible reason in support of the theory advanced by him. But this evidence in order to determine the state of mind under which appellant acted at the time he shot and killed his two victims must be considered with other evidence in the case reflecting his state of mind at the time. This other evidence which must be considered includes, of course, his previous conduct toward his wife, and particularly the threats made by him that if she did not come back to him something would happen, and that if he ever caught her running around with anybody he would kill the two of them; and the statements to the police officers shortly after his arrest, that he shot Culp for being out with his wife, and further to quote his own words: "I came here to kill them and, by God, I sure took care of them"; also his statement later made to an officer, who told appellant that he did not know whether or not his wife was dead, "I hope she is because if she is not, my time is spent in vain." This undisputed evidence as a whole shows without a shadow of a doubt that appellant did not act "upon any sudden quarrel or heat of passion" in the slaying of his wife and her companion, but upon mature deliberation to kill and murder her and whomever he caught her running around with. It would be difficult to imagine a more complete and conclusive case of deliberate premeditated murder.

[2] The entire evidence in this case, as previously outlined, and without repetition, should be considered in determining the guilt of appellant and the degree of his crime. This would include practically the history of their married life; their relations toward each other after their marriage; their frequent separations; his attempt to use his pistol on one occasion coupled with a threat to kill her; her institution of an action for divorce resulting in an interlocutory decree of divorce against him, and an order to show cause why he should not be restrained from visiting her; his attempts to persuade her to return to him and her refusal to do so; his threats against her if she did not return to him; his purchase of the pistol on the day of the murder, and his immediate departure thereafter for Long Beach where his wife was living; their meeting and separation on that day; his subsequent sight of her as she entered the club with another man; his acts of following them into the club and shooting each of them to death on finding them seated in a booth together; his arrest, and subsequent statements to the police officers, not only admitting that he shot his wife and companion, but that he came to Long Beach for that purpose, and that he shot to kill them.

[3] Viewing the evidence as a whole, we are of the opinion that the appellant's intent to kill his wife if she refused to return and live with him was formed at the time he purchased the pistol from Langley, if not long before when he was endeavoring to buy a pistol. This conclusion seems inevitable when considering the entire evidence in the case. The facts in this case are in some respects similar to those in the case of People v. Coleman, 20 Cal.2d 399, on page 409, 126 P.2d 349, on page 355, where this court reviewing the evidence in that case stated its conclusion as follows: "There is here an abundance of credible evidence to support the verdicts of the jury. Even if the jury believed the defendant's testimony that he had no recollection of what transpired after he left Laguna Beach until he awoke in the Coronado jail, there is sufficient in the record to justify the implied finding of the jury that the defendant formed the specific intent before he commenced the trip to San Diego, and that such intent continued to control his act. People v. Norwood, 39 Cal.App.2d 503, 505, 103 P.2d 618."

The evidence against the appellant is much stronger than that in the case just cited and supports in every respect the order of the trial court in determining the degree of the crime as murder in the first degree and fixing the extreme penalty as the punishment.

The judgment is affirmed.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

Ex parte HOUGH.

Cr. 4500.

Supreme Court of California.

Dec. 27, 1943.

Rehearing Granted Jan. 24, 1944.

1. Habeas corpus 🔑85(1)

A prisoner sentenced to death was not entitled to release on habeas corpus on ground that he was deprived of life without due process of law, because his pleas of guilty to murder in the first degree were secured by illegal means, where there was no showing that any one connected with prosecution made any promise to prisoner or his counsel or misled either of them as to entry of the pleas. U.S.C.A.Const. Amend. 14.

2. Criminal law 🔑641

Judgments of conviction were not illegal on theory that public defender representing accused was an officer of the county and represented the state. St.1921, p. 355, §§ 5, 6, as amended by St.1931, p. 2567.

3. Criminal law 🔑641

A public defender appointed to represent accused becomes accused's attorney to same extent as if regularly retained by accused. St.1921, p. 355, §§ 5, 6, as amended by St.1931, p. 2567; Const.Cal. art. 1, § 13; U.S.C.A.Const. Amend. 6.

4. Habeas corpus 🔑83, 85(1)

A statement appearing for first time in traverse to return to petition for habeas corpus is new matter and is deemed denied by the respondent, and burden of proving it is upon petitioner.

5. Habeas corpus 🔑85(1)

On petition for habeas corpus, petitioner did not sustain burden of proving truth of statement that he was misled by public defender in entering his pleas of guilty, in view of contradictions between statements in petition and in affidavit of public defender annexed thereto with petitioner's affidavit annexed to his traverse to the return. St.1921, p. 354.

6. Habeas corpus 🔑83

Prisoner sentenced to death upon conviction of murder in first degree was not entitled to release on habeas corpus on ground that he was misled to enter pleas of guilty by statement of public defender that prisoner would not be "gassed" if he should plead guilty, where alleged promise was found for first time in petitioner's affidavit annexed to his traverse to the return.

7. Habeas corpus 🔑85(1)

A petitioner sentenced to death has same right to present his case on habeas corpus as any one else, but his testimony should be scrutinized with greatest care.

8. Habeas corpus 🔑85(1)

Petitioner under sentence of death, seeking release on habeas corpus failed to sustain burden of proving that public defender had guaranteed that if petitioner would plead guilty he would not be gassed.

9. Criminal law 🔑624

Where two alienists reported that accused was sane at time he killed his wife and at time of their examination, and a third alienist was unable to state whether accused was sane, but stated that in his opinion accused would be legally insane at a time prior to date when trial was had, whether court should have proceeded with the case was within court's discretion.

10. Criminal law 🔑624

Where, after accused pleaded not guilty by reason of insanity, two alienists reported that accused was sane and a third alienist was unable to state whether he was sane, and thereafter accused pleaded guilty under amended indictment, accepting the pleas and proceeding to determine degree of crime was not an abuse of discretion.

11. Habeas corpus 🔑30(3)

Petitioner was not entitled to release on habeas corpus on ground that court imposing death penalty took no evidence regarding mitigating circumstances, where, after petitioner's pleas of guilty, court took evidence as to degree of crime and punishment, and greater part of three days was spent by court in hearing such matters.

12. Habeas corpus ⚷85(1)

Petitioner was not entitled to release on habeas corpus on ground that court imposed death penalty without taking any evidence to fix the punishment, because of court's statement, "Now the matter of fixing the degree remains," where there was no showing that hearing was limited to question of degree of crime and did not include evidence for purpose of fixing the punishment.

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In Bank.

Habeas corpus proceeding by William Leva Hough to secure release from custody.

Writ discharged, and petitioner remanded to the custody of the warden.

Morris Lavine, of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., and Frank Richards and Eugene M. Elson, Deputy Attys. Gen., for respondent.

CURTIS, Justice.

The petitioner seeks his release from the custody of the warden of the State Prison at San Quentin after his pleas of guilty to two counts of murder upon which the death sentence was pronounced against him.

The ground upon which his petition for release is based is that the judgments of conviction are illegal and are violative of the Fourteenth Amendment of the Constitution of the United States, and deprive petitioner of his life without due process of law. His main complaint is that his pleas of guilty were secured and induced by improper and illegal means, which render his conviction void and of no legal effect. As will more fully hereinafter appear, petitioner was represented during the pendency of his action in the trial court and on the appeal of said action to this court by a representative of the Public Defender of the county. While his said appeal was pending, he changed attorneys and his newly acquired attorney represents him in the present proceeding.

Petitioner was indicted for the murder of his wife and her male companion on June 13, 1942, at Long Beach in the county of Los Angeles. The original indictment was in two counts. By count one he was charged with the murder of his wife, Inez Hough, and by count two, with the murder of Frederick L. Culp. To each of these two counts he pleaded not guilty and not guilty by reason of insanity. At a later date an amended indictment was filed against him in which he was charged with the same two offenses of murder and with a prior conviction of a felony. Upon filing the amended indictment petitioner withdrew his two former pleas of not guilty, and pleaded guilty to the two charges of murder and admitted the prior conviction of a felony.

He now contends, in the first place, that his counsel was misled by the trial judge and the prosecuting officers of the county by assurances that if petitioner would withdraw his pleas of not guilty and plead guilty to the amended indictment, the sentence of death would not be imposed. The case against petitioner was before us on appeal, and the factual situation therein involved is set forth in some detail in our opinion therein this day filed. People v. Hough, 144 P.2d 581.

The record before us in the present proceeding fails to show that either the trial judge or anyone connected with the district attorney's office or with the prosecution of the case against petitioner made any promise or commitment, directly or indirectly, to petitioner or to his counsel in consideration of his withdrawal of his pleas of not guilty and of his entry of pleas of guilty. Deputy District Attorney Sten was assigned by the district attorney's office to represent the prosecution, and Deputy District Attorney Hunt was assigned to assist Mr. Sten in the prosecution of the case. In the numerous conferences had between them and petitioner's counsel, Deputy District Attorney Sten informed the latter that the district attorney's office would not consent to life imprisonment, or any lesser punishment than the death penalty. The trial judge who took part in some of those conferences "hoping to get a satisfactory disposition of this case, stated that if the District Attorney would be satisfied with life imprisonment, it would be satisfactory to the Court." The trial judge, however, at no time promised or intimated to petitioner or his counsel that he would impose the penalty of life imprisonment in opposition to the recommendation of the district attorney's office.

The case after some continuances was set down for trial for August 11th. The day before, the trial judge called into his chambers the petitioner's attorney and the two deputy district attorneys, informed them that the case could not be tried on the 11th, due to an unfinished case then before the court, and suggested to counsel that the case be continued to the next day, August 12th. This was agreed to, and at the same meeting Mr. Sten informed the court that he intended to file an amended indictment charging petitioner with a prior felony conviction in addition to the two charges of murder. On the morning of August 11th, the case was called with counsel for all parties present. The amended indictment was filed, charging the two crimes of murder and the previous conviction of a felony. The petitioner was arraigned on these charges and the case continued to the following day, August 12th. On the evening of August 11th, petitioner's counsel informed the trial judge that the petitioner would withdraw his pleas of not guilty by reason of insanity and not guilty to each count of the amended indictment, and plead guilty and admit his prior conviction.

Before the opening of court the next morning, August 12th, the trial judge called petitioner's counsel and Mr. Sten and Mr. Hunt into his chambers and made the following statement to petitioner's counsel: "Before you proceed in this matter I don't want you to be misled by any of the conversations you have had with me, or by any conversation that you have had with anyone else, or by anything that you might have heard from anyone, because if I try this case I may have to pronounce the death penalty, and I want you to know this in advance so you won't plead the defendant guilty with any expectations. We have a jury panel present and you can have a jury trial." To this statement petitioner's counsel replied: "All I want to know is, do you start this case with an open mind?" In answer to this question Judge Still (the trial judge) states in his affidavit: "I told him that I did, and he [petitioner's counsel] said; 'I am going to proceed as I have advised you.'" Immediately following this meeting, court convened with petitioner and his counsel present. Petitioner withdrew his former pleas of not guilty and not guilty by reason of insanity and pleaded guilty to the two counts of murder contained in the amended indictment and admitted his prior felony conviction. Thereupon the court proceeded to take evidence to determine the degree of the crime and to fix the punishment. This hearing consumed the greater part of three days. At its close petitioner waived time for sentence. Thereupon the court sentenced him to suffer the death penalty.

[1] It will thus be seen that there is absolutely no showing that either the trial judge or the district attorney offered any promise or inducement to petitioner's attorney or to petitioner to withdraw his pleas of not guilty and enter pleas of guilty. There is no attempt to show that any person whatever connected with the prosecution of petitioner made any promise to either petitioner or his counsel or misled either of them as to the entry of petitioner's pleas of guilty. Petitioner leans heavily upon certain statements made to his attorney by Deputy District Attorney Hunt. He refers to him as the "veteran prosecutor," and a lawyer with much more experience in the prosecution of cases than Mr. Sten. But the record shows without conflict that Mr. Sten was in charge of the prosecution of the case against petitioner and that Mr. Hunt was assigned to assist Mr. Sten, but was without any authority whatever to bind the district attorney's office in any matter in reference to the case. The record further shows without dispute that Mr. Hunt at no time made any promise or inducement to petitioner or his counsel respecting petitioner's pleas in said action. Mr. Hunt did state to petitioner's counsel at various times before petitioner entered his pleas of guilty, that in his opinion a sentence of life imprisonment would satisfy the ends of justice, but, as just stated, he at no time promised directly, indirectly, or impliedly, that he would ask or recommend to the court a sentence of life imprisonment in case pleas of guilty were entered. Petitioner's counsel well knew of Mr. Hunt's position in the case and that he had no authority to bind the district attorney's office respecting any matter involved in the case and Mr. Hunt, realizing his subordinate position, never purported to do so. In the conferences before the trial judge he expressed his views respecting the punishment to be administered in the case, and that was all. According to the trial judge "Mr. Hunt took only a negligible part in the conversation." The attempt to show that petitioner or his attorney was misled by any

statement or act on the part of Mr. Hunt finds no support whatever in the record before us.

[2] Petitioner's second contention rests upon the following state of facts: At the time of petitioner's arraignment upon the original indictment he was without any attorney and without funds to employ an attorney to defend him. For this reason the court appointed the public defender of the county to represent him. Mr. E. J. Hovden, a regularly appointed and acting deputy in the office of the public defender, was assigned to conduct the defense of petitioner, and he acted as petitioner's attorney during the entire proceedings in said action up to and including the time that judgment was pronounced against him. It is petitioner's contention that the public defender is an officer of the county, and represents the state in the prosecution of criminal actions, in the same light and to the same extent as the district attorney, or other officer of the state or county connected with the prosecution of criminal cases. With this contention we cannot agree. Petitioner cites no authority in support of his contention and none has come to our attention.

The office of public defender was created by an act of the Legislature enacted in 1921. See Stats.1921, p. 354, chap. 245. By section 5 of this act the duties of such an officer are defined in the following terms, so far as pertinent to this proceeding: "Upon request of the defendant or upon order of the court, the public defender shall defend, without expense to them, all persons who are not financially able to employ counsel and who are charged with the commission of any contempt, misdemeanor, felony or other offense. He shall also, upon request, give counsel and advice to such persons, in and about any charge against them upon which he is conducting the defense, and he shall prosecute all appeals to a higher court or courts, of any person who has been convicted upon any such charge, where, in his opinion, such appeal will, or might reasonably be expected to, result in the reversal or modification of the judgment of conviction." While the act has been amended on two occasions, Stats. 1927, p. 1886; Stats.1931, p. 2566, the quoted portion of section 5 has not been changed in any respect. Section 6 of the act, both in its original and amended form, provides for the appointment by the board of supervisors of a sufficient number of deputies to properly conduct the office of public defender and fixes their salaries.

[3] Under this statute when the public defender is appointed to represent a defendant accused of a crime, he becomes the attorney for said defendant for all purposes of the case and to the same extent as if regularly retained and employed by the defendant. The judge of the trial court has no more authority or control of him than he has of any other attorney practicing before his court. The public defender is free from any restraint or domination by the district attorney or of the prosecuting authorities. He is as free to act in behalf of his client as if he had been regularly employed and retained by the defendant whom he represents. Were it not so his client would not be afforded the full right "to have assistance of counsel for his defence" which the Constitutions, both state and federal, give to one accused of crime. Const.Cal. art. 1, § 13; Const.Fed. Amend. 6. With such plenary powers given a public defender when appointed to defend one accused of crime, it necessarily follows that no act of his in advising his client or in defending the latter upon the charge against him can be considered in any different light than if such act were performed by an attorney regularly employed and retained by the defendant. In no sense can it be held that the prosecuting officers of the county are in any respect charged with the consequences of such an act. The contention therefore that the petitioner is not bound by his pleas of guilty, on the ground that in so pleading he was misled by the advice of the public defender acting as his attorney, is not well taken.

The further contention is made by petitioner that his attorney was so negligent in handling his case, both in informing him of its progress and in advising him in respect to his pleas to the amended indictment, that he was deprived of the rights vouchsafed to him by the Constitution. This contention is based upon petitioner's claim that Mr. Hovden failed to fully advise him as to the attitude of the trial judge and the district attorney's office respecting the punishment which might be imposed upon him in case he pleaded guilty to the charges, and furthermore that Mr. Hovden stated to petitioner: "I guarantee you that if you plead guilty you won't get gassed."

As to the first of these two charges, that is, that Mr. Hovden failed to advise petitioner of the attitude of the trial judge and the district attorney respecting the sentence he would receive by pleading guilty, the affidavit of Mr. Hovden annexed to and made a part of the petition and offered by petitioner as a traverse to the return to the writ, states: "It is well to state here that the substance of these various conversations with Deputy District Attorneys Sten and Hunt, the police officers and the court were communicated to and discussed with the defendant." Again later on in this affidavit Mr. Hovden states: "On the adjournment of the court I consulted with the defendant concerning the amended indictment and the decision of the day before that pleas of guilty would be entered remained the same." This consultation between Mr. Hovden and petitioner took place on August 11th after the amended indictment had been filed.

Furthermore, in the petition herein which, together with the affidavit of Mr. Hovden, is offered as a traverse to the return to the writ, it is stated, referring to the various conferences had between Mr. Hovden and the trial judge and the two deputy district attorneys, "that he [Mr. Hovden] communicated the result of these conferences to the defendant from time to time." Again it is stated in the petition that after the conference held on the morning of August 12th, "Mr. Hovden took the remarks merely to mean that the trial court did not wish it to appear that he had made a positive commitment, but not that he had receded from his expressed intentions to fix a degree and a penalty less than the death penalty. [We have already shown that the trial court at no time expressed an intention to fix the degree less than the death penalty.] Bearing all these matters in mind Mr. Hovden then advised the defendant that the court had given assurances that a punishment other than death would be inflicted."

[4] In no place in his petition for the writ does petitioner state or contend that his attorney did not inform him of what took place at the various conferences between him, the court, and the prosecuting officers, or that his counsel failed to inform him of the statement of the trial judge, made on August 12th, just before the opening of court, that he (the trial judge) might have to impose the death penalty. However, in his affidavit annexed to his traverse to the return, petitioner stated that Mr. Hovden did not at any time tell him of the conference with the trial judge held on August 12th just before the convening of court, in which the trial judge stated to Mr. Hovden that he did not want Mr. Hovden to be misled by any conversation he had had with him, (the trial judge) or with Mr. Hunt. This statement appears to be in direct conflict with those quoted above from the petition and the affidavit of Mr. Hovden, in which it is stated that Mr. Hovden consulted with petitioner and informed him of what took place in the various conferences between himself, the trial judge and the two deputy district attorneys. Had such a claim been set up in the petition, it would have given the respondent an opportunity to answer it in the return. This statement appearing for the first time in the traverse to the return is new matter and is deemed denied by respondent, and the burden of proving it is upon the petitioner. In re Collins, 151 Cal. 340, 343, 90 P. 827, 828, 91 P. 397, 129 Am.St.Rep. 122. In that case, the court said: "To adopt the analogy of pleadings in civil actions, the return is the complaint, the traverse is the answer; new matter set up in the traverse is deemed denied, and must be proved by the party alleging it."

[5] Petitioner now contends that had he known of the attitude of the trial judge as expressed at the conference held on the morning of August 12th, he would not have pleaded guilty to the two murder charges against him, and that the failure of his counsel to inform him of the result of that conference misled him and caused him to waive his right to a jury trial. We agree with petitioner that if he was misled by his attorney in entering the pleas of guilty, it was a serious matter for him and presents a situation concerning which he may well complain. However, though this matter was of extreme importance to petitioner, he does not refer to it in any manner in his petition for the writ. On the other hand, his former attorney in his affidavit annexed to the petition, states: "It is well to state that the substance of these various conversations with the Deputy District Attorneys Sten and Hunt, the police officers and the court were communicated to and discussed with the defendant." In other places in his affidavit, Mr. Hovden makes general statements to the same effect. In

view of the contradictions between the statements in the petition and in the affidavit of Mr. Hovden annexed thereto with petitioner's affidavit annexed to his traverse to the return, we are unable to attach sufficient weight to the statement in petitioner's affidavit to hold that it overcomes the conflicting allegations of his petition. We are of the opinion that petitioner has not sustained the burden of proving the truth of his statement that he was misled by his attorney in entering his pleas of guilty.

[6] Petitioner further claims that he was misled and induced to enter pleas of guilty by the following statement of his attorney: "I guarantee you that if you plead guilty that you will not be gassed." This statement is also found for the first time in petitioner's affidavit annexed to his traverse to the return, and being new matter is deemed denied and the burden of proving it is upon petitioner. The original draft of petitioner's affidavit annexed to the traverse is typewritten. It contains numerous corrections in pen and ink consisting of erasures, insertions and interlineations, including the statement alleged to have been made by Mr. Hovden: "I guarantee you that if you plead guilty that you will not be gassed." These corrections were apparently made just before the affidavit was signed and sworn to by petitioner on July 5, 1943, as they are all initialed by him. His original petition was sworn to by his attorney on May 31, 1943. As his original petition makes no mention of the fact that his former attorney assured him that he would not be gassed if he should plead guilty, it is only reasonable to assume that he did not mention that fact to his present attorney at the time he gave him the facts upon which to prepare his petition. The same situation appears to have existed some weeks afterwards when his present attorney prepared petitioner's affidavit annexed to his traverse to the return. No mention is made in the original draft of this affidavit of the alleged statement of his former attorney referred to above. It must be assumed therefore that petitioner at that time failed to make mention of this important fact to his present attorney. It seems incredible that if his former attorney had given him this assurance, that petitioner would have forgotten this important matter and only remembered it after he had twice given the facts of his case to his present attorney. In our opinion it would be too great a tax upon the credulity of this court to accept the statement of petitioner under these circumstances and accord to it a reasonable degree of verity.

[7] We appreciate that a person in petitioner's position under sentence of death has the same right to present his case and to give his testimony as any other individual who may come before our courts, and that his evidence will be given that reasonable weight and consideration which the circumstances under which it is given will permit. However, with the sentence of death hanging over petitioner, the temptation to color, if not to falsify, his testimony would seem almost irresistible, if by so doing he could escape the impending death penalty. Testimony given under such extreme circumstances should be scrutinized with the greatest care. Petitioner had the opportunity on two previous occasions to relate this significant incident to his present attorney, which he now contends is of sufficient importance to release him from the custody of the state warden and free him from the death penalty now pending against him, and on each occasion he failed to mention it. It is hard to believe if this assurance had been given him by his former attorney, that he would not have informed his present attorney of that fact at his first opportunity; yet the only reasonable conclusion at which we can arrive from the record before us is that he failed not only once but twice to give to his present attorney this important information at the time he was stating to the latter the facts of his case. The belated statement in his affidavit inserted therein with pen and ink after the affidavit had been typed does not come to us with that assurance of its truth as to enable us to accept it as reliable and credible evidence of the facts which it purports to prove. On the other hand, it has much the appearance of a final and desperate attempt of a condemned man to save his own life.

[8] Mr. Hovden was a seasoned attorney and had had some twelve years' experience as a deputy in the office of the public defender of the county of Los Angeles. The record before us indicates that he was zealous in his efforts to protect the rights of petitioner. He could not help realizing that the evidence against

petitioner presented an exceedingly strong case. It showed without any conflict that petitioner deliberately, and carrying out former threats against his wife, shot and killed her and also her companion without warning and without any justification whatever. With such evidence against petitioner, Mr. Hovden from his experience in defending persons charged with crimes could, and no doubt did, conclude that petitioner would stand slight if any chance before a jury of escaping the death penalty, and that practically the only hope of saving petitioner's life was for him to acknowledge his guilt by pleas of guilty and throw himself on the mercy of the court, hoping perhaps by saving the expense of a trial and the time of an overcrowded court, that the trial judge might conclude to mitigate the punishment to life imprisonment. That petitioner's counsel did not accomplish the result desired may have been a disappointment to him and his client, but it affords no legal ground for setting aside the pleas of guilty and permitting petitioner to have restored his previous pleas of not guilty and not guilty by reason of insanity. In view of the convincing evidence of petitioner's guilt of which Mr. Hovden is presumed to have had knowledge, and his further knowledge of the attitude of the district attorney's office and the trial judge respecting petitioner's case, coupled with his long experience as a member of the public defender's office, it seems most improbable that he would have assured petitioner that he would not suffer the death penalty if he should plead guilty. Petitioner has not sustained the burden of proof on the issue.

[9, 10] Petitioner also advances the contention that he was weak in body and in such a highly nervous and irrational state of mind as to render himself mentally incompetent to make a proper defense to the action against him, and that a plea of guilty by a defendant in such a mental state is no plea at all and should be set aside when the true facts are shown to the court. It is unnecessary to go into the details of petitioner's condition subsequent to his arrest and during the progress of the action against him up to and during the hearing by the court after his pleas of guilty. After petitioner had pleaded not guilty by reason of insanity at his arraignment on the original indictment, the trial court appointed three alienists to examine petitioner as to his mental condition. Two of these alienists reported that petitioner was sane both at the time he killed his wife and at the time of their examination of him. One of the three was unable to state whether or not petitioner was sane. He did report that in his opinion the defendant "will be legally insane at the time of the hearing set for July 28, 1942" (the date then set for defendant's trial). As noted above, the date of trial was advanced to August 12, 1942. Whether the court should have proceeded with the case against defendant in his then mental state was within the sound discretion of the trial judge. Under the circumstances shown and particularly in view of the report of the two appointed alienists that petitioner was then sane, we are of the opinion that there was no abuse of discretion on the part of the trial judge in proceeding with petitioner's case in the manner shown by the record.

[11] The final contention of petitioner needs even less discussion than that just considered. Petitioner in this contention claims that the court proceeded to impose upon him the death penalty without taking any evidence to fix the punishment or to determine whether there were any mitigating circumstances sufficient to justify the judgment of life imprisonment rather than death. This contention is answered by what we have previously said in this opinion, that is, that after petitioner's plea of guilty the court then proceeded to take evidence as to the degree of the crime and to fix the punishment, and that the greater part of three days was spent by the court in the hearing of said matter.

[12] Petitioner bases his hope of sustaining this contention upon the statement of the court after petitioner had entered his pleas of guilty. This statement was made immediately after petitioner had entered said pleas and was in the following words: "Now the matter of fixing the degree remains. How do you want to take care of that?" It was in answer to this question and by agreement of all parties in the case that the court spent the greater part of three days in hearing the witnesses, both of the prosecution and the defense, and at its close both parties rested, the petitioner waived time for sentence and the court pronounced its judgment. There is no showing that this hearing was limited to the question of the degree of the crime and did not include evidence for the purpose of fixing the punishment. In fact it would be difficult if not impossible to separate these two purposes for which the evidence was admitted. In endeavoring to show that the crime was not of the first degree, a defendant would introduce every item of evidence which would have the least tendency to prove that he was only guilty of some lesser offense. This would include not only evidence that he was not guilty of the higher offense, but also such evidence if any he had, which would mitigate his offense and thus influence the court in fixing his crime at less than the supreme penalty.

We find nothing in the record before us which would justify the relief sought by the petitioner. The writ is accordingly discharged and the petitioner is remanded to the custody of the warden of the State Prison of the State of California at San Quentin, California.

GIBSON, C. J., and SHENK, EDMONDS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

23 Cal.2d 431

FEWEL v. FEWEL.

L. A. No. 18329.

Supreme Court of California.

Dec. 22, 1943.

1. Divorce 🔑303(3)

Entry of order modifying order concerning custody of divorced parents' minor children exclusively on the basis of recommendation for an order made by court investigator containing no statement of facts or reasons and without permitting mother to call witnesses in her behalf or cross-examine investigator was reversible error, though affidavits of both parents were on file but not considered by court. Code Civ.Proc. § 261a.

2. Divorce 🔑303(3)

Court investigator's confidential report given to trial judge privately in chambers but not presented to parties or filed at time of hearing could not be considered as evidence in support of order modifying order concerning custody of divorced parents' minor children. Code Civ.Proc. § 261a.

3. Courts 🔑55

The purpose of legislation providing for court assistants in the capacity of investigators of domestic relations cases is to assist court and not to replace it, and does not authorize trial court to deny to litigants any of the usual attributes of a fair trial in open court upon due notice. Code Civ.Proc. § 261a.

4. Courts 🔑55

Court assistants may ascertain and report evidence and make recommendations based thereon and perform various details of work which are preliminary or incidental to exercise of judicial power itself by the judge. Code Civ.Proc. § 261a.

5. Courts 🔑1

"Judicial power" consists in the inherent authority not only to decide, but to make binding orders or judgments, and the instrumentalities used to inform the tribunal are merely auxiliary.

See Words and Phrases, Permanent Edition, for all other definitions of "Judicial Power".

6. Courts 🔑55

Investigators of domestic relations cases occupy a position of importance in the court as adjuncts of the state judicial system, and it is their province under judge's direction to assist court in transaction of judicial business dealing most intimately with welfare of children of divorced parents to the end that children's welfare shall actually be paramount in determining their custody. Code Civ.Proc. § 261a.

7. Constitutional law 🔑75

The power of decision vested in trial court is to be exercised by duly constituted judges and may not be delegated to investigators. Code Civ.Proc. § 261a.

8. Courts 🔑55

Reports of investigators of domestic relations cases should be presented in affidavit form or otherwise under oath, and an investigator upon timely demand by any party must appear and testify subject to rules of evidence and right of cross-examination. Code Civ.Proc. § 261a.

9. Courts ⚷55

Investigators of domestic relations cases are not authorized to make a private factual report or recommendation to judge or any recommendation independently of the evidence upon which it is based. Code Civ. Proc. § 261a.

10. Courts ⚷55

Report of investigator of domestic relations cases is advisory only and may be disregarded by trial judge if there is other evidence. Code Civ.Proc. § 261a.

11. Courts ⚷55

An order of court having jurisdiction of subject matter of proceeding and parties, though erroneous because entered without receiving and considering any competent evidence, was not on that account void for want of jurisdiction.

12. Appeal and error ⚷123

Order which was indorsed on paper containing written recommendation of investigator of domestic relations case, signed by trial judge and filed, when considered in the light of minute order which recited that recommendation of court investigator was approved, filed and made the order of court, constituted not a mere memorandum but an appealable order.

13. Appeal and error ⚷440

After notice of appeal had been filed, trial court had no jurisdiction to order supplemental affidavit filed nunc pro tunc as of date of entry of order appealed from, and errors committed in entering original order could not be remedied by such affidavit or purported findings of fact and formal order subsequently filed.

14. Divorce ⚷312

Errors committed in entering order affecting custody of divorced parents' minor children without competent evidence in support thereof could not be remedied by attaching, as an exhibit to purported findings of fact filed after notice of appeal from order had been filed, the confidential report of court investigator which was never properly before the court in the first instance. Code Civ.Proc. § 261a.

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In Bank.

Appeals from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action for divorce by Helen Mary Fewel against Richard William Fewel. Decree for plaintiff, and from orders modifying an order which modified provisions of the decree as to the custody of the parties' minor children, plaintiff appeals.

Orders reversed, and cause remanded for further proceedings consistent with opinion.

Prior opinion, 133 P.2d 440.

Stewart, Shaw & Murphey and William L. Murphey, all of Los Angeles, for appellant.

Reynolds & Painter and Howard Painter, all of Los Angeles, for respondent.

SCHAUER, Justice.

We have before us two appeals, one from an order filed November 7, 1941, and one from a similar order filed January 5, 1942. Stripped of unnecessary details the record establishes that in a proceeding instituted by defendant to secure modification (after final judgment) of an order awarding to the plaintiff the custody of the two minor children of the parties, the trial court refused to hear evidence on the part of plaintiff and made the initial order of modification, which is the controlling subject of this appeal, based exclusively on the recommendation of a court investigator of domestic relations cases, provided for by section 261a of the Code of Civil Procedure. It appears that when the motion was called for hearing on October 1, 1941, the court indicated that it would refer the matter to its assistant for investigation and report, and that it instructed the parties, "You will all return—without witnesses because the report of the investigator will be final—with that understanding—November 7th at 10:00 o'clock." On November 7, the motion was again called for hearing and the court immediately stated, "We are going to adopt the recommendation of the investigator, gentlemen, I will say to you."

The recommendation referred to is a recommendation for an order and nothing more. It contains no statement of facts or of the reasons for the conclusions suggested. The investigator was not present for cross-examination. Counsel for plaintiff offered in evidence certain affidavits averring facts material to the issue before the court. These affidavits were ordered filed but were not read or considered by the court. The recommendation of the investigator was filed and on it were endorsed the words, "Approved and so ordered," and below them, the judge's signature. An appropriate minute entry was made.

[1] Such procedure cannot be sustained. By it the plaintiff was denied the fair trial in open court to which she was entitled; she was deprived of the right to produce and have consideration given to material evidence; she was precluded from cross-examination of adverse witnesses; and the order rests upon no evidentiary foundation whatsoever. Such errors require a reversal of the order.

[2] The fact that certain affidavits were in the files of the court, including that of defendant and those proffered by plaintiff, is immaterial in view of the showing that they were not considered by the trial judge. Likewise immaterial is the fact that a confidential factual report of the investigator had been given to the judge privately in chambers. Such confidential report had not been presented to the parties or filed at the time of the hearing and hence it cannot be considered as evidence in support of the order which was made.

[3] The purpose of the legislation providing for court assistants in the capacity of "investigators of domestic relations cases" to "assist the court in the transaction of the judicial business of said court" (Code Civ.Proc. § 261a) is obviously what the language used implies; i. e., to assist the court and not to replace it. The Legislature would have no power to substitute an investigator for a judge. Neither does such legislation authorize a trial court to deny to the parties any of the usual attributes of a fair trial in open court upon due notice.

[4, 5] This does not mean that the court may not direct its assistant to ascertain and report evidence and make recommendations based thereon. The use of court assistants in performing various details of work which are preliminary or incidental to the exercise of the judicial power itself by the judges has long been recognized. In People v. Hayne, 1890, 83 Cal. 111, 118, 23 P. 1, 3, 7 L.R.A. 348, 17 Am.St.Rep. 211, 217, this court declared the law as follows:

> "The great burden of the work of this court is that which is necessarily done in sifting the causes to ascertain, from the mass of matter brought here in each case, the truth and the law bearing upon it, preparatory to the processes of adjudication and judgment. To say that the court cannot be assisted in this preliminary work by men sworn to fidelity, learned in the law, unconnected with and unbiased in the causes, is to deny us unbiased assistance in the very direction in which we are bound to receive it, and do receive it, in every cause that comes before us, from counsel not equally free or likely to give us unprejudiced opinions and statements; and to deny us such assistance as courts of every grade have been accustomed, time out of mind, to receive, without objection, in this country and in England. It is no more unconstitutional for this court to receive such assistance from commissioners designated by itself, or from amici curiæ, than to accept similar assistance from the statements of fact and arguments of the counsel in the cause. As well might it be said that section 266 of the Code of Civil Procedure, which provides that the secretaries and bailiffs of this court shall hold their offices at the pleasure of the justices, and 'shall perform such duties as may be required of them by the court or the justices thereof,' is unconstitutional, and conferred upon those officers judicial power.
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> "'The power to hear [examine] causes, and report facts or conclusions to the court for its judgment, is not judicial within the meaning of the constitution.' Shoultz v. McPheeters, 79 Ind. 378 [373]. 'No action which is merely preparatory to an order or judgment to be rendered by some different body can properly be termed judicial. * * * It is the inherent authority not only to decide, but to make binding orders or judgments which constitutes judicial power; and the instrumentalities used to inform the tribunal, whether left to its own choice or fixed by law, are merely auxiliary to that power, and operate on the persons or things only through its action and by virtue of it.' Underwood v. McDuffee, 15 Mich. 361 [93 Am.Dec. 194]."

[6-10] The investigators of domestic relations cases occupy a position of importance in the court as adjuncts of the state judicial system (cf. Noel v. Lewis, 1917, 35 Cal.App. 658, 662, 170 P. 857.) It is their province, under the direction of the judge, to "assist the court in the transaction" of that particular part of its judicial business which deals most intimately with the welfare of children of broken homes. They are in a position to produce for the judge evidence which might not otherwise be available at all and certainly not otherwise so expeditiously. As unbiased and trained observers they may gain at first hand information which is of vast importance to the court and to the children whose interests are involved, as well also, to the

parents whose claims are just, all to the end of giving actual vitality to the proposition that the children's welfare shall be paramount in determining custody problems. They may see the homes in which the children live, they may call without previous notice of the exact time, they may observe whether children appear to be supervised or neglected, nourished or famished, happy or abused. They are far more than "messengers" of the judge without "province to recommend a decision." The statements to the contrary in Washburn v. Washburn, 1942, 49 Cal.App.2d 581, 589, 590, 122 P.2d 96, are too broad and are disapproved. But, as correctly declared in the Washburn case (49 Cal.App.2d at page 589, 122 P.2d at page 101), "The power of decision vested in the trial court is to be exercised by a duly constituted judge, and that power may not be delegated to investigators or other subordinate officials or attachés of the court, or anyone else." The reports of the investigators should be presented in affidavit form, or otherwise under oath, and an investigator, upon timely demand by any party, must appear like any other witness and testify subject to the rules of evidence and the right of cross-examination. It definitely is not the province of investigators to make a private factual report or recommendation to the judge, or any recommendation independently of the evidence upon which it is based. Also, as declared in Prouty v. Prouty, 1940, 16 Cal.2d 190, 194, 105 P.2d 295, 298, the report of an investigator "is advisory only and the trial judge always has the right [assuming that there is other evidence] to disregard it."

[11] Plaintiff further contends that the order is void for want of jurisdiction by reason of the circumstances previously related, and cites McGuire v. Superior Court (1934), 137 Cal.App. 272, 275, 30 P.2d 61, as authority for her position. Such contention cannot be sustained. Admittedly the court here had jurisdiction over the subject matter of the proceeding and over the parties and their children. Therefore, even though it received and considered no competent evidence, its order, though erroneous, was not beyond its jurisdiction or void. (Ex parte Bennett (1872), 44 Cal. 84, 88; Johnston v. San Francisco Savings Union (1888), 75 Cal. 134, 139, 16 P. 753, 7 Am.St.Rep. 129; Gray v. Hall (1928), 203 Cal. 306, 315, 265 P. 246; Mueller v. Elba Oil Co. (1942), 21 Cal.2d 188, 206, 130 P.2d 961; Holland v. Superior Court (1932), 121 Cal.App. 523, 531, 9 P.2d 531; Bley v. Dessin (1939), 31 Cal.App.2d 338, 341, 87 P.2d 889.) The holding in the McGuire case (McGuire v. Superior Court (1934), supra, 137 Cal.App. 272, at page 275, 30 P.2d 61, at page 62), that the order therein described "was made without jurisdiction and is void," because assertedly not supported by competent evidence, is overruled. Neither, under the circumstances there related, was there a total lack of competent evidence nor would the order have been void if there had been such lack. The record depicted in the opinion in that case shows error but not want of jurisdiction.

After the order of November 7, 1941, had been filed, and after the notice of appeal therefrom had been filed (on November 17, 1941), the trial court, on December 27, ordered filed nunc pro tunc as of November 7, a proffered supplemental affidavit by defendant. There was no order granting a new trial or reopening the case for further evidence. Thereafter, on January 7, 1942, the defendant served on counsel for plaintiff certain proposed findings of fact and conclusions of law, and on January 13, 1942, such proposed findings and conclusions were signed by the trial judge and filed. Antedating these purported findings and conclusions, on January 5, 1942, and erroneously reciting that "the court having made and filed its written findings, reference to which is hereby made," the court filed another document entitled "Order in re Custody, Care and Control of Minor Children." The provisions of this purported order, as to their effect on the custody of the children, are identical with those of the order which was signed and filed on November 7, 1941. An appeal is also taken from this later order.

[12, 13] The order endorsed on the paper containing the written recommendation of the investigator, which was signed by the trial judge and filed on November 7, 1941, considered in the light of the minute order which was then entered, and which minute order recited that "Recommendation of * * * court investigator is approved, filed and made the order of court," appears to have been intended to be an operative order of the court and is the order from which the initial appeal is taken. That order is not a mere memorandum such as was involved in Neblett

v. Neblett (1936), 13 Cal.App.2d 304, 56 P.2d 969, but is an appealable order. The notice of appeal therefrom was filed on November 17, 1941. Thereafter the trial court had no right to order defendant's supplemental affidavit to be filed nunc pro tunc as of November 7, 1941, and made a part of the record on appeal from the order of that date. Such supplemental affidavit cannot be said to correct the record to speak the truth as of November 7 because in truth it was not before the court on November 7. Likewise the purported findings of fact and formal order subsequently filed have no place in this record insofar as the appeal from such initial order is concerned and cannot remedy the error committed on November 7. (See R. H. Herron Co. v. Westside, etc., Co. (1912), 18 Cal.App. 778, 780, 124 P. 455; Durbrow v. Chesley (1913), 23 Cal.App. 627, 629, 138 P. 917; Bailey v. Superior Court (1932), 125 Cal.App. 748, 750, 14 P.2d 151; Linstead v. Superior Court (1936), 17 Cal.App.2d 9, 12, 61 P.2d 355.)

[14] The previously mentioned confidential report to the judge appears in the record for the first time as an exhibit attached to the purported findings of fact. Evidence which was never properly before the court in the first instance cannot thus be infused into the record to support the previously appealed from order. Regardless of whether the appeal filed November 17, 1941, divested the trial court of jurisdiction in the premises during the pendency of such appeal, the subsequently filed documents do not ameliorate the errors previously committed.

For the reasons stated the orders appealed from are reversed and the cause is remanded for further proceedings consistent with the views hereinabove expressed.

GIBSON, C. J., and SHENK, CURTIS, EDMONDS, and CARTER, JJ., concurred.

TRAYNOR, Justice (concurring).

I concur in the result reached herein. I think it should be made clear, however, that an affidavit may not be used as evidence in cases of this kind. An affidavit is ordinarily excluded as hearsay. See 6 Wigmore, Evidence (3rd Ed.), secs. 1709, 1710. Section 2009 of the Code of Civil Procedure permits its use in a limited number of situations in uncontested cases but does not give it the character of evidence in a contested case. The fact that section 2009 permits its use "upon a motion" does not mean that the issues in a contested case may be determined and a judgment rendered on the basis of written statements of parties not before the court and therefore not subject to cross-examination. Where a motion is concerned not with an incidental procedural matter but with the fundamental substantive issues in controversy, and the order deciding it is in effect a judgment on the merits, the ordinary rules of evidence apply. See Lacrabere v. Wise, 141 Cal. 554, 75 P. 185. It should also be made clear that an affidavit of a court investigator appointed by the judge and reporting to the judge is not within the intendment of the statute permitting a party to support his motion with affidavits procured and filed by himself.

Whether custody cases are of such a nature as to require a departure from these established principles is a question for the Legislature.

62 Cal.App.2d 185

MOON v. MOON.

Civ. 14118.

District Court of Appeal, Second District, Division 3, California.

Jan. 4, 1944.

1. Divorce ⚷302

Interlocutory decree awarding custody of minor child to mother and providing that child remain in maternal grandparents' home required that child, and not the mother, remain in home of child's maternal grandparents.

2. Divorce ⚷303(1)

Court which granted divorce and awarded custody of minor child to its mother had jurisdiction to change the order respecting custody of child. Civ.Code, § 138.

3. Divorce ⚷303(2)

Custody of three year old daughter of divorced parents, because of her tender years, other things being equal, should be awarded to mother, and trial court having so determined, some change in conditions or some unusual circumstance must be shown to justify alteration of such order. Civ.Code, § 138.

4. Divorce ⚷303(3)

One seeking modification of existing custody order has the burden of proving that conditions have so changed that modification is justified. Civ.Code, § 138.

5. Divorce ⚷298(1)

The paramount purpose of proceeding involving custody of minor child of divorced parents is to serve the best interests of the child. Civ.Code, § 138.

6. Divorce ⚷303(3)

Father's affidavit that mother to whom custody of minor child had been awarded had failed properly to care for child and that child was living in unsuitable environment which would be detrimental to her welfare stated only affiant's conclusions, and had no evidentiary value in support of order modifying custody provision of interlocutory decree. Civ.Code, § 138.

7. Divorce ⚷302

Mother did not violate provision of divorce decree awarding custody of minor child to her and providing that child remain in maternal grandparents' home by moving away from parents' residence, and the fact that such removal was not in harmony with recommendation of court's assistant was immaterial. Civ.Code, § 138.

8. Divorce ⚷303(3)

In proceeding to modify order awarding custody of minor child of divorced parents to mother, trial court did not err in directing a disinterested investigation by an investigator of domestic relations cases. Code Civ.Proc. § 261a.

9. Divorce ⚷301

Report of investigator of domestic relations cases privately made to trial judge without any stipulation that it might be considered was not competent evidence or a proper foundation upon which to base an order affecting custody of minor child of divorced parents. Code Civ.Proc. § 261a.

10. Affidavits ⚷18

An affidavit is incompetent evidence except where authorized by law.

11. Divorce ⚷312

Upon reversal of order modifying provision of interlocutory decree awarding custody of minor child of divorced parents, appeal from subsequent order denying motion to restore original custody provision of interlocutory decree became moot and was dismissed.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action for divorce by Naomi Moon against Charles Moon, wherein defendant filed a cross-complaint. A final judgment of divorce was entered which by reference adopted the terms of interlocutory decree respecting custody of a minor child of the parties, and from an order modifying such provision of the interlocutory decree, and an order denying plaintiff's motion to restore the provision awarding custody to her, plaintiff appeals.

Order modifying interlocutory decree reversed, and appeal from subsequent order dismissed.

See, also, 144 P.2d 599.

Arthur A. Jones, of Los Angeles, for appellant.

Clarence Hansen, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Plaintiff gave notice, January 5, 1943, that she appealed from two orders, one made on December 18, 1942, and the other on January 4. In the first of these orders the court modified a provision, in the interlocutory judgment, respecting the custody of Charla, the three year old child of the parties, and by the order of January 4 the court denied a motion which, if granted, would have restored the provision that the custody of Charla was awarded to the plaintiff.

[1] In the interlocutory judgment which had been entered in this cause on November 17, 1941, this provision was made respecting Charla's custody: "The Court hereby awards to the plaintiff and cross-defendant, the custody, care and control of Charla Jean Moon, the minor child and baby of the parties herein to remain in the maternal grandparents home until further order of the Court; that the defendant and cross-complainant may visit the child at all reasonable times without

interference, and that he may have the child with him each Tuesday of each week from 9:00 o'clock a. m. until 7:00 o'clock p. m. beginning November 4, 1941 until further order of the Court." A final judgment of divorce, entered November 23, 1942, by reference adopted the terms of the interlocutory decree respecting custody and thus continued them in effect. Because the trial court could not, validly, decree that the plaintiff must continue to live at any particular place, certainly not at a home which was not hers, and because it is apparent that the court was concerned not with the plaintiff's environment, but with that of Charla, we are of the opinion that the only reasonable construction to be placed upon the provision just quoted is that it required that Charla, not the plaintiff, was to remain in the home of Charla's (not the plaintiff's) maternal grandparents.

[2-5] Undoubtedly the trial court had authority to change its order respecting the custody of Charla (Civil Code, sec. 138). Because of her tender years, "other things being equal" she should be in the custody of the plaintiff, her mother. Civ.Code, sec. 138. The court having originally determined that she should be in her mother's custody, some change in conditions or some unusual circumstance had to be shown to justify an alteration of that provision. Foster v. Foster, 1937, 8 Cal.2d 719, 726, 68 P.2d 719; Washburn v. Washburn, 1942, 49 Cal.App.2d 581, 587, 122 P.2d 96. One who seeks a modification of an existing custody order has the burden of proving that conditions have so changed that a modification is justified. (Prouty v. Prouty, 1940, 16 Cal.2d 190, 193, 105 P.2d 295), and the paramount purpose of the whole proceeding is to serve the best interests of the child. Prouty v. Prouty, supra, 16 Cal. 2d page 195, 105 P.2d 295. The sum of the matter is that the evidentiary support for the order taking three year old Charla from her mother's custody and placing her in that of her father, must be adequate, if the order is to stand.

[6, 7] There is, we find, very little, if any, competent evidence that can be said to have been the basis for the order. In support of the order directing the plaintiff to show cause why the custody provision of the decree should not be modified, the defendant filed his affidavit containing these statements:

"That since said Order was made the conditions and circumstances surrounding the parties, and upon which said Order was based, have materially changed, in this: * * *

"That the plaintiff and cross-defendant has failed to obey the order of the Court and the reco*me*ndations of Mrs. Mary Cook, the Court assistant, in this, that she has for many months past and now failed to properly take care of the minor child, and that she did move away from the residence of her mother and father; that the minor child of the parties hereto is not being properly raised and is living under an unsuitable environment, which, if continued, will be detrimental to the welfare of said minor child in the future; that the plaintiff and cross-defendant has not conducted herself as a fit and proper person within the past year."

With but one exception these statements are but the conclusions of the defendant upon the very questions which the trial court had to determine; they had no evidentiary value. Pearson v. Superior Court, 1932, 122 Cal.App. 571, 573, 10 P.2d 489, 490; People v. Thompson, 1935, 5 Cal.App. 2d 655, 663, 43 P.2d 600, 603. The exception is the statement that the plaintiff had moved away from the residence of her parents. This did not, as we have seen, constitute a violation of the court's previous order, and the fact that it was not in harmony with the recommendation of the court's assistant has no significance.

At the hearing, on the order to show cause, a few additional facts appeared, which, had they been developed, might well have been sufficient support for the order of December 18. For example, the defendant testified that on several occasions when he called in the evening to ask permission to take the child the next day he found that she had been left in the care of "another minor child." How old this other minor was, or her competence to care for Charla, was not made to appear. The defendant complained, too, that quite often "the child" was dirty when he took her. These, and another fact or two, caused the trial judge to say that he had all the evidence he wanted; that he was going to send an investigator to look into the home; that the matter was continued until December 18.

[8, 9] With the determination of the trial court to make use of one of the two investigators provided by the Legislature (Code Civ.Proc., sec. 261a) we have no fault to find; the witnesses before him were very partisan, and it appeared that a disinterested investigation should be made. We are of the opinion, however, that in the words of section 261a, Code of Civil Procedure, providing that "* * * to assist the court in the transaction of the judicial business of said court, [it] may appoint the following employees: * * * two investigators of domestic relation cases * * *" there is not to be found any legislative intent to authorize the acceptance of a report of the investigator privately given, not upon the stipulation of the parties, as the basis for the making of a judicial order. But it clearly appears that the order which was made December 18 was based largely on the investigator's report, communicated privately to the judge, and without any stipulation that it might be considered. The "Recommendation" of the investigator was filed December 18, with the court's notation, "Approved and so ordered," but no further report appears in the record. At the hearing on December 18, no witnesses were called; the trial judge announced the recommendations of the investigator, and indicated that they constituted his order; he then concluded the brief session with the words: "I have gone into this very thoroughly with my investigator, with the report. That is all. You get the child today."

[10] Even an affidavit is incompetent evidence save where authorized by law. Reidy v. Collins, 1933, 134 Cal.App. 713, 722, 26 P.2d 712, and cases cited. Until the Legislature so provides, the report of the court's investigator, not required to be under the sanction of an oath, or to be made a part of the record, is not competent evidence, and is not a proper foundation upon which to base an order. The opinion of our Supreme Court in Fewel v. Fewel (144 P.2d 592, decided December 22, 1943, and not yet reported [in State reports]), while dealing primarily with an order based exclusively on a recommendation of an investigator, without an accompanying report, contains a discussion pertinent to our conclusion and fully supports it.

[11] The order of December 18, 1942, is reversed. The appeal from the subsequent order of January 4, 1943, having become moot, is dismissed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

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62 Cal.App.2d 189

MOON v. MOON.

Civ. 14194.

District Court of Appeal, Second District, Division 3, California.

Jan. 4, 1944.

1. Divorce 🔑303(3)

Findings of fact are not required to support an order modifying provision of divorce judgment awarding custody of minor child, unless custody is awarded to some one other than a parent of child.

2. Appeal and error 🔑901

Order providing that defendant prepare findings of fact to be added to clerk's transcript on appeal, and that otherwise clerk's transcript and reporter's transcript on appeal were signed, settled and allowed, and made a part of records in the case, was affirmed in absence of showing that order was erroneous or prejudicial to appellant.

3. Contempt 🔑66(2)

A judgment or order in a contempt proceeding is not appealable. Code Civ.Proc § 1222.

4. Divorce 🔑312

Where order to show cause based on affidavit that father was in default in payments for support of minor child of divorced parents did not give father notice that motion for support of child pending appeal would be made, such motion was properly denied, though supplemental affidavit on which no new order to show cause was issued asked that father be required to continue payments pending appeal.

5. Divorce 🔑312

Any modification of provision of divorce judgment requiring father to pay $30 per month toward support of minor child that could be implied from order transferring custody of child from mother to father was counteracted by appeal from order changing custody, writ of supersedeas issued pending appeal, and reversal of order changing custody so that denial of motion asking that father be compelled to continue support payments pending appeal was not prejudicial to mother.

6. Appeal and error 🔑790(1)

Issuance by District Court of Appeal of a writ of supersedeas staying execution of order appealed from rendered moot the appeal from order rescinding order for posting of stay bond on appeal.

7. Appeal and error ⚷1074(3)

Appellant was in no position to complain of trial court's order concerning payment by appellee of costs on appeal, where the amount which appellee was directed to pay was more than sufficient to cover such costs.

8. Divorce ⚷312½

Trial court did not err in refusing to allow to mother attorney's fee on appeal from order transferring custody of minor child of divorced parents from mother to father, where mother had arranged with attorney to pay his fee as she could, had already paid $50, and was earning enough to pay whatever more was reasonably due.

9. Appeal and error ⚷134(1)

Appeals from orders which record did not disclose had ever been entered were dismissed.

◆

Appeal from Superior Court, Los Angeles County; Wm. S. Baird, Judge.

Action for divorce by Naomi Moon against Charles Moon, wherein defendant filed a cross-complaint. A final judgment of divorce was entered awarding custody of minor child to plaintiff, and requiring defendant to make monthly payments for child's support. From certain orders entered in connection with plaintiff's proceeding to have defendant punished for contempt for default in payments, plaintiff appeals.

Orders affirmed in part, and appeals from other orders dismissed.

See, also, 144 P.2d 596.

Arthur A. Jones, of Los Angeles, for appellant.

Clarence Hansen, of Los Angeles, for respondent.

BISHOP, Justice pro tem.

Plaintiff's notice of appeal states that she appeals from all orders made in this case on February 15, 1943, and particularly from six orders which are specifically mentioned. We shall comment upon these orders in the order of their appearance—or failure to appear.

[1, 2] The first to appear is this order: "Defendant is ordered to prepare Findings of Fact and said Findings are to be added to the Clerk's Transcript on Appeal, otherwise Clerk's Transcript and Reporter's Transcripts on appeal are signed, settled, allowed and made a part of the Records in this case." The findings referred to were ultimately signed and filed and came up, physically, as a part of the record in the companion appeal, 144 P.2d 596, in which we are today filing an opinion. We paid no attention to them, however, for findings of fact are not required to support an order modifying a custody provision (Crater v. Crater, 1902, 135 Cal. 633, 635, 67 P. 1049; Simmons v. Simmons, 1913, 22 Cal.App. 448, 456, 134 P. 791; Gavel v. Gavel, 1932, 123 Cal.App. 589, 591, 11 P.2d 654), except possibly in the case of an award of custody to one not a parent of the child (see Stever v. Stever, 1936, 6 Cal.2d 166, 56 P.2d 1229), and these findings were filed more than two months after the making of the order from which an appeal had already been taken. The plaintiff devotes the first portion of her brief to some criticism of the court's order respecting the preparation of findings, although the subject is not one of those listed in her Statement of Questions Involved, but she fails to reveal either that this first order of February 15 was erroneous or that it prejudiced her in any way. The first order is affirmed.

[3] The second order reads: "The contempt matter is dismissed." This matter was initiated by the filing of plaintiff's affidavit in which she alleged that the defendant was in default in that he had not made the payments for the support of his child which were required by the interlocutory decree referred to in the companion appeal. At the hearing it was admitted that since the order, which we reversed in the companion appeal, the defendant has made none of the payments required of him. However, no appeal lies from a judgment or order in a contempt proceeding. Code Civ.Proc., sec. 1222; Taylor v. Superior Court, 1942, 20 Cal.2d 244, 246, 125 P.2d 1. The appeal from the second order is dismissed.

[4] The third order is thus recorded: "Motion for support of child pending appeal is denied." This order might well have been denied because no notice was given that it was to be made. On January 19 plaintiff filed the affidavit already referred to in which she alleged (1) that the defendant was in default in his pay-

ments for the support of Charla and (2) that she had taken an appeal from the order of December 18, and was without funds to pay her attorney and court costs on appeal. An order to show cause, based on this affidavit and limited to the two matters referred to in it, served not only as a citation to the defendant to appear but also as a notice that two motions would be made, one that the defendant should be punished for contempt, the other for attorney fees and costs on appeal. Difani v. Riverside County Oil Co., 1927, 201 Cal. 210, 213, 256 P. 210. Early in February the plaintiff made and filed a "Supplemental Affidavit for order to Show Cause in re Contempt" in which she made more specific allegations concerning defendant's default and added these words: "It is further requested by affiant that Charles Moon be compelled to pay to Naomi Moon, continuously, the sum of Thirty Dollars ($30.00) per month, or more, for the support of said child, pending the appeal involving the custody of said child." No new order to show cause was issued nor was any notice given that the plaintiff was going to move for such an order.

[5] Furthermore, the denial of the motion works no prejudice to the plaintiff. The order of December 18, modifying the provision existing in the divorce judgment, that the plaintiff have custody of Charla, by giving her custody to the defendant, made no change, unless by implication, in the further provision that the defendant pay the plaintiff $30 per month toward the support of Charla. Any modification in this provision that could be implied from the change of custody has been counteracted by the appeal, the writ of supersedeas issued to prevent an actual change of custody being enforced pending appeal, and the reversal of the order re custody which is being made in the companion appeal. The order denying the motion for support pending appeal is affirmed.

[6] Turning again to the orders made on February 15, we find the next one, the fourth, to be: "Order for posting of stay bond on appeal is rescinded." Whatever else might be said respecting this order, the fact that this court issued a writ of supersedeas, staying the execution of the order appealed from, makes the matter moot. Plaintiff evidently so regards it, for she presents no argument concerning it. The appeal from this order is dismissed.

[7, 8] The last order made on February 15, appears as follows: "Motion for attorney fees on appeal is denied, the higher courts to fix the fees, if any are to be allowed. Defendant is ordered to pay Plaintiff's attorney $135.00 costs on Appeal." The plaintiff is in no position to complain about the portion of this order respecting costs. The evidence, generously interpreted, warranted an order for $52.50 for costs of appeal other than for printing briefs. The charge for briefs was said to be $1 per page; the outside estimate was that there would be sixty pages. (The fact is that plaintiff's briefs in the companion appeal, for which the order was made, total twenty-six pages.) Respecting the matter of attorney fees, it appeared that the plaintiff had made an arrangement with her attorney to pay his fees as she could, had already paid him the sum of $50 and was earning enough so that if more was reasonably due she could pay it. The order is affirmed.

[9] We now come to some orders particularly appealed from, but which do not appear to have been made. The first of these is an order made on the "Motion and order to show cause" for an order that the defendant pay attorney fees and court costs on the writ of prohibition which was denied by this court in Moon v. Superior Court, 1943, 59 Cal.App.2d 447, 139 P.2d 84. There was no order to show cause ever issued respecting this subject, no notice that the motion was to be made, and no order entered respecting it. The same is true respecting the motion that was made for attorney fees and court costs for the filing of a writ of mandamus in the Supreme Court. These appeals from nonexistent orders are dismissed.

SHINN, Acting P. J., and PARKER WOOD, J., concur.

62 Cal.App.2d 247

MULE et al. v. SUPERIOR COURT IN AND FOR LOS ANGELES COUNTY et al.

Civ. No. 14312.

District Court of Appeal, Second District, Division 3, California.

Jan. 11, 1944.

1. Costs ⚿6

A court has no inherent power to order a party to a suit to provide his adversary with means to prosecute or defend it.

2. Bastards ⚿7

The statute relating to liability for support of an illegitimate child and granting court power to order parent to advance costs and attorneys' fees is limited to actions brought to enforce the parent's obligation to support the child and does not authorize court to order the father to furnish child with means of making a defense to the father's action for declaratory relief that he is not the father of the child. Code Civ.Proc. § 1060; Civ.Code, § 196a.

3. Constitutional law ⚿70(1)

Courts have no power to write provisions into statutes.

◆

Application for peremptory writ of mandate by Margherita Mule and another against the Superior Court of the State of California, in and for the County of Los Angeles, and another to compel the court to hear relators' motion for order requiring plaintiff, Paul J. Ocello, who commenced action against petitioners, to pay them a sum to be used as costs and attorney fees in their defense of plaintiff's action.

Petition denied.

Hy Schwartz, of Los Angeles, for petitioners.

Chas. W. Rollinson, of Los Angeles, for respondents.

BISHOP, Justice pro tem.

An action having been commenced by one Paul J. Ocello against the petitioners before us, a mother and her infant daughter, to have it judicially determined that he was not the father of the daughter, born out of wedlock, they made a motion to obtain an order requiring Ocello to pay them a sum to be used as costs and attorney fees in their defense of his action. In this proceeding petitioners seek a peremptory writ compelling the respondent court to hear their motion. We have concluded that their motion can have no merit and that as a consequence they have no right to demand a hearing on its merits.

[1] Petitioners pin their hope for a peremptory writ on Carbone v. Superior Court, 1941, 18 Cal.2d 768, 117 P.2d 872, 136 A.L.R. 1260, where such a writ was issued. There the petitioner had vainly sought to obtain a sum for costs and attorney fees to enable her to prosecute an action brought under section 196a, Civil Code, the section which authorizes the bringing of a suit to enforce the obligation of a father to support his minor child. The problem before the court was to determine whether or not the section made possible an order at the inception of the suit requiring the defendant to advance a sum for costs and attorney fees. The Supreme Court found that authority for such an order existed since the 1939 amendment to the section. It pointed out, however, that prior to the amendment it had been held, in Schallman v. Haas, 1917, 33 Cal.App. 28, 32, 164 P. 336, that "the right to counsel fees, costs, and support pending the final determination of the action [brought under section 196a, Civil Code] was denied." [18 Cal.2d 768, 117 P.2d 874, 136 A.L.R. 1260.] No question was raised as to the correctness of the Schallman decision, which was based on the theory that a court has no inherent power to order a party to a suit to provide his adversary with the means to prosecute or defend it; if the court has power to make such an order it is due to a grant from the Legislature.

[2, 3] Section 196a does not grant such power, generally. Plainly it is limited to actions brought to enforce a parent's obligation to support and educate his, or her, minor child. But that is not the nature of the action pending in the respondent court. It is an action for declaratory relief. The plaintiff there sought a declaration, "negative in form and effect," as authorized by section 1060, Code of Civil Procedure, that he was not the father of the minor child in question, "either by birth or adoption." We know of no statutory authority which would support an order compelling the plaintiff in such an action to furnish the defendant the means of preparing and making a defense. If this is a gap in the

law which should be filled, it should receive the attention of the legislative division of the state government. We have no power to write provisions into the statutes.

For the reasons stated, we are of the opinion that the petition fails to state facts entitling the petitioners to a peremptory writ of mandate. The petition is denied.

DESMOND, P. J., and PARKER WOOD, J., concur.

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62 Cal.App.2d 353

REPUBLIC PICTURES CORPORATION v. ST. JOHN.

Civ. 12478.

District Court of Appeal, First District, Division 2, California.

Jan. 17, 1944.

As Corrected on Denial of Rehearing Feb. 16, 1944.

Hearing Denied March 16, 1944.

1. Contracts 🔑170(2)

A Delaware corporation's payment of California sales taxes on sales of motion picture films made in California and sold by manufacturer to such corporation, which licensed New York corporation to distribute them under ambiguous contract obligating distributor to pay all expenses, including taxes, was an interpretation of contract relieving successor of California corporation, which licensee sublicensed to distribute films in California, from liability for Delaware corporation's California use taxes, paid by licensee, on sales of films manufactured in New Jersey for use in California. Civ.Code, §§ 1649, 1654.

2. Appeal and error 🔑1008(3)

When true intent of parties to contract is shown by evidence and followed by trial court in construing contract, appellate court will not substitute another interpretation thereof, though such interpretation also seems reasonable. Civ.Code, § 1636.

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Appeal from Superior Court, City and County of San Francisco; James G. Conlan, Judge.

Action by the Republic Pictures Corporation against Floyd St.John to recover the amount of state use taxes paid by plaintiff. Judgment for defendant, and plaintiff appeals.

Affirmed.

Loeb & Loeb, of Los Angeles, for appellant.

Clarence A. Linn, of San Francisco, for respondent.

NOURSE, Presiding Justice.

The plaintiff corporation hereinafter referred to as Republic of New York, sued the defendant as guarantor of Republic Pictures Corporation of California to recover taxes assessed under the California Use Tax. The controversy arises over the interpretation of the distribution agreement of July 1, 1938. The trial court found that it did not obligate the defendant to reimburse plaintiff on account of such taxes paid and gave judgment for defendant. The appeal is grounded on an attack upon this finding.

The facts are fairly stated in respondent's brief, from which we quote:

"Consolidated Film Industries manufactured certain motion picture films in its laboratories in California and New Jersey. It sold these films to Republic Pictures Corporation of Delaware (formerly Cajo Company) for use in the State of California.

"On these sales either one of two taxes were assessed; i.e., the California Sales Tax on the sale of films manufactured and used in California, or, the California Use Tax on the sale of films manufactured in New Jersey for use in California. The sales tax was assessed against the Consolidated Film Industries and by it passed on to and paid by Republic of Delaware. The use tax was assessed against and paid by the Republic of Delaware.

"The Republic of Delaware licensed the Republic of New York, the plaintiff herein, to distribute the motion picture films generally throughout the country and the New York corporation in turn sublicensed the Republic of California (defendant's predecessor) to distribute the films in question in the State of California.

* * * * * *

"The contractual arrangements between Consolidated Film Industries, Republic of Delaware and Republic of New York were unknown to Republic of California.

* * * * * *

"Prior to the first part of 1936 films manufactured in California were furnished by Republic of New York to Republic of California and the sales tax was paid by Republic of Delaware; that thereafter films manufactured in New Jersey were furnished and the sales tax was avoided. No use tax was ever paid until late in 1940 * * *

"Republic of Delaware was assessed additional penalties and interest for its failure to make the proper returns and payments. Republic of New York paid these assessments although the State of California never at any time asserted any liability against anyone other than Republic of Delaware. Republic of New York claimed that it was bound to do so by its contract with Republic of Delaware, a contract to which Republic of California was not a party and of which it was unaware.

"The contract between Republic of New York and Republic of California was drafted by Republic of New York."

The pertinent portion of the distribution agreement reads: "The Distributor agrees, at its own expense, to pay or cause to be paid, all costs, charges and expenses of distributing and/or sub-licensing the exhibition of and of advertising and/or exploitation, of each and all the pictures in the licensed territory, of every nature whatsoever, and all obligations and liabilities incurred by Distributor in connection therewith, including, but without being limited to, all expenses for transportation, shipment and delivery, of prints, advertising materials and accessories, all censorship fees and charges, and all municipal, county, state and/or federal, and all other taxes and/or fees, and/or charges, that may be levied or assessed, on account of or arising out of, the distribution, licensing, sub-licensing, leasing, or sub-leasing, the exhibition of, and/or exploitation of, all or any of the pictures, or all or any prints thereof, or the presence of any or all such prints, in the licensed territory, or any other act or thing done or caused or permitted to be done by Distributor on account hereof."

It is the contention of respondent that by this agreement he undertook to pay all taxes "incurred by Distributor" and did not undertake to pay sales taxes chargeable to the purchaser or use taxes levied in lieu thereof upon sales outside the State of California; that for several years after the execution of the contract the sales taxes were paid by the Republic of New York without protest or controversy, and that this was a practical interpretation of the contract by the parties.

[1] In support of the judgment the respondent relies upon sections 1649 and 1654 of the Civil Code, which read: "If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it." And "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. * * *" It is apparent at once that the contract is ambiguous. If the respondent's associates were merely distributors, and not purchasers, the sales taxes charged upon sales of films made in this state would not be taxes "incurred by Distributor." The parties so interpreted the contract and the Republic of Delaware paid those taxes. This was an interpretation of the terms of the contract upon which the respondent was entitled to rely when the subsequent charges were levied under the California Use Tax and the appellant endeavored to hold him liable for the taxes paid. At least the contract terms were ambiguous in that respect and called for an interpretation by the trial court.

[2] We are in full accord with the conclusions reached by the trial court; the evidence of the intention of the parties was admissible for the reasons heretofore stated, and that evidence fully supports the findings of fact and conclusions of law. Technical rules of evidence must often give way to the settled rule of the Civil Code that: "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Sec. 1636. And when the true intent of the parties is shown by the evidence and followed by the trial court, another interpretation will not be substituted by the appellate court, though such interpretation may also seem reasonable. Johnston v. Landucci, 21 Cal.2d 63, 130 P.2d 405.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concur.

Hearing denied; CARTER and TRAYNOR, JJ., dissenting.

62 Cal.App.2d 274

PEOPLE v. GONZALES et al.

Cr. 3738.

District Court of Appeal, Second District, Division 3, California.

Jan. 12, 1944.

1. Lotteries ⟹3

The giving of a prize by a method involving chance for a consideration paid by the participant constitutes a "lottery", within statute defining lottery. Pen.Code, § 319.

See Words and Phrases, Permanent Edition, for all other definitions of "Lottery".

2. Lotteries ⟹3

A "cash night" drawing conducted by a theater was a "lottery" within statutes defining lotteries, where prize of $500 was offered to holder of winning ticket, tickets were not delivered to anyone who did not pay to enter theater, and winning ticket was determined by wheel spinning. Pen. Code, § 319; Const. art. 4, § 26.

3. Criminal law ⟹260(11)

In prosecution for attempted grand theft based on theory that defendants attempted to obtain prize money at theater "cash night" drawing by use of stolen ticket, whether ticket had been obtained in violation of rules of theater was question for trial court sitting without a jury. Pen. Code, § 319.

4. Larceny ⟹6

A lottery ticket, as such, has no value, and it cannot, in contemplation of law, be the subject of theft. Pen.Code, § 319.

5. Larceny ⟹7

In prosecution for attempted grand theft based on defendants' attempt to obtain game prize in violation of lottery rules by presentation of winning ticket which allegedly had been stolen from lottery operator, acts of lottery operator and defendants were required to be considered together in determining property rights of lottery operator and personal rights of defendants. Pen.Code, §§ 319, 320, 325; Const. art. 4, § 26.

6. Larceny ⟹24

Where defendants offered to lottery operator winning ticket which allegedly had been stolen from operator in an effort to obtain the game prize, the presentation of the ticket was not the offense of "attempted grand theft". Pen.Code, §§ 319, 320, 325; Const. art. 4, § 26.

See Words and Phrases, Permanent Edition, for all other definitions of "Attempted Grand Theft".

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Tony Gonzales and Philip Basile were convicted of attempted grand theft, and they appeal.

Reversed.

Anna Zacsek, of Los Angeles, for appellants.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

PARKER WOOD, Justice.

Defendants were accused by information of the crime of attempted grand theft, in that they feloniously attempted to take $500 in money, the property of the Metropolitan Theaters, Inc. Trial by jury was waived. Defendants were convicted, and they appeal from the judgments and the orders denying their motions for a new trial.

The Metropolitan Theaters, Inc., hereinafter referred to as the theater company, owned and operated five motion picture theaters in Los Angeles. On June 30, 1942, the date of the alleged offense, and once every two weeks for more than a year prior thereto, at a designated time, the theater company operated at its theaters a drawing known as "cash night" drawing, whereby $500 was awarded to a person who held the winning ticket issued by the theater company. The number of the winning ticket was determined by chance in a wheel-spinning process upon the stage of one of the theaters. Details as to the manner of issuing the tickets and determining the winning number will be stated hereinafter.

On the night of June 30, 1942, which was a regular date for a "cash night" drawing, Basile and his wife were in one of the theaters sitting side by side in the last row of patrons' seats in the balcony during the operation of the drawing. The winning number was determined by spinning the wheels and was announced from the stage. Basile held the winning ticket. He handed the ticket to his wife and she handed it to one Slater who occupied the seat next to her and asked him to present it. Slater took the ticket and shouted, "Here!" The paymaster of the theater then went to Slater, who was in the balcony, and read aloud the number on the ticket held by Slater. The master of ceremonies, an employee of the theater company who was on the stage directing the drawing, announced that the number was correct and requested the paymaster to bring Slater to the stage. Slater and the paymaster then went upon the stage and the master of ceremonies congratulated Slater, handed a card to him upon which Slater's name and the winning number were written, and told Slater that the paymaster would take him to one of the other theaters where the $500 would be paid to him. Thereupon they left the stage and the drawing for that evening was closed.

A patron of that theater, who sat near Basile, Mrs. Basile, and Slater, observed that Basile had two suitcases and that Mrs. Basile had a cardboard box, and during the drawing Basile was looking in the suitcases and box at what appeared to be many "cash night" tickets. The patron observed further that Basile took a ticket from among those in the cardboard box and handed it to Mrs. Basile who handed it to Slater. The patron told an employee of the theater what he had observed concerning Basile.

The manager of the five theaters thereupon interviewed Basile, Mrs. Basile, and Slater in the office of the theater. The suitcases and the box contained 7,643 tickets which were made by the theater company for use by participants in the drawings. All of the tickets as arranged in the suitcases and the box were in numerical order and were in various bundles held together by rubber bands, and on the bundles there were index tabs. The numbers on 1,185 of those tickets were not in consecutive numerical order. The remainder of those tickets, that is 6,458, were in bundles in which the numbers on the tickets were in consecutive numerical order, and some of those bundles contained about 250 tickets.

Basile told the manager of the theater that defendant Gonzales, who was the janitor at one of the theaters, had been giving tickets to him. A police officer testified that Gonzales said: That he had given tickets to Basile on numerous occasions; that he had taken the tickets from the box office of the theater; and that he was to get one-third of the winnings. Gonzales was not present at any of the theaters on the night of June 30, 1942.

The case was submitted to the trial court upon the transcript of the preliminary examination. Defendants did not testify, and called no witnesses.

Defendants contend that the "cash night" drawing conducted by the theater company was a lottery, and that, even if it be conceded that the winning ticket had been stolen, an attempt to obtain the prize money solely by the presentation of a stolen lottery ticket was not attempted theft.

Section 319 of the Penal Code provides in part as follows: "A lottery is any scheme for the * * * distribution of property by chance, among persons who have paid * * * any valuable consideration for the chance of obtaining such property * * * upon any agreement, understanding, or expectation that it is to be distributed * * * by lot or chance, whether called a lottery, raffle, or gift enterprise, or by whatever name the same may be known."

The elements of a lottery as stated in that definition were present in the case before the court, as shown by the foregoing references to the evidence.

There was a scheme for the distribution of property. A prize of $500 had been awarded to the holder of the winning ticket on the many previous "cash night" drawings, and a prize in the same amount was offered at the drawing involved herein.

The distribution of the property was by chance. The winning number at the drawing, which determined the identity of the person to whom the distribution would be made, was ascertained by chance as shown by the following: The numbers on the tickets used at the drawing were of six digits. On the stage of each of the five theaters there were three wheels so installed that the master of ceremonies at the drawing could spin them. The front wheel, known as the pellet wheel, contained pellets upon each of which a number of three digits was written. The first three numbers, or the thousandths numbers, of the winning number were the three numbers on the pellet which would fall out of the pellet wheel when it was spun. The second wheel was back of, and smaller than, the pellet wheel. The fourth, or hundredths number, of the winning number was the number indicated on the second wheel by an arrow after the spinning of that wheel. The third wheel was back of, and larger than, the other two wheels. The last two numbers, or the tens and units numbers, of the winning number were the numbers indicated on the third wheel after the spinning of that wheel. After a winning number was determined by spinning the wheels in one of the theaters, the number was announced in the other theaters by an intercommunication system of telephones and loud speakers. If no one in any of the other theaters presented a winning ticket within one minute after the first winning number was announced, a second winning number was determined by spinning the wheels in another theater. The wheel spinning continued in rotation from one theater to another until a winning ticket was presented.

A valuable consideration was paid for the chance of obtaining such property upon an understanding that it was to be distributed by chance. The period of time for which the "cash night" tickets were considered valid by the theater company for participation in the drawings was six weeks. Approximately 30,000 tickets were issued each week, and therefore about 180,000 tickets were outstanding during each six weeks period. At the trial herein forty-seven persons, being practically all of those who were employed as cashiers, usherettes, closing men, and managers, at some time during the six weeks preceding June 30, 1942, were called as witnesses by the prosecution. Twenty-six cashiers, eight usherettes who were also cashiers, seven closing men, four managers, one master of ceremonies, and the general manager of the five theaters testified that, under instructions by the theater company, only one "cash night" ticket was delivered to each patron at the time he paid the regular and usual charge for admission to one of the theaters; and that another "cash night" ticket was given without charge therefor to each patron as he was leaving the theater. The general manager also testified that his instructions to the employees were that if a patron in leaving the theater asked for tickets in addition to the one handed to him, it should not be given unless the employee ascertained there were others in the patron's party, and then to give only one ticket for each person in the party; that the employees, including the janitors, were instructed to pick up every drawing ticket which the patrons dropped in the theaters, the entrances thereto, or the sidewalks in front thereof, and return them to the box office; and that the employees were instructed to "try to get every one" of the tickets which were dropped by patrons, but "if patrons get there first" to pick up a ticket the employee should not make trouble about it.

The general manager testified further, after having stated that tickets were given to patrons only at the time they paid admission and at the time they were leaving the theater, as follows: "You misunderstood that modification I just mentioned. I said a customer asking for a ticket without purchasing an admission, they could receive a ticket gratuitously."

It is to be noted that the general manager, in modifying his previous testimony, used the word "customer" in designating the class of person who should receive a ticket "gratuitously," if he asked for it. The use of the word "customer" indicates that a person to whom a "free" ticket might be given, for the asking, was a person who had paid admission at some time. The record does not show that any ticket was delivered by the theater company to any person or "customer" for the asking, or at all, who did not pay admission. There was no announcement by sign or otherwise, outside or inside the theater, that drawing tickets would be given gratuitously to "customers" or other persons if they would ask for them, or that such tickets would be given gratuitously at all. Even if a drawing ticket were given "gratuitously" as related by the general manager, it does not appear that the winning number was announced outside the theater for the benefit of such a person who had not paid admission, or announced outside the theater at all. Furthermore, it does not appear that any provision was made whereby such a "customer" who held the winning ticket could enter the theater to claim the prize without paying the admission charge, if by some means he had been notified that he held the winning ticket.

There was no general or indiscriminate distribution of the drawing tickets to persons irrespective of whether they paid admission.

Respondent cites several excerpts from the testimony to the effect that tickets were given free to persons as they were leaving the theaters, and that those persons dropped many of the tickets on the theater premises. Counsel for respondent argues, in support of his contention that there was an indiscriminate and free distribution of the drawing tickets, that such evidence shows the tickets were generously distributed and carelessly handled; that the persons finding such dropped tickets could hand them to friends who could use them when they attended a subsequent "cash night" drawing, and therefore the owner of a winning ticket need not be a patron at all or part with anything of value for the ticket. It is to be observed, however, that such distribution (as the patrons were leaving) was made in the theaters, and consequently was made only to persons who had previously paid admission to enter the theaters, and therefore was a distribution to persons only who by reason of such payment were in a position to receive the alleged "free" tickets. In other words, insofar as the substance of the method of distribution was concerned, the delivery of a ticket at the time admission was paid, and the delayed delivery of another ticket until the person was leaving, were the same as if two tickets had been delivered at the time of paying admission. It is to be observed also that the careless handling, if any, of the tickets was not by the theater company, but by the patrons, those who had received the tickets at the time of, or after, paying admission, and therefore the asserted carelessness by the patrons in dropping the tickets was not an indiscriminate distribution of the tickets by the theater company. On the contrary, the theater company was careful and diligent in its efforts to obtain dropped tickets before patrons or others picked them up. In view of the theater company's efforts to prevent distribution by the dropped ticket method, certainly a substantial number of the tickets was not distributed even by that method, but the number so distributed was negligible. It is to be noted that even the dropped tickets, which respondent contends were distributed by the theater company, were tickets that had been delivered to the patrons, who dropped them, only when or after those patrons had paid admission. Furthermore, if a person picked up a dropped ticket and gave it to a friend to be used at a subsequent drawing, as respondent suggests, the friend would be required to pay admission in order to enter the theater and participate in the drawing.

It is clear that drawing tickets were not delivered by the theater company to anyone who did not pay to enter the theater, and that anyone who held a ticket and desired to participate in the drawing was required to be in the theater and therefore was required to pay admission. It was therefore a condition that a person pay a consideration, namely, the charge for at least one admission, in order to participate in the drawing.

Of course, it does not appear expressly that the trial court found there was an indiscriminate distribution of the drawing tickets irrespective of whether admission was paid. This court, however, would not be bound by such a finding inasmuch as there was no evidence to support such a finding. The only evidence which might be considered as contra to the testimony of the forty-seven employees of the theater, to the effect that two drawing tickets only were given to each patron—one when he entered and one when he left the theater—was the qualifying statement made by one of those witnesses (after he had testified the same as the other forty-six witnesses had testified) when he said that a ticket would be given to a "customer" gratuitously if he asked for it. Literally that statement referred to a person who had paid admission at some time. If it be considered, however, that the witness used the word "customer" inadvertently when he intended to say "person," such qualifying statement did not present a substantial conflict in the evidence as to the method of distribution. The record does not show that any person who had not paid admission asked for, or was given, or was offered a drawing ticket by the theater company. Even if the evidence had shown that drawing tickets were distributed to "persons" gratuitously in accordance with the qualifying statement of that witness, it would not have presented a conflict in the evidence which would have supported a finding that there was an indiscriminate distribution of tickets to persons irrespective of whether they paid admission, unless such distribution to non-customers was of a substantial number of tickets in relation to the 180,000 tickets issued to customers for each six weeks period. The distribution of a negligible number of tickets to non-customers would not have presented a substantial conflict in the evidence.

Apparently the only reported case in this state involving the question whether a theater "cash night" drawing was a lottery is the case of People v. Cardas, 1933, 137 Cal. App.Supp. 788, 28 P.2d 99, wherein it was held that the drawing involved therein was not a lottery. That decision was based upon the fact that there was a general and indiscriminate distribution of the drawing tickets irrespective of whether admission was paid; that attendance inside the theater was not a prerequisite to participation in the drawing; and announcement was made outside the theater for the benefit of non-customers. The method of distributing the prize tickets in that case was different very materially from the method of distribution herein. Defendant therein, an operator of a motion picture theater, advertised that a prize would be given at the theater to the holder of the lucky ticket. The tickets were delivered to the public by distributing, in the vicinity of the theater, 5,000 theater programs, each containing one of the tickets, and handing 2,000 tickets to passing motorists, and giving the tickets to pedestrians who came near the theater. No charge was made for such tickets so distributed and it was not necessary that an admission ticket be purchased. The cashier sold only admission tickets, and did not deliver any of the prize tickets or have any of them in her possession. There was a sign outside the entrance to the theater which stated that the holder of the winning number was entitled to enter the theater, without charge, to claim the prize. The court said on page 791 of 137 Cal.App.Supp., 28 P.2d on page 100: "Certainly those who received prize tickets without buying an admission ticket did not pay anything for the chance of getting the prize." In that case the court cited with approval the case of Cross v. People, etc., 1893, 18 Colo. 321, 32 P. 821, 36 Am.St.Rep. 292, wherein it was held that the drawing was not a lottery. In the Colorado case persons holding tickets, although not present, were entitled equally with those present at the store to win the prize, and it was stated in that case at page 325 of 18 Colo., 32 P. at page 822, 36 Am.St.Rep. 292: "These tickets or chances were given indiscriminately to persons, whether they purchased goods of plaintiff in error or not, to those who registered their names at their shoe store, and to those, who, from a distance, sent the return postage."

In State v. Danz, 1926, 140 Wash. 546, 250 P. 37, 48 A.L.R. 1109, the statute there involved, relative to lottery, was substantially the same as section 319 of the Penal Code of this state, relative to lottery. Defendant therein, who operated a motion picture theater, distributed groceries and other articles from the stage of the theater to the holders of winning tickets. The articles distributed did not cost the defendant anything but were obtained from various merchants whose names were mentioned as the articles were distributed. On the night of each drawing each adult patron, upon paying the admission charge, received a drawing ticket. There was a sign at the front of the theater stating that the drawing tickets were free and it was not necessary to purchase tickets to the theater. The evidence showed, however, that no ticket was given unless admission was paid. Announcement of the winning number was made outside the theater, and anyone outside who held a winning ticket had the right to enter the theater without charge to claim the prize. The court said at page 548 of 140 Wash., 250 P. at page 38, 48 A.L.R. 1109: "Manifestly, it was the plan and purpose of the appellants to get additional money by putting on the chance drawing. The testimony shows it was put on as an additional drawing card. The patrons knew it was 'country store' night. They paid a valuable consideration to participate. The fact that they paid the same price charged on other nights when the theater was running a more popular play without an added attraction is not conclusive or controlling in favor of the appellants. A valuable consideration was paid. What did the purchaser get? Not simply a ticket for the screen show, but a ticket to that, and to the chance drawing. The appellants and their patrons so understood and intended it. That was the plan and purpose for which the consideration was paid. Nor is the fact that free tickets were offered to outsiders material in any controlling sense. None such was given out as a matter of fact, and, if there had been, it would not of itself have made any difference." Apparently the explanation of the last statement just quoted, to the effect that if free tickets had been given to non-customers it would *not of itself* have made any difference, was that if the free distribution to non-customers was negligible as opposed to a general free distribution of a substantial number of tickets to non-customers it would not have made any difference.

In People v. Cardas, supra, 137 Cal.App. Supp. 788, at page 792, 28 P.2d at page 101, it was said: "An examination of the cases holding certain schemes, apparently somewhat similar to the one here in question, to be lotteries, discloses vital points of distinction. In general they fall into two groups. In one group it will be found that the prize tickets were only furnished to customers—those who purchased something. The payment made by the customer was for both the articles purchased and the prize ticket—part of the consideration was for the ticket [citing cases]. The decisions, however, are not entirely uniform in holding even such a scheme to be a lottery. [Citing a Mississippi case which held it not to be a lottery.] In the other group, it will be found that while the distribution of prize tickets purported to be both to non-customers as well as customers, in fact the distribution to the former class was negligible. Featherstone v. Independent Service Station Ass'n, Tex.Civ.App., 10 S.W.2d 124, is typical of this group, where there was no general free distribution of the tickets to the public as in the case at bar."

[1, 2] It therefore appears that the three elements of a lottery specifically referred to above, and generally referred to as (1) the giving of a prize, (2) by a method involving chance, (3) for a consideration paid by the participant (Darlington Theaters, Inc., v. Coker, 1939, 190 S.C. 282, 291, 2 S.E.2d 782), were present in this case. The "cash night" drawing involved herein was a lottery. See also annotation, 103 A.L.R. 866–872.

It seems that the prosecution made the extensive showing as to the method of distributing the tickets, in order to establish a basis for an inference that it was not reasonably probable, under the theater company's restricted method of distribution to its patrons only, that Basile could have accumulated so many tickets in such large groups of consecutively numbered tickets, except by stealing them from the theater company. The evidence which established that inference also established that the drawing was a lottery.

The Constitution of California, article IV, section 26, provides in part: "The Legislature shall have no power to authorize lotteries or gift enterprises for any purpose and shall pass laws to prohibit the sale in this State of lottery or gift enterprise tickets or tickets in any scheme in the nature of a lottery." Section 320 of the Penal Code provides in part: "Every person who contrives, prepares * * * or draws any lottery, is guilty of a misdemeanor." The "cash night" drawing herein was unlawful.

[3] Although Basile had many tickets which were stolen, he also had tickets which he received at the times he paid the admission charges on the evening of the drawing and on previous occasions during the preceding six weeks period. Whether the winning ticket was one of those issued to him by the theater company when he paid admission, or was one given to him by someone who had received it when an admission charge was paid, or whether it was one given to him by someone who had stolen it, or whether he had stolen it, or whether it was one he had picked up after a patron had dropped it, or whether he obtained it in violation of any of the various rules of the theater company as to the manner of obtaining tickets, were questions of fact for the trial court. There was testimony that the winning ticket, No. B477462, was in a bundle of tickets held by Basile, in which the tickets were in consecutive numerical order from No. B477431 to and including No. B477475. Of course, the finding of the court as to the manner in which Basile obtained the winning ticket does not appear expressly. It is not necessarily an implied finding that it was a stolen ticket. It will be assumed, however, that the court found it was a stolen ticket, particularly in view of appellants' contention on appeal which is based upon the assumption that it was stolen.

Respondent has not replied to appellants' contention that an attempt to obtain the prize money solely by the presentation of a stolen lottery ticket was not attempted theft, other than to reply that the drawing was not a lottery. Respondent's reply was that the drawing was not a lottery; that no consideration was paid and no element of chance was involved since the holder of a drawing ticket paid nothing for it; that the number drawn was announced by loud speaker outside the theater; that it was not a prerequisite that the holder of the winning ticket be in attendance; and that the opinion in People v. Cardas, supra, is determinative that the drawing herein was not a lottery. Respondent asserts further that if the decision in People v. Cardas is not the law and is not followed, then the judgment and order in the present case should be reversed. Although these points have been discussed hereinbefore, it should be noted here: (1) That the record does not show that the number drawn was announced outside the theater; (2) that the record does not show it was not a prerequisite that a ticket holder be in attendance; (3) that respondent, in support of the statement that no consideration was paid and no chance was involved, refers only to testimony that an additional ticket was given to patrons (who had paid to enter) as they were leaving the theater, and that a ticket would be given to a "customer" gratuitously if he asked for it; and (4) that in the Cardas case the factual situation as to distribution of tickets was practically the opposite of the factual situation herein. In the Cardas case more than 7,000 drawing tickets were distributed free in the neighborhood, to passing motorists, and to pedestrians outside and near the theater; a sign outside stated that tickets would be given free; the winning number was announced outside for the benefit of those who had not paid admission, and the holder of a winning ticket on the outside was permitted to enter the theater to claim the prize.

The decision in the Cardas case was a proper determination upon the facts therein that the drawing therein was not a lottery. That decision, however, is not determinative or at all persuasive that the drawing herein, involving facts vastly different from those therein, was not a lottery. The presence of certain facts in that case, as to free distribution, and as to announcements and participation outside the theater, was the basis for the decision therein that the drawing was not a lottery, but in this case those or similar facts are not present and an opposite state of facts exists.

[4] The winning ticket and the other drawing tickets were lottery tickets. A lottery ticket, as such, has no value and it cannot, in contemplation of law, be the subject of theft. People v. Caridis, 1915, 29 Cal.App. 166, 168, 154 P. 1061. In that case the information charged that the defendant committed grand larceny, in that he had stolen a winning lottery ticket from an individual, after the drawing had occurred, and collected $1,250 thereon from the lottery company. It was held that the lottery ticket had no value, except perhaps as a mere piece of paper, and that the facts stated in the information did not constitute the public offense of grand larceny. On page 168 of 29 Cal.App., 154 P. on page 1061, therein the court said: "The lottery ticket which was the subject-matter of the larceny charged in the present case had no relative value save, as affirmatively alleged in the information, as the evidence of a debt due from an enterprise which was denounced by law and which apparently existed and was conducted by its promoters in defiance of the law. Pen.Code, § 319 et seq. It is a well-settled principle that an obligation which exists in defiance of a law which denounces it has, in the eye of the law, neither validity nor value." Considered as a piece of paper, a lottery ticket might possess some slight intrinsic value which would suffice, insofar as the element of value in the crime of petty theft is concerned, to make the unlawful taking of it petty theft (People v. Caridis, supra, 29 Cal.App. at page 169, 154 P. at page 1062), but defendants herein were not charged with petty theft of the pieces of paper.

The number on the lottery ticket which Slater received from Mrs. Basile was the number which the lottery operator announced publicly from the stage was the winning number, after the ticket held by him was inspected by the theater's paymaster and found to be the winning ticket. Slater was invited by the lottery operator to present it to the master of ceremonies on the stage. The theater company was engaged in the operation of a lottery in defiance of law at the precise moment that Slater, in response to such invitation of the lottery operator, presented the winning lottery ticket of that lottery to claim the lottery prize which was then and there being offered by the lottery operator to the participant in the lottery who held the winning ticket. The act therefore, which it is asserted constituted the attempt to commit theft, was not an act which was unrelated to the actual procedure of drawing the lottery, such as would be an effort to seize the prize by force or intimidation, or by taking and carrying it away during the absence or unawareness of the owner; but the act was a principal part of the lottery operator's actual manipulation and drawing of the lottery, and outwardly and on the face of the act it was in compliance with the rules prescribed by the lottery operator. The act of Slater in presenting the ticket was in violation of the rules of the lottery only in respect to the manner in which the ticket so presented was obtained originally from the lottery operator. An investigation indicated that it was a ticket which had been stolen from the lottery operator rather than one for which compensation had been paid to the lottery operator, i. e., rather than one which had been issued by the lottery operator to a patron of the theater at the time he paid admission or at the time he was leaving the theater.

In other words, the basis for the accusation that a felony, attempted theft, was committed when Slater presented the winning lottery ticket is that the rules laid down by the lottery operator for playing the lottery had been violated, in that, the lottery ticket so presented had been stolen from the lottery operator. Specifically, as applied to this case, the rule violated was that the ticket had not been obtained originally from the theater company by purchase, but was stolen from it. Apparently, if the ticket had been issued or delivered in the first instance by the theater company to a person who had paid admission, even if thereafter it had been stolen from that patron, the presentation of it to claim the prize would not have been a violation of the rules of the lottery, inasmuch as there was no rule that the tickets were non-transferable. It therefore seems that the asserted culpability involved in the act of presenting the ticket was that it was not merely a ticket stolen from a patron who had paid the lottery operator for it at some time, but that it was a ticket stolen from the lottery operator and for which the operator had not been paid at any time.

The theory of the prosecution may have been that the ticket was of no value because it had been stolen from the theater company, and that the presentation of such a ticket was a false token or device by which an undue advantage of the theater company was about to be taken. The ticket was of no value, however, because it was a lottery ticket. The lottery ticket, as a matter of law, was not recognized by the People of the State as of any value, and was entitled to no recognition as a thing of value by anyone, including the lottery operator. The lottery operator, particularly, was charged with knowledge that its lottery ticket was valueless, and was not entitled to regard the presentation of the ticket as an implied or any representation that it was of value.

Neither the defendant, nor Slater, obtained the $500 or any part thereof as a result of the presentation of the ticket or at all. The presentation of the stolen lottery ticket was a violation of the self-prescribed rules of the lottery operator for playing its lottery, but the violation of such rules is not a felony or other public offense. If the presentation of a stolen lottery ticket to claim the lottery prize in violation of the lottery rules is attempted theft, then the presentation of a lottery ticket to claim the lottery prize in violation of any of the various other rules which might be made, such as the tickets shall not be transferable, shall not be usable if dropped on the floor, and shall not be mutilated, would also be an attempt to commit theft. Of course, the rules adopted by a lottery operator for his unlawful lottery business do not have the effect of penal statutes.

If it were an offense against the People of the State to violate lottery rules in playing a lottery, the result would be to encourage the existence of lotteries which are prohibited by the Constitution and penal statutes. If the public force were brought to bear through the courts upon a person who, in playing the lottery, violated a lottery operator's private rules for playing the lottery, it would amount to enforcing the rules of the lottery and would be inconsistent with the provisions of the Constitution and penal statutes denouncing lotteries.

In People v. Caridis, supra, 29 Cal.App. 166, 154 P. 1061, as above stated, the defendant, who was charged with grand larceny of a lottery ticket, actually collected $1,250 from the lottery operator by presenting the winning lottery ticket which he had stolen. If the charge therein had been grand larceny of the $1,250 from the lottery company, the legal issues in that case and in the present case would have been the same. It is of some significance that the court therein, in ruling that the public offense of grand larceny had not been stated, referred (29 Cal.App. on page 169, 154 P. on page 1062) to petit larceny of the mere piece of paper as a probable ground for prosecution under those circumstances, but did not refer to the actual collection of $1,250 from the lottery company upon a stolen lottery ticket as a probable ground for a charge of grand larceny of the $1,250.

In People v. Rosen, 1938, 11 Cal.2d 147, 78 P.2d 727, 116 A.L.R. 991, the defendant was charged with robbery. Over a period of months defendant lost sums of money in a lottery game. The operator of the game kept the money received from the game in a nearby shop of another person. Defendant, armed with a pistol and by putting the shop owner in fear, took from the shop a lesser amount of money than he had lost in gambling. The trial court refused to admit evidence offered by defendant in support of the defense that the taking was under a bona fide claim that the money lost by him belonged to defendant since it was money lost by him in an illegal game and he was only recapturing it. Defendant was convicted. The Supreme Court held that such evidence should have been admitted, and reversed the judgment. The court said on page 150 of 11 Cal.2d, 78 P.2d on page 728, 116 A.L.R. 991: "It is the law in this state that certain games of chance, such as lotteries, are illegal; that the winner gains no title to the property at stake nor any right to possession thereof; and that the participants have no standing in a court of law or equity. [Citing cases.]" The court said further on page 151 of 11 Cal.2d, 78 P.2d on page 729, 116 A.L.R. 991: "The view which seems to be consistent with the declared policy in this state is that the complaining witness, being in a sense in pari delicto with the accused, should not be heard in a court of justice on a charge of robbery against one whose only purpose was to retake money lost at an illegal game. This view neither condones nor invites the commission of crime, inasmuch as the accused must pay the penalty for the violation of any applicable penal law." (This last statement apparently had reference to a further statement therein that defendant was guilty of assault with a deadly weapon.) The theater company in operating the lottery was in a sense in pari delicto with the defendants, if defendants had committed a public offense.

It is true that the prize money, even though it was designated and set apart as a lottery prize, remained subject to theft, did not lose its character as property, and did not become property which anyone could appropriate in any event to his own use merely because it was a lottery prize. The lottery operator was entitled to be secure in its lottery prize (except perhaps under the provisions of section 325 of the Penal Code, relating to forfeiture of lottery property) against interference therewith under various circumstances such as seizure thereof by force and intimidation, and the taking thereof during its absence or unawareness. The question here, however, is not whether it was entitled to be secure in its lottery prize, as just mentioned, against violence in the seizure thereof, or the removal thereof without its knowledge, but the question is whether the lottery operator was entitled to be secure, by virtue of the penal statutes, in its lottery prize against the violation of the self-prescribed rules for playing its lottery during the actual lottery drawing, i. e., whether the People of the State were offended by the violation of the lottery operator's rules for playing its lottery.

[5] It might be argued that the fact the theater company was engaged in an unlawful act in operating the lottery would not justify an unlawful act by defendants; and that the fact the lottery operator should have been prosecuted also was immaterial insofar as the prosecution of defendants was concerned. Such an argument would be reasonable, but would not be an answer to the question herein whether the defendants committed a public offense in not adhering to the lottery rules. The act of presenting the ticket was an inseparable part of the unlawful lottery drawing, and the acts of the lottery operator and the defendants must be considered together in determining the property rights of the lottery operator and the personal rights of defendants.

[6] The theater company was conducting a game denounced by law. While participating in the illegal game and as a part of it, defendants offered to the game operator at its invitation one of its illegal game tickets in an effort to obtain the game prize. In common parlance, the act of presenting the ticket was an attempt "to beat the lottery operator at its own illegal game," by not following the rules whereby it planned to receive compensation for tickets used in playing the game. The People of the State are not concerned in promoting the financial or other success of a lottery operator, and are not offended if his rules for playing his lottery are violated. The presentation of the ticket was not the public offense of attempted grand theft. As above stated, the defendants were not charged herein with petty theft of the tickets as mere pieces of paper.

The judgments and the orders denying the motions for a new trial, as to both defendants, are reversed. The appeal from "the orders" entered on May 20, 1943, is dismissed.

DESMOND, P. J., and BISHOP, Justice pro tem., concur.

In re NAFTZGER'S ESTATE.

WEISS et al. v. NAFTZGER et al.

Civ. 14281.

District Court of Appeal, Second District, Division 2, California.

Dec. 16, 1943.

Rehearing Denied Jan. 13, 1944.

Hearing Granted Feb. 10, 1944.

1. Executors and administrators ⚷375

Upon hearing of petition for confirmation of sale of realty by an executor, superior court, sitting in probate, did not have authority under statute to confirm a sale of the property to a bidder, who in open court bid a sum 10 per cent. over amount for which property had been sold by executor, but which sum was not 10 per cent. over amount originally bid exclusive of expenses of the new sale. Probate Code, § 785.

2. Statutes ⚷206

If possible, effect must be given to each sentence, word and phrase of a statute and unless exigencies as a whole imperatively demand that some word, phrase or sentence thereof be disregarded, no such word, phrase or sentence should be considered unnecessary or surplusage.

3. Executors and administrators ⚷375

Under statute requiring sale of property of a decedent's estate to be confirmed to bidder to whom property has been sold by executor unless a sum exceeding original bid by at least 10 per cent. exclusive of expenses of sale is made at time of hearing of the petition for confirmation of the sale, real estate broker's commission was an "expense of sale" and was required to be included in determining whether subsequent bid exceeded original bid by 10 per cent. Probate Code, §§ 760, 785.

See Words and Phrases, Permanent Edition, for all other definitions of "Expense of Sale".

MOORE, P.J., dissenting on motion for rehearing.

Appeal from Superior Court, Los Angeles County; William R. McKay, Judge.

Proceeding in the matter of the estate of Louise E. Naftzger, deceased. Fred E. Naftzger, executor of the estate of Louise E. Naftzger, deceased, petitioned for approval of sale of real property to Lawrence A. Weiss, Molly Weiss, R. L. Larquier and Rose Larquier for $11,500, and Beth M. Preninger filed in open court a written bid of $12,650 for the property. From an order confirming a sale of the property to Beth M. Preninger and from an order refusing to set aside order confirming the sale of property, Lawrence A. Weiss, Molly Weiss, R. L. Larquier and Rose Larquier appeal.

Reversed with directions.

Ernest C. Griffith, of Los Angeles, for appellants.

Dryer, Richards & Page, of Los Angeles, for petitioner and respondent.

John Boukather and T. C. Dalton, both of Los Angeles, for purchaser and respondent.

McCOMB, Justice.

This is an appeal from an order of the Superior Court of Los Angeles County, sitting in probate, confirming a sale of real property belonging to the Estate of Louise Naftzger, deceased. There is also an appeal from the order of the court refusing to set aside its order confirming the sale of real property.

The essential facts are:

The will of decedent authorized the executor to sell property of the estate. The duly appointed and qualified executor, Fred E. Naftzger, sold at private sale, certain real property of the estate to appellants for $11,500.00 cash. There was not any broker's commission payable in connection with the sale. The inventory and reappraisement of the estate showed the property to be of the appraised value of $11,500.00. At the time of the hearing of the petition for the confirmation of sale of the aforementioned real property, respondent Preninger filed in open court a written bid in the sum of $12,650.00 cash for said property. This bid provided:

"The name of real estate agent procuring within bid, and to whom commission is to be paid, according to law, if confirmed by court to within bidder, is as follows: Geo. S. Preninger, 2015 Beverly Blvd. DR. 3363."

The probate court accepted respondent Preninger's bid and confirmed the sale to her. The formal order of the court confirming the sale contained, among others, the following provisions:

"Said sale is subject to the payment of a commission to George S. Preninger, licensed broker, of 2½% on $11,500.00, and 5% on $1,150.00, a total of $345.00, payable on consummation of said sale."

There are two questions necessary for us to determine which will be stated and answered hereunder seriatim:

First: *Upon the hearing of a petition for confirmation of the sale of real property by an executor of an estate, does the Superior Court, sitting in probate, have the authority under section 785 of the Probate Code to confirm a sale of the property to a bidder, who in open court bids a sum ten per cent over the amount for which the property was sold by the executor, but which sum is not ten per cent over the amount originally bid exclusive of expenses of the new sale?*

[1, 2] This question must be answered in the negative and is governed by applying to section 785 of the Probate Code the following established rule of statutory construction, to wit: if possible, effect must be given to each sentence, word, and phrase of a statute, and unless the exigencies of a situation from a consideration of a statute, as a whole, imperatively demand that some word, phrase or sentence thereof be disregarded, rendered useless, or deprived of meaning, no such word, phrase, or sentence should be considered unnecessary or surplusage. (County of Los Angeles v. Emme, 42 Cal.App.2d 239, 242, 108 P.2d 695; Davidson v. Burns, 38 Cal.App.2d 188, 191, 100 P.2d 1105, 101 P.2d 568.)

Section 785 of the Probate Code reads thus:

"Upon the hearing the court must examine into the necessity for the sale, or the advantage, benefit and interest of the estate in having the sale made, and must examine the return and witnesses in relation to the sale; and if it appears to the court that good reason existed for the sale, that the sale was legally made and fairly conducted, and complied with the requirements of the previous section, that the sum bid is not disproportionate to the value, and it does not appear that a sum exceeding such bid at least ten per cent exclusive of the expenses of a new sale may be obtained, the court shall make an order confirming the sale and directing conveyances to be executed; otherwise it shall vacate the sale and direct another to be had, of which notice must be given and the sale in all respects conducted as if no previous sale had taken place. But if a written offer of ten per cent more in amount than that named in the return is made to the court by a responsible person, and the bid complies with all provisions of the law, it is in the discretion of the court to accept such offer and confirm the sale to such person or to order a new sale."

In view of the above rule of statutory construction the words in the last sentence of section 785 of the Probate Code, viz., "and the bid complies with all provisions of the law" should be construed to refer to the requirement in the first sentence of the code section, that the sale is to be confirmed to the bidder to whom the property has been sold by the executor unless a sum exceeding such bid by at least ten per cent "exclusive of the expenses of a new sale" is made at the time of the hearing of the petition for confirmation of the sale.

As so construed, the provision for making "a written offer of ten per cent more in amount than that named in the return" of sale, in the last sentence of the quoted section, means ten per cent more, exclusive of the expenses of the sale. By placing this construction upon section 785 of the Probate Code, effect is given to the provisions in both the first and second sentence of the section, while if respondent's contention to the effect that the offer referred to in the last sentence in the section need only be ten per cent in excess of the original bid exclusive of expenses of the sale, were to be adopted, then the words in the first sentence of the section "at least ten per cent exclusive of the expenses of a new sale" would be rendered nugatory. (Estate of Flaherty, 69 Cal.App. 429, 431, 231 P. 591.)

[3] Second: *Is a real estate broker's commission an expense of sale?*

This question must be answered in the affirmative. (Section 760, Probate Code; Estate of Shaw, 85 Cal.App. 518, 524, 260

P. 351; Estate of Hughes, 3 Cal.App.2d 551, 553, 40 P.2d 295.)

In view of our conclusions since respondent Preninger's bid did not exceed the bid of appellants by ten per cent exclusive of the expenses of the sale, the probate court's order was erroneous.

For the foregoing reasons, the orders appealed from are and each is reversed with directions to the trial court to confirm the sale to appellants.

MOORE, P. J., and W. J. WOOD, J., concur.

On Motion for Rehearing.

Rehearing denied.

MOORE, Presiding Justice.

I dissent from the order denying a rehearing.

An analysis of section 785 of the Probate Code emphasizes the last sentence which reads as follows: "But if a written offer of ten per cent more in amount than that named in the return is made to the court by a responsible person, and the bid complies with all provisions of the law, it is in the discretion of the court to accept such offer and confirm the sale to such person or to order a new sale."

Clearly this language does not contemplate that the court should, at the time of receiving a new bid at the hearing on confirmation, determine what the expense of the sale to the new bidder will be. The expense of "a new sale" is not there considered. The only occasion for the court to reckon on the expense of a "new sale" is when the court hesitates to confirm the reported sale by reason of the fact that it appears that a sale price might be obtained of sufficient magnitude to exceed the reported price by at least 10 per cent *exclusive of the expense of a new sale.* The procedure contemplated for a hearing on a sale and a confirmation is as follows: (1) If at the hearing of a reported sale no one offers a higher price than the reported offer and the court has no reason to doubt the justice or the wisdom of the price offered, the sale to the single offer is confirmed. (2) If the court concludes that the price is so inadequate that by a renewed effort the executor might obtain an advance of at least ten per cent exclusive of the expense of a new sale over the first offer, the hearing must be adjourned to a later day to hear the report of a new offer which would be a "new sale." (3) But if at the hearing first reported a new offer is made in compliance with the requirements regulative of sales of real property and if it is "ten per cent *more in amount* than that named in the return * * * *it is in the discretion of the court to accept such offer and confirm the sale* * * *."

It must have been intended by the Legislature that the additional ten per cent included in the bid made at the hearing on the return would be sufficient to cover any additional expenses, as well as the commissions to be paid the broker, and still leave a net advance over the reported bid. Section 761, Probate Code, provides a method for the division of commissions in event a sale is confirmed to a new bidder at the hearing. It allows one half of the commission on the full amount of the confirmed sale to the agent whose bid was returned for confirmation and the balance of the commission to the agent, if any, who procured the purchaser to whom the sale was confirmed.

The purpose of section 785 is to enable the court to secure "as high a price for the property as possible," and if it can accomplish this result without subjecting the estate to the expense and delay attendant upon a new sale, it would seem to be in the exercise of a wise discretion to permit a competitive bidding for the property at the hearing upon the return. In re Estate of Griffith, 127 Cal. 543, 544, 59 P. 988; In re Estate of Bradley, 168 Cal. 655, 144 P. 136.

No new sale is necessary if the court accepts the new offer at the hearing. The estate profits by such new bid or bids. No new expenses are to be incurred when the court accepts a new offer made at the hearing on confirmation of the return. The property is disposed of then and there by confirming a sale to the highest bidder. No reason is suggested and none has occurred why the estate should not have the benefit of "ten per cent more in amount than that named in the return", sec. 785, so long as it is to cost the estate nothing to obtain the excess.

A rehearing should be granted.

62 Cal.App.2d 291

POWELL v. CITY AND COUNTY OF SAN FRANCISCO et al.

Civ. 12510.

District Court of Appeal, First District, Division 1, California.

Jan. 13, 1944.

Hearing Denied March 6, 1944.

1. Municipal corporations ⚷994

Where advancement of funds by citizens' committee to defray expenses of municipal officials in making trip to present municipality's position on particular matter to Congress was not intended to promote individual interests of committeemen or influence delegation and municipality was not prejudiced, circumstance that officials were not personally out of pocket was not a reason for enjoining disbursement of public funds to repay advances.

2. Municipal corporations ⚷860

The rule against expenditure of public funds for election purposes for acquisition of a new utility system by municipality does not extend to expenditure of public funds in protecting rights of a municipally owned utility already acquired.

3. Municipal corporations ⚷861

The appointment of delegation of officials of San Francisco to present certain facts to a Congressional committee in interest of San Francisco in connection with a proposed amendment to the Raker Act was a proper "municipal purpose" for which public funds could be expended. Gen.Laws Supp.1941, Act 4276, § 1; Act Cong.Dec. 19, 1913, 38 Stat. 242.

See Words and Phrases, Permanent Edition, for all other definitions of "Municipal Purpose".

4. Municipal corporations ⚷860

In determining propriety of appropriation by San Francisco to pay expenses of delegation of officials to present municipality's viewpoint on proposed amendment to Raker Act for purpose of seeking approval of Congress to continuance of a contract under which municipality was operating a power project with a private concern, absent anything disclosing a dishonest intention, legality of particular contract was not involved.

5. Municipal corporations ⚷860

The term "operating expenses" as used in San Francisco charter authorizing appropriation from funds of each utility operated by municipality for payment of operating expenses is not confined to maintenance.

The phrase "operating expenses" usually covers physical maintenance and may include administration, labor, interest, taxes, rent, insurance, claims, litigation expenses, etc., depending upon how the phrase is used in a particular case.

See Words and Phrases, Permanent Edition, for all other definitions of "Operating Expense".

6. Municipal corporations ⚷60, 167

The power of a board of supervisors to adopt an ordinance, or power of a commission to adopt reasonable rules to make effective purpose of establishment of such commission under an express grant may sometimes be implied in absence of legislative prohibition.

7. Municipal corporations ⚷860

Board of supervisors of San Francisco could properly appropriate money from unappropriated funds of Hetch Hetchy Power Division for payment of expenses of officials in advocacy of an amendment to Raker Act to permit sale of electric power by San Francisco to a public utility corporation as "operating expenses" within charter provision authorizing expenditure of operating expenses in connection with operation by city of a utility. Act Cong. Dec. 19, 1913, 38 Stat. 242.

8. Municipal corporations ⚷860

Whether purpose of visit to Washington, D. C., of delegation of San Francisco officials regarding proposed legislation affecting the city's distribution of electric power was necessary and in good faith is for board of supervisors as respects their right to appropriate money for payment of expenses.

PETERS, P. J., dissenting.

Appeal from Superior Court, San Francisco County; Alden Ames, Judge.

Suit by Russell Powell against the City and County of San Francisco and others to enjoin the expenditure of public funds in the payment of traveling and per diem expenses of municipal officials to and from Washington, D. C., in the presentation of legal and engineering studies to a committee of Congress. Judgment of nonsuit, and plaintiff appeals.

Affirmed.

Phil F. Garvey, of San Francisco, for appellant.

John J. O'Toole, of San Francisco, for respondents.

WARD, Justice.

Plaintiff prosecutes this appeal from a judgment of nonsuit. He is a resident and taxpayer of the City and County of San Francisco, and brought the action for the purpose of enjoining the expediture of public funds in the payment of traveling and per diem expenses of city officials to and from Washington, D. C., in the presentation of legal and engineering studies to a committee of Congress. Charter of the City and County of San Francisco, sec. 27. It was contemplated that such expenses would be incurred in the advocacy of an amendment to the Raker Act, enacted by the 63rd Congress of the United States of America, Act Dec. 19, 1913, H.R. 7207, 38 Stat. 242, to permit the sale by the municipality to a public utility corporation of electric power for resale to the people of San Francisco. It had been judicially held that an agency contract to that end theretofore entered into violated the terms of the act, which granted certain rights of way over federal public lands and national parks to the City and County of San Francisco for the purpose of supplying water and electrical energy to the public. The mayor of San Francisco, therefore, upon authorization of the board of supervisors, appointed a committee of citizens (subsequently known as the Committee), to introduce an amendment to the Raker Act. Following its introduction in Congress, it was there referred to the Public Lands Committee, a subcommittee of which visited San Francisco for the purpose of investigating the propriety of the amendment. Public hearings upon the amendment terminated about the time of the Japanese attack on Pearl Harbor in December 1941, with the understanding that further hearings would be held in Washington before the full committee on a date to be set. In pursuance of this understanding the board of supervisors passed an ordinance appropriating $10,000 out of the unappropriated balance in the Hetch Hetchy Power Division to provide funds for the payment of expenses of certain designated city and county officials, etc., to be incurred in connection with the hearings before the congressional committee. Subsequently the board of supervisors approved a resolution, directing the manager of utilities, two members of the board of supervisors, the city attorney and two public utility engineers to represent the city and county before the Public Lands Committee.

Shortly prior to the time when it was necessary for these representatives to leave for Washington this action to enjoin the expenditure, and praying for a temporary injunction, was filed. Confronted by this emergency the Committee hereinbefore mentioned made advances to cover such expenses, obtaining receipts from the heads of city departments. It was understood that should the claims be allowed by the city and county, the advances would be repaid. The amount appropriated by the supervisors was $10,000; the expenses incurred totaled $4,105.54.

[1] Plaintiff contends that the circumstance that the members of the Committee were not personally out of pocket affords an additional reason for restraining the proposed disbursement of public funds. This contention is not supported by authority nor by convincing argument. It does not appear from the evidence that the city was prejudiced, or that the advancement of the funds was to promote the individual interests of those advancing the money, or intended in anywise to influence the position that the city desired its official committee to take before Congress in its efforts to protect the interest of the municipality. On the trial of this cause some questions were asked indicating a misuse of the funds by individual members, but on appeal it seems to be admitted that there was no misuse of funds.

Plaintiff contends that the purposes for which municipal funds may be used does not include expenses to urge enactment of an amendment to a congressional act empowering the city and county to use certain lands, water and power of the United States government. This contention seems to be without merit if the funds were properly and legally appropriated under the city charter from the particular fund used. The propriety of the action of the municipality will be first considered.

Plaintiff relies upon Mines v. Del Valle, 201 Cal. 273, 257 P. 530, and Mobley v. Board of Public Works, 44 Cal.App. 167, 186 P. 412. In the Mobley case it was pointed out that the charter provided a precise method of acquiring a privately owned railway system and that the word "extension" had reference to improvements to an existing municipal system and not to the use of funds in investigating the advisability of "acquiring" an independent railway system. In the Mines case [201 Cal. 273, 257 P. 535], the charter of Los Angeles, sec. 192(h), empowered the public service commissioners to use money in the power revenue fund for the purpose of " 'conducting, operating, and maintaining and extending the business of said department pertaining to electric power,' and particularly upon the words 'extend electric plants, works,' etc., and 'extending the business of said department.' " It appears that the commissioners carried on a campaign, addressed to the purpose of influencing the voters of the municipality to approve a bond issue, using power revenue funds to pay for newspaper advertisements, circulars, posters, banners, etc. At pages 282, 283 of 201 Cal., page 535 of 257 P., the court said: "The provisions of the charter giving to the board of public service commissioners power to extend the electrical plants and works of said city and to expend the funds in the power fund for the purpose of extending said public utility in our opinion refer simply to the physical management of the same, and cannot be enlarged to include another and distinct power, that of raising money either directly or indirectly for the purpose of conducting and operating said utility, or for the purpose of extending the business thereof." Quoting from the Mobley case the court further said (201 Cal. at pages 284, 285, 257 P. at page 536): " 'Without regard to any other question discussed in the opinion of the District Court of Appeal, we are satisfied that the charter of San Francisco, as now written, does not authorize the payment of money from the funds of the municipal railway system for the purpose of investigating the condition and availability of a part or the whole of another street railway with a view to its purchase. The purposes for which expenditures from such fund can be made are carefully specified in section 16, article XII, of the charter, which, we think, excludes any such expenditure as here proposed. Such an *investigation* may not fairly be held to constitute an "extension or improvement" of the municipal system.' " The Mines case held that a municipality in its proprietary capacity does not have power to do any and all things in the conduct of its business, and that the use of public funds on one side to advocate a controversial question before the voters was unjust to the rights of the members of the public who held a contrary opinion, in view of the fact that there was neither an express nor an implied provision in the charter authorizing an expenditure of public money for banners, etc.

In Mahoney v. City and County of San Francisco, 201 Cal. 248, 257 P. 49, it was held that when municipal revenue is allocated to separate funds the money in one fund may not be used for another purpose unless there is a specific provision therefor. As will appear hereafter there is a provision for the use of municipal funds for the purpose here contemplated.

[2, 3] There is a difference in the expenditure of money in acquiring a new system and in protecting the rights of that acquired. That the Supreme Court of this state recognized that there is a difference between the expenditure of funds for election purposes and the use of money to pay expenses in appearances before a judicial or legislative body is demonstrated when the holdings in two cases decided within a six-month period—the Mines case and Crawford v. Imperial Irrigation Dist., 200 Cal. 318, 253 P. 726—are considered. In the Crawford case, supra, 200 Cal. at page 322, 253 P. at page 728, the court said: " 'The employment of persons to influence legislation, or to influence decisions of the Land Department, or even the decisions of judicial tribunals, in a proper way, is not against sound public policy.' * * * 'The means and methods to be used must be improper, or else such employment is perfectly legitimate in the eyes of the law.' " Quoting from 6 Cal.Jur., page 126, the court further said: " 'A distinction is drawn between the use of personal, or any secret or sinister, influence upon legislators, by one who seeks the passage of an act, which is contrary to public policy, and the open advocacy of the same. It is generally agreed that the appearance of a representative of an interested party before a public body to urge the adoption of a particular measure or policy is neither illegal nor improper when the means employed are open and have for their purpose the presentation of the merits of the advocated matter.' " There is no evidence in the present case that the Commission or its designated representatives in appearing before the con-

gressional subcommittee in San Francisco or the full committee in Washington were actuated by any motive other than the legitimate protection of the city's interest as it reasonably and honestly appeared to the Commission. In the Crawford case, 200 Cal. at page 334, 253 P. at page 732, quoting from 21 Cal.Jur. 874, the court said: "'A public officer or board has not only the powers expressly enumerated by law, but also those implied powers which are necessary to the exercise of the powers expressly granted. * * *'" As late as June of 1943 the Crawford case, to the effect that authority is often implied from power granted, was quoted with approval in California Drive-in Restaurant Ass'n v. Clark, 22 Cal.2d 287, 140 P.2d 657. See, also, 67 A.L.R. p. 686. In addition, attendance at legislative and congressional sessions has been authorized by the laws of the state of California for advocacy of the passage of beneficial, or opposition to that of detrimental, legislation. Deerings General Laws, 1941 Supp., Act 4276, sec. 1, p. 2064; California, etc., Ass'n v. Rindge L. & N. Co., 199 Cal. 168, 248 P. 658, 47 A.L.R. 904. We conclude that the purpose in the appointment of the San Francisco representatives to attend and present the facts in the interest of the City and County of San Francisco was, under all the circumstances as they appear in the record, proper.

The procedure adopted was as follows: The board of supervisors appropriated a specified sum out of the "unappropriated balance" in the Hetch Hetchy Power Division for the use of representatives in connection with hearings before Congress on the proposed amendment to the Raker Act. Subsequently the board approved the Committee appointed to represent the city at such hearings. The members of the Committee—in one instance there was a substitute for one of them—carried out their mission. The question therefore is whether the ordinance authorizing the expenditures violated the provisions of the charter.

Section 127 of the charter provides: "Receipts from each utility operated by the commission shall be paid into the city and county treasury and maintained in a separate fund for each such utility. Appropriations from such funds shall be made for the following purposes for each such utility in the order named, viz.: (a) for the payment of operating expenses, pension charges, and proportionate payments to such compensation and other insurance and accident reserve funds as the commission may establish or the board of supervisors may require; (b) for repairs and maintenance; (c) for depreciation as hereinafter described; (d) for the payment of interest and sinking funds on the bonds issued for acquisition, construction or extensions; (e) for extensions and improvements; and (f) for a surplus fund." Section 128 provides for the disposition of funds for reconstruction and replacement. Section 129 provides that "If any accumulation in the surplus fund of any utility shall, in any fiscal year, exceed 25 per cent of the total expenditures of such utility for operation, repairs and maintenance for the preceding fiscal year, such excess may be transferred by the board of supervisors to the general fund of the city and county, and such amount shall be deposited by the commission with the treasurer to the credit of such general fund." The sections relate to receipts from utilities. Hetch Hetchy project is one of several utilities operated by the city. The appropriation for expenses was from the particular fund involved; that is, the separate fund of Hetch Hetchy for "operation." Whether the money was to be taken from a "surplus" fund, as provided in the ordinance, or from an "unappropriated balance" as set forth in the appropriation itself, seems to be immaterial. The charter authorizes the payment of traveling expenses, including Pullman charges, and a reasonable amount per diem for necessary expenses, except in the discharge of routine duties. (sec. 219.)

In the Mobley case it was held that an *"investigation"* could not be held to be an "extension". In the Mines case it was held that there was no express authorization in the charter for the "extension," "nor can it be implied from any of the terms thereof." 201 Cal. at page 288, 257 P. at page 537.

The distinction between the present case and that principally relied upon by appellant is that in the Mines case the expenditure was for the purpose of "carrying on a campaign for the purpose of influencing the voters" (201 Cal. at page 287, 257 P. at page 537) in favor of an "extension." The court specifically differentiated between the operation or extension of a municipal public utility and "the raising of the money to extend said system." 201 Cal. at page 282, 257 P. at page 535.

[4] In the present case the money was not allocated for the purpose of extending the system under the circumstances of the

Mines case, or to investigate the desirability of a purchase as in the Mobley case. The purpose here was to continue a going business by seeking the approval of Congress to the continuance of a contract under which the municipality was operating with a private concern. The legality or illegality of that particular contract is not involved on this appeal. There is no evidence in the record disclosing a dishonest intention on the part of the municipality. Mahoney v. City and County of San Francisco, supra; Mines v. Del Valle, supra. The vital question is, Under the implied provisions of the charter, may the action of the board of supervisors in appropriating the money as part of operating expenses be legally authorized? Mines v. Del Valle, supra.

[5, 6] "Operating expenses" usually cover physical maintenance, and may include administration, labor, interest, taxes, rent, insurance, claims, litigation expenses, etc., depending upon how the phrase is used in a particular case. Words and Phrases, Perm.Ed., vol. 29, p. 555 et seq.; 46 Corpus Juris, p. 1112, § 5. When the expenses, as in the present case, are under the control of a governmental agency, they may include such as are necessary or required by the governing body to promote or maintain before legislative bodies the interest of the utility. The term "operating expenses" as used in the San Francisco charter is not confined to maintenance, but expressly refers to reserve funds, including pensions, accident compensation, etc. The power of a board of supervisors to pass an ordinance, or the power of a board or commission to adopt reasonable rules to make effective the purpose of the establishment of the commission under an express grant may sometimes be implied in the absence of legislative prohibition. California Drive-in Restaurant Ass'n v. Clark, supra; Bank of Italy v. Johnson, 200 Cal. 1, 251 P. 784; Crawford v. Imperial Irrigation Dist., supra.

The opinion in O'Connell v. City and County of San Francisco, 204 Cal. 1, 284 P. 655, 660, decided subsequent to the Crawford and Mines cases, does not set forth the facts of the case but the record on appeal discloses it to have been a suit in equity to compel the return of money paid by the city to a supervisor who had advanced the expenses of the mayor, several attorneys, engineers and his own "to, and in, and returning from Washington, D. C." for the purpose of persuading the Secretary of the Interior to approve a written contract of sale to a private corporation of products of the Hetch Hetchy Project. By ordinance the board of supervisors had authorized the payment from the "Hetch Hetchy Operative Revenue Fund." The complaint alleged that there was no such fund out of which the demand could lawfully be paid. The charter in effect at that time used the term "operating expenses" and "reserve fund." A general demurrer to the complaint was sustained. On appeal the Supreme Court evidently did not consider the Mines opinion applicable to the facts in the O'Connell case, and filed the following opinion quoted in its entirety: "Upon a careful examination of the record herein, we are satisfied that the plaintiff's complaint failed to state a cause of action, that the demurrer thereto was properly sustained, and that the judgment in favor of the defendants thereon was correctly given and made, and that this appeal is without merit."

[7, 8] In conclusion it may be said that the record does not show that the visit to Washington was made in bad faith. It was a matter for the board to determine, without interference from a court, whether the purpose was necessary and in good faith. The funds expended are legally a charge against the municipality. In City and County of San Francisco v. Boyd, 17 Cal. 2d 606, at pages 617, 618, 110 P.2d 1036, at page 1042, in considering the power of the board of supervisors it was held, assuming the purpose to be proper, "that 'the enumeration of some powers does not exclude the exercise of powers not enumerated except as limited by the charter and the Constitution' (West Coast Advertising Co. v. [City and County of] San Francisco, 14 Cal.2d 516, 523, 95 P.2d 138, 143); that where a charter is silent a city may exercise powers conferred upon it by general law provided such general powers are not inconsistent with those granted by the charter; if no restrictions or limitations are found in the charter, the power of the city in municipal affairs is full and complete." We find no such limitation or restriction in this case. It is not the function of this court "to interfere with such determination." City and County of San Francisco v. Boyd, supra, 17 Cal.2d at page 614, 110 P.2d at page 1041.

The judgment is affirmed.

KNIGHT, J., concurs.

PETERS, Presiding Justice.

I dissent. I am of the opinion that the charter of the City and County of San Francisco expressly prohibits the expenditure of moneys from the Hetch Hetchy fund for the purposes here involved.

The basic facts are as follows: On December 1, 1941, the Board of Supervisors purported by ordinance to appropriate $10,000 out of the "unappropriated balance in the Hetch Hetchy Power Division" to provide funds to defray the expenses of the mayor, city attorney, representatives of the public utilities commission and two members of the board of supervisors for a trip to Washington, D. C., so that such persons could appear before a Congressional committee to urge the adoption of an amendment to the so-called Raker Act, which amendment was deemed vital to the interests of the city by a majority of the board. The proposed amendment would have authorized the utility to dispose of its power in a manner prohibited by existing law. The sole question involved is whether the board of supervisors had power to appropriate money from *that* fund for *that* purpose.

I agree with the majority opinion in so far as it holds that where a charter does not prohibit or expressly permits such expenditures that such expenditures do not violate public policy. There can be no doubt that under such circumstances governmental agencies may properly send their representatives to Washington, D. C., to appear before Congressional committees to urge, in a proper manner, the adoption or defeat of legislation which the governing body deems necessary for the protection of the governmental agency involved. In my opinion there can be no reasonable doubt but that the City of San Francisco lawfully could have appropriated money from its general fund for this purpose. The real question here presented is not whether the challenged power would exist in the absence of express prohibition, but whether the charter of San Francisco prohibits the use of Hetch Hetchy funds for the purpose here under discussion. This is purely a question of interpretation. If the people of San Francisco, in an attempt to prevent dissipation of the utility's funds, have seen fit to rigidly prohibit the expenditure of the utility's funds except for certain designated purposes, and if the purpose here involved does not fall within the permitted categories, the Board of Supervisors simply lacks power to expend the money for the challenged purpose. In my opinion, a reading of the pertinent provisions of the charter demonstrates to a certainty that the charter prohibits appropriations from the Hetch Hetchy fund for the purpose here involved.

The applicable sections of the charter are quoted in the majority opinion, and need not be again quoted in their entirety in this dissent. Section 127 is the basic section. It requires all receipts from each utility, of which Hetch Hetchy is one, to be deposited by the public utilities commission in the city and county treasury "and maintained in a separate fund for each such utility." The section then provides that appropriations from such separate funds shall be made for certain designated purposes. Subdivision (a) provides that money may be appropriated from the fund for "operating expenses" and certain other expenses not here involved. Subdivisions (b), (c), (d) and (e) provide for appropriations from that fund for certain other specific purposes not here involved, and subdivision (f) provides "for a surplus fund." Section 129 provides that when the surplus fund reaches a certain size a portion thereof shall be transferred to the general fund. The majority opinion, after holding that the purpose here involved is a proper public purpose, holds that, under the power to appropriate money from the fund for "operating expenses," the board has power to appropriate money for the purpose of sending representatives of the commission and of the city and county to Washington to urge the adoption of the measure then under consideration.

The basic theory of the charter is that funds earned by each utility shall be kept in a separate fund, and that no money shall be taken therefrom except for the purposes specified. The funds of the utility are not to be used to pay the expenses of the city and county generally, nor are such funds to be dissipated because, forsooth, the majority of the board of supervisors decide that the expenditure is reasonably necessary for the protection of the city and county or of the utility. If the phrase "operating expenses" is to be "interpreted" into a general catch-all that will authorize all expenditures deemed necessary by a majority of the board to protect the utility, the entire protection of the utility's funds set up by the charter will be lost.

The precise problem here involved has already been passed upon by the Supreme Court on at least two occasions. In both cases the decisions were adverse to respondents. Mines v. Del Valle, 201 Cal. 273, 257 P. 530, 534, is the leading case. That case involved the interpretation of the charter of the City of Los Angeles. That charter conferred upon the board of public service commissioners power "to construct, operate, maintain and extend" power plants; required the funds of the utility to be deposited in the city treasury in a separate fund, and provided that such moneys could be expended, among other things, "For the necessary expense of conducting, operating and maintaining, and extending the business of said department pertaining to electric power, of the electric power works, plants, systems and equipments and of making all current and ordinary extensions, betterments and repairs." The city operated a public utility that supplied electricity to some of its inhabitants, but the plant was too small to supply all the electric energy needed, and a considerable quantity of electric energy was purchased from a competing company. The city council determined to submit to the electors of the city a bond issue for the purpose of securing money to extend the system. The bond issue was contested. The governing board of the utility determined that the opponents of the measure were circulating (201 Cal. at page 278, 257 P. at page 533) "misleading, deceptive, and untruthful reports against said bonds * * * in the form of circulars, newspaper articles, and advertisements." The board thereupon expended from the utility's funds some $12,000 in payment of claims for the cost of advertising the merits of the bond issue in newspapers, and for the cost of cards, banners, windshield stickers, handbills, postal cards, etc. This was done in an attempt to urge the voters to approve the bond issue and to offset what the board believed was the misleading and untruthful reports of the opponents of the issue. A taxpayer challenged these payments. The defense of the city was that the extension of the electric system was necessary to the best interests of the city; that the opponents were circulating false reports in an attempt to defeat the bond issue; that in order to inform the voters of the merits of the proposal it was necessary to incur the expenditures. The trial court granted the taxpayer judgment on the pleadings, holding that such expenditures from the utility's funds could not be justified under the power to "extend" the system. It was urged that the power to extend the system included the power to do all things reasonably necessary to execute that power. The court held (201 Cal. at page 282, 257 P. at page 535) that the "vice of this argument is in assuming that the raising of the necessary funds is any part of the power to extend said electrical system. We may all concede that the system cannot be extended without funds with which to carry on such extension. But the raising of the money to extend said system is one thing and the extension of it is an entirely different and distinct power. The provisions of the charter giving to the board of public service commissioners power to extend the electrical plants and works of said city and to expend the funds in the power fund for the purpose of extending said public utility in our opinion refer simply to the physical management of the same, and cannot be enlarged to include another and distinct power, that of raising money either directly or indirectly for the purpose of * * * extending the business" of the utility. The court then held that the expenditures could not be justified by the argument that they were necessary to correct the misinformation disseminated by the opponents of the bond issue. The problem was purely one of construing the provisions of the charter. At page 288 of 201 Cal., page 537 of 257 P., it is stated: "It is sufficient to show that the authority claimed by the board of public service commissioners to make such expenditures was not given to them by any express provisions of the charter, nor can it be implied from any of the terms thereof. This being so, neither said board nor this court nor any other court can invest said board with the authority denied it by the charter, no matter how desirable or necessary it may be made to appear that said board should be invested with such authority."

The other case in which the precise question here involved has been decided adversely to the position taken in the majority opinion is Mobley v. Board of Public Works, 44 Cal.App. 167, 186 P. 412. That case involved the old charter of San Francisco under which the board of supervisors were authorized to make appropriations from the receipts of a public utility for the purpose of "extensions and improvements." The city operated a municipal railway system. The board sought to appropriate from the municipal railway fund a sum of money to be expended in investigating the availability of a competing private railway for purchase by the city. The District Court of Appeal affirmed a decision in favor of a taxpayer who had brought an action to enjoin the expenditure. The Supreme Court, in denying a hearing, stated (44 Cal.App. 167, at page 173, 186 P. at page 415): "Without regard to any other question discussed in the opinion of the district court of appeal, we are satisfied that the charter of San Francisco, as now written, does not authorize the payment of money from the funds of the municipal railway system for the purpose of investigating the condition and availability of a part or the whole of another street railway with a view to its purchase. The purposes for which expenditures from such fund can be made are carefully specified in section 16, article 12, of the charter, which, we think, excludes any such expenditure as here proposed. Such an *investigation* may not fairly be held to constitute an 'extension or improvement' of the municipal system."

These cases are direct and controlling authority on the issue presented in the instant case. In the Mines case, supra, the Supreme Court held that power to expend money to extend the utility did not include the power to expend money to induce the electorate to extend the utility by approving a bond issue. In the Mobley case it was held that power to expend money for extensions and improvements did not include the power to expend money for the purpose of investigating the merits of a proposed extension. In our case, the power to expend money for "operating expenses" cannot be interpreted to mean that the board has power to expend the utility's funds to induce The Congress to extend the utility by approving an amendment to the Raker Act so as to permit the utility to extend its system by disposing of its electric energy in a manner then prohibited.

The Mines and Mobley cases, supra, constitute binding and conclusive adjudications on the precise point here involved. If the power to extend the system does not include the power to expend money to advocate the extension, or, if the power to make "extensions and improvements" does not include the power to expend money to investigate the propriety of an extension, how can the power to expend money for "operating expenses" be interpreted to include the power to advocate an extension of the system? It must be remembered that the purpose of the committee was to advocate a specific amendment to the Raker Act by which the utility would be permitted to operate in a manner then prohibited by federal law. That is just as surely an attempt to "extend" the system as would be the purchase of a competing utility. It makes no difference legally that the utility here had already illegally "extended" its system by entering into the prohibited contract. Certainly there can be no difference so far as the question of power is concerned between seeking approval of an extension in the first instance, and seeking ratification of such extension, where the extension was illegal when made, after it becomes a completed fact. The theory of the two cases under discussion was simply that the charter provisions there under consideration did not authorize such expenditures.

The majority opinion apparently holds that there is some distinction between an attempt to convince the voters of the propriety of an extension, and an attempt to convince the legislature or one of its committees of the propriety of such extension. In the Mines case, supra, the desired extension had to be approved by the voters. In the present case approval for the desired extension had to be secured from The Congress. Certainly if expenditures to convince the voters, the repository of legislative power, was improper, expenditures to convince a Congressional committee are equally improper.

The majority opinion cites Crawford v. Imperial Irrigation District, 200 Cal. 318, 253 P. 726, in support of its conclusions, and implies that in some way that case qualifies the holding of the Mines case. All that the Crawford case held was that the employment of persons to influence legislation, in a proper way, is not against public policy, and that there was no limitation in the statutes regulating irrigation districts which prohibited the expenditure of money for this purpose. With that holding I heartily agree. The point is that in the present case the charter prohibts such expenditures from this fund.

The majority place considerable reliance upon the decision in O'Connell v. City and County of San Francisco, 204 Cal. 1, 284 P. 655. A reading of that opinion discloses that it is not authority for any rule of law. That opinion is five and one-half lines long. It simply holds that the plaintiff's complaint failed to state a cause of action, and that the demurrer thereto was properly sustained. What the complaint alleged is not disclosed, nor are we told why the contents of the undisclosed allegations were not sufficient. That case is not authority for any point of law. 7 Cal.Jur. p. 641, § 46. The opinion cannot be bolstered by a reference to the record. There were many reasons disclosed in the record why the complaint therein may not have stated a cause of action, and this court is not entitled to engage in conjecture, surmise or guess as to the basis of that opinion. We know that the Supreme Court in that case did not mention the Mines or Mobley cases, supra, and we certainly are entitled to believe that that court did not intend, in such cavalier fashion, to overrule those cases.

In my opinion, the record demonstrating that the proposed expenditures are prohibited, the judgment should be reversed.

Hearing denied; EDMONDS, CARTER, and TRAYNOR, JJ., dissenting.

62 Cal.App.2d 249

In re EVANS' ESTATE.

MOSS v. FRY.

Civ. No. 12492.

District Court of Appeal, First District, Division 1, California.

Jan. 12, 1944.

Hearing Denied March 6, 1944.

1. Courts 🔑202(4)

Unless order of probate court involving disposition of property is void on its face, a petition to set it aside after it has become final may not be entertained upon a collateral attack.

2. Courts 🔑202(4)

The presumption as to validity of final orders and decrees in probate proceedings, such as order for settling an account, applies as in the case of orders of a court of general jurisdiction.

3. Courts 🔑198

Jurisdiction of probate court continues until final discharge of one directed to make effective its orders, and until such discharge the court retains jurisdiction for purpose of compelling the execution of its orders.

4. Courts 🔑200¼

A probate court has no general equity jurisdiction, but it has power to apply equitable principles in carrying out its orders.

5. Trusts 🔑331

The probate court has power to surcharge trustee on supplemental accounts made after a decree settling a final account, with reference to matters not previously reported.

6. Trusts 🔑331

The settlement of accounts of trustee is not conclusive on omitted matters, and they may be surcharged in subsequent accounts. Probate Code, §§ 1020, 1120.

7. Trusts 🔑331

Former decrees settling accounts of trustee were not res judicata as to items not actually determined. Probate Code, §§ 1020, 1120.

8. Trusts 🔑289

In discharging a trust, a trustee must account for all moneys received and disbursed. Probate Code, §§ 1020, 1120.

9. Trusts 🔑331

The administration of a trust in probate is not separable in parts to the extent that an incomplete final account is res judicata against a subsequent or supplemental account, and in such a situation the probate court is not destitute of power, but it may use the equitable and legal authority in determining rights of parties with reference to concealed or nonadjudicated matters.

10. Trusts 🔑182

The mingling of trust property with property of others or with that of trustee is a breach of trust.

11. Trusts 🔑325

Evidence sustained finding rejecting contention that handling by trustee of securities of estate subsequent to approval of trustee's first and second accounts was by virtue of a personal contract with beneficiary, where trustee had never been discharged and dealings took place while trust relationship existed.

12. Trusts ⚿331

Where probate court allowed trustee's accounts, the last of which purported to be final account, but trustee had concealed or misrepresented certain matters and after a period of years, and while he was still trustee, filed a supplemental account, probate court had jurisdiction to surcharge the trustee.

13. Trusts ⚿327

The probate court in determining extent of individual liability of trustee may not render a personal money judgment against him on which execution may be had.

14. Trusts ⚿327

A probate decree determining individual liability of trustee may be enforced by appropriate means, as by contempt if trustee is able to pay or by an action at law based on the probate decree. Probate Code, § 1021.

◆

Appeal from Superior Court, San Francisco County; I. L. Harris, Judge.

Proceedings in the matter of the estate of Eliza Italia Evans also known as E. I. Evans, deceased, wherein Italia Evans Moss filed a petition for a further accounting by H. Ray Fry, trustee. During the pendency of the proceeding H. Ray Fry died, and Eva V. Fry was substituted for him. From a decree surcharging the account of the trustee, Eva V. Fry, substituted for H. Ray Fry, deceased, appeals.

Affirmed.

R. V. Bressani, of San Jose (Robert E. Hayes, of San Jose, of counsel), for appellant.

Cooley, Crowley & Supple and Leighton M. Bledsoe, all of San Francisco, for respondent.

WARD, Justice.

This is an appeal from a decree in probate in the Estate of Eliza Italia Evans, deceased, by which the account of H. Ray Fry, trustee of a trust created by her will, was surcharged the sum of $7,171.46, with interest, being the value of three promissory notes, the investment in which resulted in a loss to the estate.

By her will Miss Evans devised and bequeathed her estate in trust for the benefit of Oliver Fairfield Evans, her brother, during his lifetime, the residue of the property to be paid upon his death to Italia Evans Moss, his daughter.

Fry, a practicing attorney, had been during the lifetime of the deceased her attorney and financial adviser, negotiating loans for her and attending to the collection of the interest and principal thereon. The notes so received constituted the bulk of her estate.

The three notes surcharged to the account of the trustee are referred to as the Ruge, Rogan and Pearson notes, respectively. The Ruge note was for the sum of $1,800. It was executed during the lifetime of the deceased by Walter Ruge and Alva Ruge, and was payable to Geraldine Helbush, Fry's secretary. This note and three others, also to Geraldine Helbush, were given for loans to the Ruges, negotiated by Fry, from funds belonging to Miss Evans and other of his clients. They aggregated in all the sum of $6,265 and were secured in common by a mortgage upon crops to be grown during the years 1927, 1928 and 1929 upon an orchard in Santa Clara county. The land on which the crops were to be grown was covered by a mortgage of $10,000 to the American Trust Company. When the estate of Eliza Italia Evans was distributed to the trustee on November 3, 1928, the 1928 crop had been severed and disposed of. On December 12, 1928, a new crop mortgage was executed by the Ruges to Geraldine Helbush covering crops for the years 1929, 1930 and 1931 to be grown upon the same land.

There is evidence that the trustee used receipts from the sale of the Ruge crops in 1929, 1930 and 1931 to pay interest to the bank and principal and interest to other creditors of the Ruges, thus preferring such creditors to the trust estate; that he commingled funds belonging to the Evans estate with those of clients and friends for whom he acted as both attorney and investment counsel, and made no effort to convert the Ruge investment, the retention of which was never passed upon, authorized or approved by the court. Further, the obligation was never identified as belonging to the Evans estate until February 16, 1932 when the note, which had again been renewed a day or two before, was endorsed, without recourse, by Geraldine Helbush to Miss Evans' niece, the residuary legatee.

The Rogan note evidences a loan made by the trustee from the Evans trust funds. Mrs. Rogan was a client of Fry and the mother of a former employee of his. The note dated January 15, 1929, is for the sum of $1,500; it bears interest at the rate of seven per cent per annum and is secured by a deed of trust, second, however, to that of the Federal Land Bank. No interest has been paid on the note since July 15, 1930, and while the deed of trust is still a lien on the property the note was never renewed and has now become barred by the statute of limitations. It was endorsed by the trustee to the order of Mrs. Moss on February 18, 1931, on the settlement of the trustee's account. The Rogan loan was never authorized or approved by the court, nor did it appear in the account as a junior lien; neither was there any effort made to convert it into an investment suitable and proper for trust funds.

The Pearson note became part of the trust in this manner: Among the assets distributed to the trustee were two notes of Eva E. Paul, another client of Fry, aggregating $1,600, bearing interest at seven per cent and secured by a first deed of trust upon a home worth $2,500. In September, 1928, Mrs. Paul had placed in the hands of Fry for the purpose of sale, a note for $3,741, dated March 24, 1926, bearing interest at six per cent, on which there remained an unpaid balance of $2,953.78. The makers of the note were Alfred and Thora Pearson; the note was secured by a deed of trust upon lands in the San Joaquin valley, and was second to a government farm loan. Fry took over this note for the account of the Evans trust estate and another client; $2,600 for the former and the balance for the latter, making payment to Mrs. Paul by discharging her indebtedness of $1,600 to the estate and paying her $1,000 of its funds. In the first account filed by Fry as trustee this transaction appears as follows: He reports the receipt of the sum of $1,600 in "full" payment of the Paul note, and, under the heading of "Disbursements" makes the following statement: "1929, * * * March 4. Loan to Alfred Pearson, secured by deed of trust, note bearing interest at 6%, payable semi-annually, $2,600." By this transaction the trustee exchanged a senior for a junior security which ultimately became valueless.

The trustee filed two accounts, the second purporting to be also a final account and being rendered shortly after the first. Both were duly allowed and settled as being true, just and correct. In them the above assets of the trust were not particularized but under the heading "Assets in hands of trustee," were included in "Promissory notes secured by trust deed or mortgage, $9,028.78," the Ruge, Rogan and Pearson notes being given their face value or the amounts then remaining due upon them.

The beneficiary for life under the trust, Oliver Fairfield Evans, having died shortly before the rendition of the purported second and final account of the trustee, this report and account also contained a petition for distribution to the ultimate beneficiary Italia Evans Moss; and the decree settling this account ordered distribution.

Shortly before, Mrs. Moss, who resided in Indiana, wrote Fry asking what his charge would be for collecting the outstanding notes. He replied that it would be five per cent of the income therefrom collected, to which she agreed, and Fry claimed his subsequent activities to be under this employment. He was never, however, discharged as trustee, and the court found that there was never any valid agreement between him and Mrs. Moss with respect to his handling of the trust estate but that his acts in this regard were performed as trustee under the supervision and jurisdiction of the court.

The securities of the estate other than the three hereinbefore discussed were soon liquidated and the proceeds duly remitted to Mrs. Moss. Some time later Fry advised Mrs. Moss that it was impossible to collect anything further, either principal or interest, although over a period of years he had been assuring her that the loans were safe investments and collectible.

Mrs. Moss on February 6, 1935 filed a petition for a further accounting by the trustee. This petition alleged that he had not distributed all the properties to her and, since his purported final account, had received additional sums of money. The trustee answered, alleging that he held the trust property, not paid over, as agent for the purpose of collection, and at the same time (March 20, 1935) filed an accounting wherein he showed that he had collected and paid over a considerable proportion of the notes owing the trust. He also set forth the three remaining notes which the beneficiary refused to accept. Nothing further was done until November 1935 when Mrs. Moss filed a petition to set aside the two decrees settling the first and second accounts and asked that Fry be charged with the unpaid amounts on the three notes. The petition alleged that Fry carelessly and negligently invested and reinvested trust funds in promissory notes secured by junior liens; that funds of the trust estate had been commingled with his (the trustee's) personal funds and with those of clients; that loans were made of such funds to his clients, and that investments of said trust funds were made in his own name and in the names of his associates and employees; that said investments were worthless, and that such facts were concealed from the court in the accounting. It is further alleged that the facts were not discovered until 1935. To this petition Fry filed a demurrer, pleading among other grounds that the court as a probate court had no jurisdiction of the matter alleged. Petitioner thereupon filed objections to the accounting last rendered, in which she repeated the allegations of her petition of November 1935. The demurrer was overruled and the trustee filed his answer. Upon these pleadings the case went to trial, with the result that the account of the trustee was surcharged in the sum of $7,171.46.

Fry having died during the pendency of the proceedings, Eva V. Fry was substituted for him, and now prosecutes this appeal. Appellant does not contend that the evidence is insufficient to support the findings, but raises questions of jurisdiction, and in her closing brief (filed by new counsel after the death of counsel of record on appeal) states that a personal judgment against Fry was entered, and that the only proper relief under the circumstances of the case would be a judgment imposing a trust upon the estate.

The first question presented is that of jurisdiction. It is contended that the trial court sitting in probate had no jurisdiction to try the question of the trustee's derelictions prior to the date of the order settling final account and decreeing distribution. It was necessary to introduce the history of the various transactions and to connect evidence thereon with evidence of the trustee's conduct following distribution of the estate to Mrs. Moss on February 18, 1931, in order to show his failure to conscientiously and properly administer the trust after such date. Except as a connecting link, the history was not material, but the court was meticulously careful in drawing the findings to charge dereliction of duty based upon conduct after February 18, 1931.

[1, 2] Unless an order of the probate court involving the disposition of property is void on its face, a petition to set it aside after it has become final may not be entertained upon a collateral attack. The presumption as to the validity of final orders and decrees in probate proceedings, such as an order settling an account, applies as in the case of orders of a court of general jurisdiction. Security-First Nat. Bk. v. Superior Court, 1 Cal.2d 749, 37 P.2d 69; Ringwalt v. Bank of America, etc., Ass'n, 3 Cal.2d 680, 45 P.2d 967; Carr v. Bank of America, etc., Ass'n, 11 Cal.2d 366, 79 P.2d 1096, 116 A.L.R. 1282; In re Estate of Richards, 17 Cal.2d 259, 109 P.2d 923; Manning v. Bank of California N. Ass'n, 216 Cal. 629, 15 P.2d 746; McLellan v. McLellan, 17 Cal.2d 552, 110 P.2d 1034.

The rule laid down in Security-First Nat. Bk. v. Superior Court, supra, and other cases cited does not hold that a probate court of limited, or a court of general, jurisdiction does not have authority over matters still pending or not passed upon by a final decree, judgment or order. In the present case the probate court did not set aside or vacate the orders previously entered, nor did the decree herein purport to do so, as contended by the appellant, but merely determined that those orders did not pass upon certain acts and items, and that there was sufficient misfeasance subsequent to their settlement to surcharge the trustee on his supplemental account.

[3] Jurisdiction of the probate court continues until the final discharge of the one directed to make effective its order, and until such discharge the court retains jurisdiction for the purpose of compelling the execution of its order. Estate of Clary, 112 Cal. 292, 44 P. 569; Maloney v. Massachusetts Bonding & Ins. Co., 20 Cal.2d 1, 123 P.2d 449. In Re Estate of Baxter, 15 Cal.2d 166, pages 169, 170, 99 P.2d 276, page 278 where the court refused to receive inventories and accounts, it is said: "We conclude that the court's ruling was proper. If the amended final account, filed pursuant to section 932 of the Probate Code, and the evidence introduced or offered in support thereof, had indicated that certain moneys or property belonging to the Baxter estate were actually in the possession of the representative of Chandler's estate, the Probate Court would undoubtedly have had

jurisdiction, notwithstanding the settlement of any prior account, to receive the report of the administrator to that effect, and to make any appropriate order of settlement and distribution. But such is not the import of the application in the present proceeding. The record does not show, nor do the appellants purport to claim, that Smith, as administrator of Chandler's estate and on behalf of that estate, is reporting as a fact that there is money or property in his possession in the amount alleged which belongs to the Baxter estate." In the present case the property was still in the possession of the trustee.

Appellant in his opening brief admits, at least for the purpose of argument, "that the Court retains jurisdiction over the Trustee after the decree of distribution out of trust to compel the distribution of the trust estate in accordance with the decree, and as an incident to that power, may compel an accounting."

[4-10] A probate court has no general equity jurisdiction, but it has the power to apply equitable principles in carrying out its orders. Security-First Nat. Bk. v. Superior Court, supra. The cases cited by appellant, principally McLaughlin v. Security-First Nat. Bk., 20 Cal.App.2d 602, 67 P.2d 726, and Ormerod v. Security-First Nat. Bk., 21 Cal.App.2d 362, 69 P.2d 469, separate suits in equity seeking to vacate probate decrees, are not in point. In the McLaughlin case, the questions involved were the legality of investments and their merit as such; also that certain participating certificates were void because no permit had been issued by the Corporation Commissioner. Similar facts appear in the Ormerod case, at page 368 of 21 Cal.App.2d, at page 472 of 69 P.2d, where the court said: "In the instant case, it is not claimed the defendant has failed or neglected to account for any item. The charge is that it bought certificates not permitted by law and that since the purchase said certificates have depreciated in value. As we have shown, no fraud is alleged and if, as claimed by the plaintiffs, the certificates purchased by the defendant have depreciated in value, such fact standing alone does not warrant a court of equity in opening, surcharging, or falsifying the accounts under attack." In the present case, with reference to matters not previously reported, the probate court had the power to surcharge a trustee on a supplemental account made after a decree settling a final account. In re Estate of Blake, 157 Cal. 448, 108 P. 287. In Re Estate of Hovland, 38 Cal.App.2d 439, 446, 101 P.2d 500, 503, the court said: "It requires no citation of authority for the statement that orders settling accounts or ordering distribution can only be conclusive as to such items or issues as are included in the account or raised in connection with the petition for partial distribution. The doctrine of res judicata therefore has no application here." The settlement of accounts is not conclusive on omitted matters and these may be surcharged in subsequent accounts. In re Estate of Adams, 131 Cal. 415, 63 P. 838. At any time subsequent to a final settlement of accounts, an heir, devisee or legatee or his assignee, grantee or successor in interest, may, after due notice, file an application for the distribution of the residue of an estate. Probate Code, sec. 1020. When a trust continues after distribution, the probate court retains jurisdiction to determine to whom property shall be delivered and is not concluded by a "decree of distribution, or settling the accounts and passing upon the acts of the trustee." Probate Code, sec. 1120. In Re Estate of Smead, 12 Cal.2d 20, 24, 82 P.2d 182, 183, the court said: "Preliminarily, it should be stated that the court below in hearing and settling the accounts of the testamentary trustee herein was engaged in the exercise of its special and limited probate jurisdiction as distinguished from its general law and equity jurisdiction. Sec. 1120, Probate Code; In re Estate of McLellan, 8 Cal.2d 49, 55, 56, 63 P.2d 1120; Security-First Nat. Bk. v. Superior Court, 1 Cal.2d 749, 753–758, 37 P.2d 69; Thomas v. Superior Court, 17 Cal.App.2d 40, 41, 61 P.2d 496; In re Estate of Smith, 4 Cal.App.2d 548, 552, 41 P.2d 565. In the last cited case wherein this court denied a hearing, it is declared that * * * 'We believe the language employed in the present section (1120) of the Probate Code was intended to broaden the jurisdiction of the probate court so as to give that court jurisdiction over practically all controversies which might arise between the trustees and those claiming to be beneficiaries under the trust.'" In view of the language used in Re Estate of Smith, former decrees are not res judicata as to items not actually determined. In re Estate of Marre, 18 Cal.2d 184, 114 P.2d 586. In discharging a trust a trustee must account for all moneys received and disbursed. Silva v. Santos, 138 Cal. 536, 71 P. 703; Estate of Clary, supra. The administration of a trust in probate is not separable in parts to the extent that an incomplete final account is res judicata against a subsequent or supplemental account. In such a situation the probate court is not lacking or destitute of power; it may use the equitable and legal authority with which, as superior court, it is invested (In re Estate of Dobbins, 36 Cal. App.2d 536, 97 P.2d 1051) in determining the rights of the parties with reference to concealed or non-adjudicated matters. Estate of Clary, supra. The mingling of trust property with the property of others, or with that of the trustee, is a breach of trust. In re Estate of Richmond, 9 Cal. App. 402, 99 P. 554.

The findings are that the trustee commingled funds and that such fact was not disclosed by his accounts; that his retention of funds "has never been passed upon nor authorized nor approved by this Court"; that the renewal of certain notes was a breach of trust; that other clients, co-owners of securities in the trust, were preferred to the trust estate. Specifically, the court found "that respondent Trustee did, subsequent to February 18, 1931, represent to petitioner that the Ruge, Rogan and Pearson loans were safe investments and that they were collectible; that the respondent Trustee did, subsequent to February 18, 1931, discourage petitioner from making any effort to enforce collection of the Ruge, Rogan and Pearson notes and did lull her into a false sense of security with regard to said investments; and did by virtue of his trust and by means of his confidential relationship in divers ways subsequent to February 18, 1931, influence and dissuade the petitioner by false and fraudulent representations from contesting or questioning before the Court any proceedings had or made by said Trustee, and from contesting before this Court the said acts and conduct of said Trustee until more than six months after February 18, 1931." These findings refer to a period subsequent to the filing of the final account, even as late as 1934 when the trustee permitted an action on one of the notes to become barred by the statute of limitations.

It is not necessary to discuss the evidence other than as related herein. The appellant does not attack the findings and impliedly agrees that the evidence is sufficient to support the findings, at least to the extent that "the trustee was guilty of misfeasance."

The problem in this case is not jurisdiction over matters previously determined by decree but with the question of continued jurisdiction over a trustee who concealed or misrepresented certain matters and who, after a period of years and while he was still trustee, filed a supplemental account. The present proceedings continued to be in probate as the trustee had never been discharged.

[11, 12] Appellant contends that the handling by the trustee of the securities of the estate subsequent to the approval of his first and second accounts was by virtue of a personal contract between the beneficiary and himself. The trial court found to the contrary. This finding must be upheld. Their dealings took place while the trust relationship existed. In Smith v. Fidelity & Deposit Co., 130 Cal.App. 45, 56, 19 P.2d 1018, 1023, the court said: "'It would seem that the agreement came within the terms of the statute, which says that all transactions between the trustee and his beneficiary during the existence of a trust are presumed to be entered into by the latter without sufficient consideration and under undue influence.'"

While the petition prays that the two previous accounts be set aside, the order appealed from does not in fact set aside those decrees, but surcharges the trustee on his supplemental account.

[13, 14] The judgment and decree provide that the petition of the trustee for settlement of the supplemental account be denied and that the accounts of H. Ray Fry as trustee be surcharged in the amount of $7,171.46. It is further ordered that the trustee distribute the said sum to petitioner as the beneficiary of the Evans trust. It is also ordered that the estate recover the designated amount from H. Ray Fry individually, but no provision is made for execution against him personally. In Willson v. Security-First Nat. Bk., 21 Cal.2d 705, 712, 134 P.2d 800, 804, the court said: "It is true that the court sitting in probate, although determining the extent of the individual liability of the trustee, may not render a personal money judgment against him upon which execution may be had. In re Estate of McLellan, 8 Cal.2d 49, 63 P.2d 1120; Costa v. Superior Court, 137 Cal. 79, 69 P. 840; In re Estate of Rey, 31 Cal.App.2d 648, 88 P.2d 718. But the probate decree may be enforced by appropriate means, as by contempt if the trustee is able to pay, or by an action at law based on the probate decree, in like manner as an order settling accounts and for final distribution in the estate of a decedent may be made the basis of contempt proceedings or an action at law. 11b Cal.Jur., § 1148, p. 617; see, also, §§ 1310-1312, pp. 818–821, citing cases; § 1021, Prob. Code."

The judgment is affirmed.

PETERS, P. J., and KNIGHT, J., concur.

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GRIER v. FERRANT et al.

Civ. 14150.

District Court of Appeal, Second District, Division 1, California.

Jan. 13, 1944.

Hearing Denied March 6, 1944.

1. Appeal and error 🔑878(4)

On appeal from judgment of dismissal following sustaining of demurrer without leave to amend, respondents could not rely for affirmance on grounds specified in the special demurrer.

2. Carriers 🔑238

A "carrier-passenger relationship" is created when one offering to become a passenger is accepted as passenger after he has placed himself under control of carrier, and ordinarily such relationship is established through circumstances warranting implication that one has offered himself to be transported on a trip about to be made and such offer has been accepted by the other.

See Words and Phrases, Permanent Edition, for all other definitions of "Carrier-Passenger Relationship".

3. Carriers 🔑238

That a passenger should have entered vehicle is not a prerequisite to establishment of "carrier-passenger relationship", which is established when person intending in good faith to become a passenger goes to place designated as site of departure, and by some action carrier indicates acceptance of passenger as a traveler.

4. Carriers 🔑238

If carrier assumes responsibility of conducting a person, who has become a passenger, to point of departure of transporting vehicle, "carrier-passenger relationship" exists during such period.

5. Carriers 🔑239

That a person has not purchased a ticket or given any valuable consideration to carrier is not determinative of existence of relationship of carrier and passenger.

6. Evidence 🔑20(2)

It is common knowledge that taxicab fares cannot be computed and therefore are not collected until termination of the trip.

7. Carriers 🔑245

A complaint, alleging that plaintiff, afflicted with apparent neuro-muscular dystrophy causing him to walk unsteadily, entered waiting room and requested to be conveyed in a taxicab, and carrier directed its agent to escort the plaintiff to taxicab, and that, while walking on slippery sidewalk some distance from taxicab stand, plaintiff fell, stated sufficient facts to establish implication of "carrier-passenger relationship" between taxicab company and plaintiff.

8. Carriers 🔑314(7)

A complaint, which stated sufficient facts to establish that relationship of carrier and passenger existed when plaintiff, while being escorted to taxicab from taxicab company's waiting room, fell on slippery sidewalk, was not subject to general demurrer on ground that allegations regarding fall showed that accident was due to an intervening proximate cause.

9. Carriers 🔑306(1)

A complaint against taxicab company and its liability insurer for injuries to plaintiff, who while being escorted by company's agent from waiting room to taxicab fell on slippery sidewalk, was demurrable as to insurer which was in no way connected with company's activities.

10. Action 🔑50(4)

A taxicab company and its liability insurer were not improperly joined as parties defendant in action for injuries caused by company's negligence, because one action sounded in tort and the other in contract, since whatever liability was incurred by insurer arose out of the tort action. Code Civ.Proc. §§ 379a, 427.

11. Automobiles ⚷89

A municipality may prescribe the nature of security to be given by those operating vehicles for hire upon its streets.

12. Action ⚷50(4)

Where city ordinance required taxicab company to carry liability insurance which inured to benefit of all persons suffering loss, a passenger injured through company's negligence could join insurer as a party defendant with the company. Code Civ.Proc. §§ 379a, 427.

13. Action ⚷50(4)

A liability insurer may be joined as party defendant with carrier whenever policy or municipal ordinance, in compliance with which policy is issued, provides that policy should inure to benefit of the public.

14. Municipal corporations ⚷592(1)

A municipal ordinance permitting joinder of insurer with taxicab company in action for injuries to passenger is not invalid as in conflict with Insurance Code, since regulation of business of operating taxicabs is strictly a municipal affair. St. 1935, p. 716, § 11580; Const. art. 11, § 11.

15. Insurance ⚷133(1)

Section of the Insurance Code relating to actions on liability policies is declarative only of the minimum provisions which must be embodied in public liability policies and is not restrictive of right of insurer to assume by its contract liability for more than the minimum responsibility prescribed by the statute. St.1935, p. 716, § 11580.

DORAN, J., dissenting.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain, Judge.

Action by Stanley Grier against Joe Ferrant, individually, and others, to recover for injuries sustained by plaintiff, who fell on a sidewalk while walking to a taxicab, wherein defendants filed demurrers. From a judgment of dismissal, plaintiff appeals.

Reversed with directions.

Paul J. Quigley, of Los Angeles, for appellant.

Reginald I. Bauder, of Los Angeles, for respondents.

WHITE, Justice.

Plaintiff instituted this action to recover damages for personal injuries allegedly sustained by reason of the negligence and carelessness of defendant Joe Ferrant, his agents, servants and employees. Also joined as a defendant was American Fidelity and Casualty Co., Inc., a corporation, the insurer of defendant Ferrant, who was doing business as Yellow Cab Company in the city of Burbank, Los Angeles County. The liability of such corporate defendant was predicated upon the issuance by it of a policy of insurance to defendant Ferrant pursuant to an ordinance of the city of Burbank. Following the filing of an amended complaint, the defendants each interposed a general and special demurrer thereto, which were sustained by the court without leave to amend. From the judgment of dismissal entered pursuant to the order sustaining both demurrers, plaintiff prosecutes this appeal.

Two counts are contained in the amended complaint, the first of which alleges that in connection with the operation of his taxicab business defendant Ferrant maintained an office and waiting room for the convenience of taxicab patrons; that directly in front of said taxicab office and at the west curb of Olive Street, the city of Burbank had designated a space for the exclusive use of defendant Ferrant in loading and discharging passengers for hire. That during the times mentioned in the amended complaint the space just referred to was vacant and unoccupied by any vehicle. It is then alleged that at the time mentioned and for many years prior thereto plaintiff was afflicted with a physical disability known as neuro-muscular dystrophy, as a result of which he was unsteady in his walk and could only walk a few feet at a time; that plaintiff's condition was obvious, apparent and known to defendant Ferrant and his agents. It is then set forth that on April 3, 1942, at about 11:45 o'clock p. m., plaintiff entered the office and waiting room of defendant Joe Ferrant, requested that he be conveyed in one of defendant's taxicabs to his home located in the city of Burbank. That at said time and place "defendant John Doe, as the agent, servant and employee of defendant Joe Ferrant, doing business as

Yellow Cab Company, and acting in the course and scope of his employment, accepted plaintiff as a passenger for hire and directed the defendant John Doe I to conduct plaintiff from said taxicab waiting room to defendant's taxicab." It is then set forth in the amended complaint that while being conducted by defendant's employee to said taxicab and while walking on a down-grade, wet and slippery sidewalk, to reach said taxicab, the plaintiff fell, thereby sustaining the injuries which gave rise to this action. After charging that the injury and damage to plaintiff was the sole and proximate result of the negligence and carelessness of the defendants, it is alleged that such negligence and carelessness arose from the fact that the defendants failed to provide plaintiff with a taxicab at the place set apart by the city of Burbank as a taxicab stand directly in front of defendant's office and waiting room; that the defendants required plaintiff to walk a distance of some 150 feet or more to a taxicab in order to obtain transportation to his home. That the defendants notwithstanding they had full knowledge of the physical incapacity and limitations of the plaintiff as above set forth, required him to walk a distance of some 150 feet or more to obtain access to the taxicab. That notwithstanding defendants' knowledge of plaintiff's physical disability, defendants failed and neglected to "aid, assist or support the plaintiff in walking to said taxicab upon a down-grade, wet and slippery sidewalk".

The second cause of action was directed against defendant insurance company alone, and by it plaintiff alleged that pursuant to an ordinance which is set forth in the amended complaint only by reference to its number and date of adoption, and which was allegedly in full force and effect at the time of the accident here in question, defendant insurance company had issued a policy of insurance conditioned that defendant Ferrant "shall pay all loss by reason of injury or damage that may result to persons or property from the negligent operation of such taxicabs or for violations of any of the provisions of this ordinance or the laws of the state of California". It is then alleged that pursuant to the terms of such ordinance it was provided in such policy that the same "shall run to the city of Burbank and shall inure by its terms to the benefit of any and all persons suffering loss or damage covered thereunder".

[1] Respondents concede that since the appeal is one from a judgment following the sustaining of a demurrer without leave to amend they cannot rely for an affirmance of the judgment on the grounds specified in the special demurrer for the reason, as stated by respondent: "It is conceded that it would constitute an abuse of discretion—at least at a stage as early as the first amended complaint—to refuse a party leave to amend defects in a complaint which are the subject of special demurrer only." In their efforts to secure an affirmance of the judgment respondents rely exclusively on the proposition that the amended complaint fails to state a cause of action against either defendant.

[2] The initial question presented for determination is whether under the allegations of the amended complaint the relationship of carrier and passenger was established and existed between the plaintiff and defendant Joe Ferrant. This relationship is created when one offers to become a passenger, and is accepted as a passenger after he has placed himself under the control of the carrier. Ordinarily, the existence of such relationship is established through circumstances which warrant an implication that the one has offered himself to be transported on a trip about to be made and such offer has been accepted by the other. 10 Am.Jur. 27, sec. 955.

[3-8] That a passenger should have actually entered the vehicle is not a necessary prerequisite to the establishment of the relation of carrier and passenger. Such relationship is established when a person who intends in good faith to become a passenger goes to a depot, waiting room or other place designated as the site of departure, and by some action taken by the carrier, the latter indicates acceptance of the passenger as a traveller. Sanchez v. Pacific Auto Stages, 116 Cal.App. 392, 396, 2 P.2d 845. In the case just cited it is also held that if a carrier assumes the responsibility of conducting a person, who has become a passenger, to the point of departure of the transporting vehicle, then the relation of passenger and carrier exists during such period. We are persuaded that the allegations of the amended complaint present a situation wherein the plaintiff, acting in good faith, offered himself as a passenger and defendant Joe Ferrant, the carrier, accepted plaintiff as such passenger and undertook to escort and

conduct him to the point where defendant's taxicab was waiting. The amended complaint charges that notwithstanding plaintiff's physical infirmities, which were allegedly apparent from observation and known to defendant Ferrant, the latter, instead of moving his taxicab into the space reserved therefor directly in front of the waiting room, chose to conduct plaintiff from such waiting room along a downgrade city sidewalk which had become wet and slippery by reason of falling rain, to a point some 150 feet away from the taxicab office and waiting room, without rendering to plaintiff such assistance as would appear to a reasonably prudent and careful person, as reasonably necessary for the safe conduct of one in plaintiff's apparent and known physical condition. While it is true the amended complaint does not allege that plaintiff had purchased a ticket or given any good or valuable consideration to the carrier, that fact of itself is not determinative of the existence of the relationship of carrier and passenger. It is common knowledge that taxicab fares cannot be computed and therefore are not collected until the termination of the trip or journey. Neither do we think the instant case is comparable to the factual situation existing in Northrup v. Pacific Electric R. Co., 8 Cal.App.2d 189, 47 P.2d 365; Choquette v. Key System, etc., Co., 118 Cal.App. 643, 5 P.2d 921, and other cases cited by respondents, all of which have to do with the duty of street car companies toward persons who are waiting to board a street car or have alighted from the same, or are injured prior to boarding the car or while walking away from the car after alighting therefrom. In none of the cited cases did any agent of the carrier undertake to escort or conduct the passenger to or from the street car. In other words, the factual conditions prevailing in such cases were not such as to warrant the implication that at the time of the injury the relationship of carrier and passenger actually existed. We find no merit in defendant's contention that the amended complaint by alleging that the plaintiff fell on the down-grade of a wet and slippery sidewalk "clearly shows that plaintiff's accident was due to an intervening proximate cause". If the amended complaint, as we have held it did, stated sufficient facts to establish the implication that the relationship of carrier and passenger existed between plaintiff and defendant Ferrant then the pleading was immune from a general demurrer. As to Count I, the general demurrer of defendant Joe Ferrant should have been overruled.

[9] Insofar as Count I is concerned, we are constrained to hold that the demurrer of defendant insurance company was properly sustained. Clearly the insurance company did not participate in the actual operation of the taxicab business and such participation therein is not alleged in the amended complaint. Without in any way connecting the insurance company with the activities of its co-defendant, Count I of the amended complaint charges that plaintiff's injuries were occasioned by the negligence and carelessness of both defendants. Manifestly, the facts as alleged in Count I fail to show any actionable negligence on the part of defendant insurance company.

Coming now to a consideration of Count II, which is directed against defendant insurance company alone, we find it is predicated solely upon the latter's claimed public liability under its policy of insurance by reason of the happening of the accident. Neither the insurance policy in question nor the ordinance pursuant to which it was issued is set out with particularity in the amended complaint. Assuming, as respondent insurance company does in its brief, that the policy complied in its language or wording with the provisions of the city ordinance, the amended complaint reveals that the ordinance and the policy provided for (a) before any permit can be issued to operate cabs the owner must file, and keep in full force and effect, a policy of insurance; (b) the policy of insurance must be approved by the City Council; (c) the policy must be with a solvent and responsible company authorized to do business in the State of California; (d) it must be in the sum of $20,000 and must contain a condition that the taxicab operator shall pay all losses resulting from the negligent operation of the taxicabs; (e) recovery in each instance is limited to $10,000 for the injury or death of one person; (f) the policy runs to the City of Burbank and inures by its terms to the benefit of all persons suffering loss or damage thereunder.

[10] Respondent insurance company asserts that the demurrer was properly sustained as to Count II for the reason that

the provisions of the Burbank city ordinance do not authorize the joinder of an insurer with the insured in an action for personal injuries.

Section 379a of the Code of Civil Procedure provides that: "All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative; and judgments may be given against such one or more of the defendants as may be found to be liable, according to their respective liabilities."

We are not in accord with respondents' contention that section 427 of the Code of Civil Procedure prohibits a joinder of these two causes of action because one sounds in tort and the other in contract. The cited section specifically provides that several causes of action may be united in the same complaint where they arise "out of the same transaction, or transactions connected with the same subject of the action * * *"; and also that more than one cause of action may be united in the same complaint where they all arise out of "injuries to person". Whatever liability was incurred by respondent insurance company under its contract of insurance arose out of the tort action, instituted to recover for personal injuries allegedly sustained by plaintiff. It was the injuries to plaintiff's person that gave rise to the liability and obligation, if any, of respondent insurance company.

[11, 12] While conceding that a municipality has the right within reasonable limits to prescribe the nature of the security to be given by those operating vehicles for hire upon its public streets (Kruger v. California Highway Indemnity Exchange, 201 Cal. 672, 682, 258 P. 602), respondent insurance company nevertheless insists that though it be held that it was familiar with the terms of said ordinance and expressly contracted in reference thereto, that there is no provision in such ordinance which in any way binds the insurer or permits of its joinder as a defendant in a lawsuit arising out of personal injuries occasioned through the alleged negligence of the insured, unless and until a judgment has been obtained against the insured and the latter fails, neglects or refuses to satisfy such judgment. Contrary to respondents' claim in this regard, we are persuaded that ti is firmly established in our law that under provisions such as are contained in the municipal ordinance now under consideration, plaintiff was authorized to join respondent insurance company as a party defedant with its insured. Milliron v. Dittman, 180 Cal. 443, 181 P. 779; Kruger v. California Highway Indemnity Exchange, supra.

[13] It is conceded that the amended complaint alleges that the policy of insurance with which we are here concerned shall, pursuant to the terms of the ordinance, "inure by its terms to the benefit of any and all persons suffering loss or damage covered thereunder". The cases we have cited establish as the law that the insurance carrier may be joined as a party defendant whenever the policy itself or the municipal ordinance, in compliance with which the policy is issued, provides that the policy should inure to the benefit of the public, Fraher v. Eisenmann, 94 Cal. App. 48, 51, 52, 270 P. 704, and cases therein cited.

In view of the fact that the amended complaint herein alleged that the municipal ordinance under which the policy was issued prescribed that the same inured to the benefit of the public, the instant case comes squarely within the rule announced in the cases just cited, and respondent insurance company's demurrer to the second cause of action should not have been sustained without leave to amend, upon the ground that a cause of action was not therein stated.

[14, 15] Respondent insurance company's claim that any provision of the municipal ordinance permitting, either expressly or by implication, the joinder of the insurance company with the taxicab company in a suit for personal injuries, is invalid and in conflict with section 11580 of the Insurance Code of California, St. 1935, p. 716, is without merit. Regulation by ordinance of the business of operating taxicabs upon the streets of a municipality is strictly a municipal affair, the regulation of which by municipalities is expressly authorized by section 11, Article XI of the constitution of this state. True, such regulations may not contravene or conflict with general laws of the state, but we view section 11580 of the Insurance Code as declarative only of the minimum provisions which must be embodied in public liability insurance policies, and not as restrictive of the right of an insurance company to assume by its contract, liability for more

than the minimum responsibility prescribed by the statute.

For the foregoing reasons the judgment is reversed with directions to the court below to overrule the demurrer of defendant Joe Ferrant as to Count I and also to overrule the demurrer of defendant insurance company as to Count II. Appellant to recover costs on appeal.

YORK, P. J., concurs.

DORAN, J., dissents.

Hearing denied; EDMONDS, TRAYNOR, and SCHAUER, JJ., dissenting.

62 Cal.App.2d 224

CITY OF SAN JOSE v. WILCOX et al. (FRANKEL, Intervener).

Civ. 12568.

District Court of Appeal, First District, Division 2, California.

Jan. 7, 1944.

1. Appeal and error 🔑907(1)

When the record is silent, it will be presumed that what ought to have been done was rightly done.

2. Appeal and error 🔑914(1)

On appeal from orders denying petition for leave to intervene and file an answer and cross-complaint on ground that summons had not been served and returned within three years after commencement of the action, reviewing court was authorized to assume that the records and files showed that no summons issued, was served or was returned, where record was silent on such issues. Code Civ.Proc. § 581a.

3. Dismissal and nonsuit 🔑45

The statute relating to dismissal of actions for lack of prosecution is mandatory. Code Civ.Proc. § 581a, Pol.Code, § 325.

4. Eminent domain 🔑178

Where summons had not issued, served, or returned within three years after commencement of city's condemnation proceeding and defendant property owners had been paid damages pursuant to stipulations, petition by owner of a parcel which did not touch either of defendants' parcels for leave to intervene and file an answer and cross-complaint was properly denied. Code Civ.Proc. § 581a.

5. Statutes 🔑231

Code Civ.Proc. § 583, relating to dismissal of actions, and section 581a, relating to dismissal for lack of prosecution, are not inconsistent. Code Civ.Proc. §§ 581a, 583.

◆

Appeal from Superior Court, Santa Clara County; Wm. F. James, Judge.

Condemnation proceeding by the City of San Jose against I. M. Wilcox and others. Martin Frankel filed a petition asking to be permitted to intervene and file an answer and cross-complaint. From orders denying his request and denying a rehearing, intervener appeals.

Affirmed.

James F. Boccardo, of San Jose, for appellant.

Robert E. Cassin, City Atty., of San Jose (Archer Bowden, of San Jose, of counsel), for respondent.

STURTEVANT, Justice.

The petitioner, Martin Frankel, filed a petition asking that he be permitted to intervene and file an answer and cross-complaint. The request was denied. He then asked a rehearing. Later his request was again denied. From said orders he has appealed.

Some time prior to the 16th day of September, 1931, the plaintiff had granted to the Southern Pacific Company the right to construct a one track railroad over and along certain streets. By the terms of that franchise the railroad would cross the Alameda, one of the streets located in San Jose. That franchise provided that a subway should be constructed in The Alameda under said railroad track and plaintiff should pay for all damage to property except railroad property. To exercise such right the plaintiff filed a complaint seeking to condemn two parcels of land in San Jose. One parcel was owned by Mr. I. M. Wilcox. It was located on the northeast corner of The Alameda and White Street. The other parcel was owned by Elizabeth and Ellen Morrison. It was located on the west side of Stockton Avenue. The action was commenced September 16, 1931, and the City of San Jose was then given an order to take and did take immediate possession of the properties described in the complaint. Mr. Wilcox and the plaintiff executed a stipulation authorizing the plaintiff to take judgment and fixing the amount of damages to be paid to Mr. Wilcox. That stipulation was executed July 19, 1932. A similar stipulation was executed by the other owners at about the same time. All owners have been paid pursuant to said stipulations; but the petitioner expressly affirms that no summons was returned in the condemnation proceeding. The petitioner is not interested in either of said parcels. April 26, 1932, the construction of the subway was completed. In January, 1936, Louis Frankel bought another parcel. On December 23, 1938, he conveyed it to his son Martin, who is the petitioner herein. Said parcel is located on the north line of West Santa Clara Street and does not touch either of the parcels hereinabove described.

On February 18, 1937, Louis Frankel and Hattie Frankel commenced an action against this plaintiff and others to recover damages. (No. 48851 Records of Santa Clara County.) The allegations of the complaint in that action show that it was commenced for the purpose of recovering the same damages which the petitioner seeks to recover under the answer and cross-complaint which he sought permission to file in this action.

[1, 2] Objecting to the petition herein the plaintiff filed "An Answer of City of San Jose to Petition and Motion of Martin Frankel to Intervene." Therein it alleged, in subdivision 1 of paragraph 4, as follows: "1. That no further proceedings shall be had in said action, under the provisions of Section 581a of the Code of Civil Procedure, since the summons was not served, and return thereon made, within three years after the commencement of said action."

The plaintiff closed its pleading with a paragraph in which it alleged: "Upon the hearing of said petition to intervene and said motion, and in support of the foregoing answer, plaintiff offers in evidence all the papers, records and proceedings in the above entitled action, and in the action of Frankel v. City of San Jose above mentioned and such further oral and documentary evidence as may be deemed proper." What papers were in fact called to the attention of the trial court the record does not disclose. The trial court denied the motion. If such denial was supported by any one of the objections made by the plaintiff, the order of the trial court may not be disturbed. When the record is silent it will be presumed that what ought to have been done was not only done but rightly done. 2 Cal.Jur. p. 856. Therefore we may assume that when the records and files in the instant action were produced in evidence they showed that no summons issued, no summons was served, and no summons was returned. And in his brief the petitioner affirms that no summons was returned.

As in our judgment the objection stated in division one of paragraph 4 of said answer is well founded, it will not be necessary for us to discuss any of the other objections. Said division is as follows: "That no further proceedings shall be had in said action, under the provisions of Section 581a of the Code of Civil Procedure, since the summons was not served, and return thereon made, within three years after the commencement of said action."

[3, 4] In 1889 the Code of Civil Procedure was amended by adding subdivision 7 to section 581 thereof. As then enacted said subdivision provided: "And no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the Court in which the same shall have been commenced on its own motion, or on the motion of any party or not, unless summons shall have been issued within one year, and served, and return thereon made within three years after the commencement of said action, or unless appearance has been made by the defendant or defendants therein within said three years." In Vrooman v. Li Po Tai, 113 Cal. 302, on page 304, 45 P. 470, on page 471, the court, Mr. Justice Temple writing the opinion, quoted the statute and said: "'And no action heretofore or hereafter commenced shall be further prosecuted, and no further proceedings shall be had therein, and all actions heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced, on its own motion, or on motion of any party interested therein, whether named in the complaint as a party or not, unless summons shall have been issued within one year and served, and return thereon made within three years after the commencement of said action, or un-

less appearance has been made by the defendant or defendants therein within said three years.' This provision is very sweeping, and is expressly made applicable to pending suits. It is mandatory; otherwise it would have no force at all. The courts were already authorized and required to dismiss suits upon motion when there had been culpable failure to prosecute. To hold this statute directory would, therefore, be to repeal it. Then the language could hardly indicate more plainly the intent that it shall be mandatory. Besides being absolute in form it contains a prohibitory clause,—'and no further proceedings shall be had therein.' Such a negative cannot be, and never has been, considered as directory merely." That decision was rendered in 1896. Since that date said statute has been amended and revised. However nearly every word contained in said statute has been retained. When enacted the numbering given the section was subdivision 7 of section 581. At the present time it appears as section 581a. It is provided in Political Code section 325: "Where a section or a part of a statute is amended, it is not to be considered as having been repealed and reenacted in the amended form; but the portions which are not altered are to be considered as having been the law from the time when they were enacted, and the new provisions are to be considered as having been enacted at the time of the amendment." The decision in the Li Po Tai Case has been cited and followed in many cases. In People v. Southern Pacific R. Co., 17 Cal.App.2d 257, 61 P.2d 1184, it was held that said provisions of said statute were mandatory. In Cook v. Justice's Court, 16 Cal.App.2d 745, 61 P.2d 357, it was held that said provisions were prohibitory. For a full discussion of the subject, see Wells Fargo v. City and County of San Francisco, Cal.App., 144 P.2d 415, filed January 3, 1944. It follows that when the petitioner asked permission to intervene in said action the trial court had no jurisdiction to grant the permit and it did not err in denying the same.

[5] The petitioner cites and relies on Bayle-Lacoste & Co. v. Superior Court, 46 Cal.App.2d 636, 116 P.2d 458. It is not helpful. It involved section 583, C. C. P. The contents of that section were formerly expressed in section 890, C. C. P., and were then applicable to justice's courts only. In 1905 it was copied and enacted as section 583 of the Code of Civil Procedure and then became applicable to actions in the superior court. Said section 583 and section 581a are not inconsistent. Jackson v. De Benedetti, 39 Cal.App.2d 574, 579, 103 P.2d 990.

The orders appealed from are affirmed.

NOURSE, P. J., and SPENCE, J., concur.

62 Cal.App.2d 347

STILLWELL v. R. C. A. MFG. CO., Inc., et al.

Civ. 3246.

District Court of Appeal, Fourth District, California.

Jan. 14, 1944.

Hearing Denied March 13, 1944.

1. Appeal and error ⇨1008(1)

Where defendant's serviceman laid a hot electric soldering iron upon a work bench in the projection room of plain-moving picture theater while he was repairing theater sound equipment and end of film which plaintiff's operator was rewinding at serviceman's direction touched the iron and resulting fire destroyed the building, whether operator knew that iron was hot and should have seen iron was a question of fact for trial court.

2. Negligence ⇨135

Where defendant's serviceman laid a hot electric soldering iron upon a work bench in the projection room of of plaintiff's moving picture theater while he was repairing theater sound equipment and end of film which plaintiff's operator was rewinding at serviceman's direction struck the iron and resulting firse destroyed the building, evidence supported finding against operator's contributory negligence.

3. Appeal and error ⇨1008(1)

Where defendant's serviceman laid a hot electric soldering iron upon a work bench in the projection room of plaintiff's moving picture theater while he was repairing theater sound equipment and end of film which plaintiff's operator was rewinding at serviceman's direction struck the iron and resulting fire destroyed the building, whether plaintiff was contributorily negligent in failing to provide operative fire extinguishers was a question of fact for trial court.

4. Damages ⚷188(2)

In determining damages for moving picture theater building which had been destroyed by fire, amount of fire insurance on the building, amount for which building had been assessed, and cost of the building were not controlling.

5. Appeal and error ⚷1013

In action for damages to moving picture theater building which had been destroyed by fire, the value of the building was a question of fact for trial court.

6. Damages ⚷138

An award of $10,000 for loss of a moving picture building which had been destroyed by fire was not excessive.

7. Damages ⚷188(2)

Where plaintiff testified that value of contents of moving picture theater building which had been destroyed by fire exceeded $10,000 and then went over the various items giving them a total value of a little over $11,000, evidence sustained finding that the value of the contents was $10,000.

8. Damages ⚷163(2)

In action for damages to moving picture theater building which had been destroyed by fire, burden was upon defendants to show that loss of profits from the building during the year of the fire had been diminished by plaintiff's operation of a new theater in a new location.

9. Damages ⚷190

Evidence sustained finding allowing $4,000 for loss of profits on a moving picture theater building during the year in which the building was destroyed by fire.

◆

Appeal from Superior Court, San Bernardino County; F. A. Leonard, Judge.

Action by Charley Stillwell against R. C. A. Manufacturing Company, Inc., and another for damages from destruction of a building and its contents by fire. Judgment for plaintiff, and defendants appeal.

Affirmed.

Crider, Runkle & Tilson, of Los Angeles, for appellants.

Fred A. Wilson, of San Bernardino, for respondent.

BARNARD, Presiding Justice.

This is an action for damages. The plaintiff was the owner of a building in which he operated a moving picture theatre at Big Bear Valley, a summer resort in the San Bernardino mountains. The sound system used in this theatre was manufactured and serviced by defendant R.C.A. Manufacturing Company. On June 21, 1941, at the plaintiff's request, the defendant corporation sent its service man, C. L. Cronkhite (sued herein as Roy Kronkhiet), to repair this sound equipment. In the course of the repairs in the projection room of the theatre, Cronkhite laid a hot electric soldering iron upon a work bench. Shortly thereafter, one Carl Teschan, who was employed by the plaintiff to operate the projection machine and who on this occasion had let Cronkhite into the theatre to do the repair work, undertook to rewind a film from one spool to another. As this operation was being completed, the last few feet of the film flopped around, as is customary in such cases, and the end of the film came in contact with the hot iron, starting a fire which completely destroyed the building and its contents.

In this action which followed, the plaintiff alleged that his loss was caused by the negligence of the defendants. Among other things, the defendants alleged contributory negligence in the manner in which the projection room was maintained and also in that the fire was caused by the negligence of Teschan, which should be imputed to the plaintiff as his employer.

The court, sitting without a jury, found, among other things, that the fire and the resulting damage were caused solely by the negligence of the defendants and that Teschan was guilty of no negligence which proximately contributed to the loss and damage. The court also found that the value of the building was $10,000, that the value of the equipment was $10,000, that the loss of profits for the year 1941 was $4,000, and that the loss of rent for two small rooms in the front of the theatre building was $600. Judgment was entered accordingly and the defendants have appealed.

It is conceded that the evidence is sufficient to support the finding of negligence on the part of Cronkhite. Appellants' main contention is that the evidence conclusively shows that Teschan was also guilty of negligence which proximately caused the fire, and that since he was acting at the time in the course of his employment by the respondent his negligence is chargeable to him and prevents a recovery.

The projection room of this theatre was 18 feet long and 10 feet wide, with an 8-foot ceiling. The projection machines which were being repaired stood at the wall of the room which was nearest the stage and along the opposite wall was a work bench. On this work bench was a rewind machine which was operated by hand. This consisted of two spindles placed about 30 inches apart on the work bench, on one of which the loaded spool was placed while the empty spool was placed on the other. Midway between the two spindles a frosted glass was sunk in the bench with an electric lamp underneath, which was used for patching film. There is no evidence that this patch light was turned on on this occasion. The electric soldering iron had been laid on this bench between this patch light and one of the spindles. As Teschan was completing the rewinding of the film in order that it might again be run through the projection machine in a further test thereof, the end of the film came into contact with the hot iron in this position. There is evidence that Teschan had had eight years experience as a projectionist; that for some years he had operated an electrical appliance store in the daytime while working in this theatre at night; that altogether he had had some 27 years experience in some form of the electrical business; that he was somewhat familiar with electric soldering irons; and that he knew they would retain their heat for some time after the current was turned off.

The appellants argue that Teschan was fully aware of the hazard of allowing the film to touch the hot iron; that he must have known of the inflammable nature of such film; that he knew that this soldering iron had been used by Cronkhite only a few moments before the rewind operation was started; that the soldering iron was in the direct line of his vision as he was operating the rewind machine; that he either saw it or should have seen it; and that it must be held that he was guilty of negligence in allowing the film to come in contact with the iron.

The repair work in question extended over a period of about four hours. Cronkhite testified that he had used the soldering iron for about three quarters of an hour during which he had disconnected it a number of times, and that after the projection machine was reassembled and shortly before the fire occurred he plugged the soldering iron in again in order to knock off some solder from one of the amplifier lids. It would appear that after this use he laid the iron on the work bench in the position where it caused the damage.

Teschan testified that he saw Cronkhite use the soldering iron earlier in the afternoon; that he knew it was heated while it was being used; that Cronkhite was using the iron at the projection machines on the opposite side of the room from the bench; that from time to time Cronkhite laid the iron on the floor and at other times stuck it in the standards of the projection machines; that he never saw Cronkhite take the soldering iron over near the work bench; that he never saw the soldering iron on or near the work bench until the fire broke out; that he did not see the soldering iron while he was rewinding the film; and that he did not see it until "the flash from the ignited film lit up the bench like a power house on fire."

[1, 2] It does not certainly appear that Teschan knew that this soldering iron had been used "only a few minutes before the rewind operation was started." He had seen Cronkhite use the iron earlier in the afternoon while the repairs were being made but he had left the room several times and gone back to his store, and it does not appear that he knew anything about Cronkhite having again heated the iron after the machine was assembled. When he had seen Cronkhite using the iron, earlier in the afternoon, the iron had been used and laid down on the opposite side of the room from the work bench. Cronkhite, who was supposed to be the expert repairman, directed Teschan to rewind this film and Teschan would hardly expect him to give such an order when he had created a condition making it dangerous to do this. It would not be too surprising if Teschan was not on his guard against such a contingency. Not only does it not appear that Teschan knew that the iron had recently been used and was still hot, but there is positive evidence that he did not see it until after the fire started. Whether or not he should have seen it might well depend upon many circumstances. In any event, these various matters presented questions of fact and it can neither be held as a matter of law that Teschan was guilty of

negligence nor that the evidence, with the reasonable inferences therefrom, was entirely insufficient to support the court's finding against such negligence.

Under this view it becomes unnecessary to decide the question raised as to whether any negligence on the part of Teschan was imputable to the respondent, and it is further unnecessary to consider the objections raised to certain other findings which become immaterial under that view of the case.

[3] It is further argued that the respondent was also guilty of contributory negligence in failing to provide and maintain operative fire extinguishers which might have been used on this occasion. Cronkhite testified that there was one small fire extinguisher in the projection booth and that it was empty. There is other evidence that there were two small fire extinguishers in the booth. There is evidence that when the fire started Teschan yelled to Cronkhite to grab the fire extinguisher and that he ran downstairs to the lobby and brought back a large extinguisher. Cronkhite testified, however, that the nozzle of this large extinguisher was corroded and that he had to open the orifice with a wire before he could use it. It does not appear that either Teschan or the respondent knew the fire extinguishers were in bad condition, if such was the fact. The condition of the extinguishers had nothing to do with the starting of the fire and if it can be said that this matter was material at all the question was one of fact for the trial court.

[4-7] It is next contended that the amounts of damages allowed for the building and its contents were so excessive as to show an abuse of discretion. The court allowed $10,000 for the loss of the building. The respondent testified that the value of the building was $14,000; that he bought the building and land in 1936 for $4,750; that he bought the building from a bank holding company that had foreclosed a mortgage of $18,000 upon it; and that after he bought the building he spent more than $3,000 on alterations and repairs. While there is evidence that he had carried only $5,500 of fire insurance on the building and that it was assessed for a smaller amount, these matters are not controlling. The cost of the building to the respondent is not controlling and conditions and values may have changed between 1936 and 1941. The entire matter was a question of fact for the court, and it can neither be said that there is no evidence to sustain the finding as to the value of the building nor that the court abused its discretion in fixing that value. With respect to the contents of the building for which the court allowed $10,000, the respondent testified that these contents were of a value in excess of $10,000 and then went over the various items giving them a total value of a little over $11,000. There was no conflicting evidence and the findings on these matters are sufficiently sustained.

[8, 9] Appellants' final contention is that the allowance of $4,000 for loss of profits on the theatre building during the year 1941 is not sustained by the evidence. The plaintiff testified that his annual profits during the preceding three years had been $4,000. On cross-examination the appellants brought out the fact that the respondent had reopened a similar business in a different location, with a much smaller seating capacity, eleven days after the fire. It also appears that the business in this new location had to be closed down on September 15 of that year because there was no heat in that building, whereas the business had been conducted all year round at the old location. It is argued that nearly half of the year had gone by before the fire occurred, that the respondent must have made some profits in operating the new business from about July 4 to September 15, and and that these profits should have been deducted from the $4,000 allowed for loss of business for that year. The burden was upon the appellants, in their attempt to minimize this damage, to show that the loss had been diminished by the operation of the new business. While the appellants brought out the fact that a new business had been established, no attempt was made to show that any profit was derived therefrom during the period of its operation and there is no evidence of such profit. Also, there is no evidence that any profit was made by the respondent during that year and preceding the fire. While it seems probable that some such profit was made which ought to have been offset against the loss of profits for this year, the appellants failed to bring out the necessary facts, and in the condition of the record we are unable to hold that this item of damage is not supported by the evidence.

The judgment is affirmed.

MARKS and GRIFFIN, JJ., concur.

Hearing denied; TRAYNOR, J., not participating.

LAURENZI v. VRANIZAN et al.

Civ. No. 12382.

District Court of Appeal, First District, Division 2, California.

Jan. 11, 1944.

Hearing Granted March 6, 1944.

1. Appeal and error ⚷1078(3)

Where appellant claimed that trial court erred in sustaining defendants' demurrer to complaint, but did not discuss such subject in his brief, District Court of Appeal would treat alleged error as abandoned.

2. Municipal corporations ⚷821(17)

In an action against owner of abutting property for injuries sustained when pedestrian fell on sidewalk, based on allegation that sidewalk was constructed in violation of statute, uncontradicted testimony that sidewalk was built pursuant to specifications of board of works was insufficient to carry case to the jury as to owner.

3. Landlord and tenant ⚷167(5)

A lessee of abutting property which had nothing whatever to do with construction of the sidewalk on which pedestrian fell was not liable on the ground that the sidewalk was constructed in violation of statutory provisions.

4. Landlord and tenant ⚷167(5)

Lessees of property abutting a sidewalk were without authority to lease the sidewalk to produce company for store purposes so as to impose liability on the sublessees for injuries sustained by a pedestrian, on ground that the sidewalk was not constructed according to statutory provisions.

5. Landlord and tenant ⚷167(5)

Lessees of property abutting a sidewalk who sublet a part thereof to a produce company were under no duty to care for the sidewalk in front of the produce company's property so as to impose liability on the lessees for injuries sustained by a pedestrian who claimed that the sidewalk was not constructed in accordance with statutory provisions.

6. Landlord and tenant ⚷167(5)

Where there was no evidence that lessees of property abutting a sidewalk had any authority to act for the municipality, no duty was imposed upon lessees by the Public Liability Act so as to render lessees liable for injuries sustained by a pedestrian on the sidewalk on ground that it was not constructed in accordance with statute. St. 1923, p. 675.

7. Municipal corporations ⚷791(1)

To charge city with constructive notice of defect in public sidewalk, some element of conspicuousness of notoriety so as to put city authorities upon inquiry as to defect and its dangerous character must be shown to establish city's liability for accident caused thereby. St.1923, p. 675; Civ.Code, § 19.

8. Municipal corporations ⚷791(1)

Where city is charged with constructive notice of defect in public sidewalk, on basis of duty to inspect, it must be made to appear that reasonable inspection would have disclosed defect. St.1923, p. 675; Civ. Code, § 19.

9. Municipal corporations ⚷755(1)

A municipality is not an insurer of its public ways and is not bound to keep them so as to preclude possibility of accident. St.1923, p. 675.

10. Municipal corporations ⚷724

The Public Liability Act constitutes a modification of rule of nonliability of municipalities for acts performed in governmental capacity, and recovery thereunder is only possible where all requirements conditioning city's liability are supplied. St.1923, p. 675.

11. Municipal corporations ⚷723

Under the Public Liability Act, liability is imposed on municipalities not alone for dangerous condition, but for failure to remedy it, upon knowledge or notice thereof. St.1923, p. 675.

12. Municipal corporations ⚷791(2)

The existence of a hole in a sidewalk about one inch wide and a half inch deep which had existed for about four years was insufficient to impose constructive notice on city of the defect so as to render it liable for injuries sustained by pedestrian who fell on sidewalk. St. 1923, p. 675; Civ.Code, § 19.

13. Landlord and tenant ⚷170(4)

In action for injuries sustained by pedestrian on sidewalk against lessees and sublessee of abutting property, based on allegation of combining to maintain nuisance, evidence not establishing that at time of lease or sublease there existed any nuisance, and that lease to lessee and sublessee respectively did not vest full possession and control of leased property, was insufficient to carry question to the jury whether defendants combined in maintaining a public nuisance. Pen.Code, § 374b.

14. Municipal corporations ⚷821(6)

In action against city for injuries sustained when pedestrian fell on sidewalk where complaint alleged that sidewalk was constructed in violation of statute, evidence that sidewalk was constructed in compliance with specifications of city and not establishing that city did any act of omission regarding construction was not sufficient to carry to the jury question as to city's negligence. St.1923, p. 675.

15. Municipal corporations ⚷818(11)

Exclusion of evidence whether defect in sidewalk was repaired after accident was not error as to pedestrian who sought recovery against city for injuries sustained therefrom. St.1923, p. 675.

16. Appeal and error ⚷843(1)

Court of Appeal would not express an opinion on a matter not involved on appeal for the guidance of the trial court in conducting a new trial.

17. Appeal and error ⚷205

Plaintiff could not complain that trial court sustained objection to a question, where no offer of proof was made. Code Civ.Proc. § 2055.

◆

Appeal from Superior Court, City and County of San Francisco; Franklin A. Griffin, Judge.

Action by Laurence Laurenzi against George Vranizan and others for personal injuries. From a judgment granting defendants' motion for a nonsuit, plaintiff appeals.

Affirmed.

Albert Picard, of San Francisco (Francis McCarty, of San Francisco, of counsel), for appellant.

Myrick & Deering and Scott and James Walter Scott, all of San Francisco, for respondent George Vranizan.

John J. O'Toole, City Atty., and Henry Heidelberg, Deputy City Atty., both of San Francisco, for respondent City and County of San Francisco.

A. B. Bianchi, of San Francisco, for Vinci and others.

STURTEVANT, Justice.

While walking in front of 522–524 Front Street the plaintiff fell. For the injuries he suffered in falling he commenced this action to recover damages. He named as defendants George Vranizan, the owner of the abutting property, Charles, John G. and Joseph Vinci, copartners doing business under the name of Oregon Restaurant the tenants of the owner, Louis Ferro and Attilio Vanucci, doing business under the name of L. Ferro Produce Company, who were subtenants of the Oregon Restaurant. He also named the City and County of San Francisco as a defendant. The defendants filed demurrers. The record discloses the contents of the demurrer of Vranizan only. That document will receive further notice as we proceed. The L. Ferro Produce Company entered into a contract with the plaintiff under the terms of which the action as to it was dismissed. The plaintiff pleaded his grievance in three separate counts. In the first one he alleged a cause of action against all of the defendants including the City and County of San Francisco under the terms of the Public Liability Act, Stats.1923, p. 675. In the second count he alleged a cause of action against all of the defendants for conspiring to maintain and for maintaining a nuisance. In the third cause of action he alleged facts showing or tending to show that the sidewalk was constructed in violation of certain statutory provisions. The same parties were named as defendants. The demurrer of George Vranizan was sustained as to the first and second causes of action and was overruled as to the third. That count he answered.

When the pleadings presented such issues the cause came on for hearing in the trial court. The plaintiff called some witnesses and introduced some documents. When he rested the defendants as above listed severally made motions for a nonsuit. Each motion as made was granted. The plaintiff contends that each ruling was erroneously made. For reasons too numerous to be stated it is necessary to consider the motion made by each set of defendants separately.

[1, 2] Taking up the motion of the defendant Vranizan we do not understand the

appellant to claim that the trial court erred in sustaining his demurrer. As appellant says nothing on the subject in his brief this court is entitled to treat such errors as abandoned. Title G. & T. Co. v. Fraternal Finance Co., 220 Cal. 362, 30 P.2d 515. It remains to consider the court's ruling as applied to the third count. As stated above that count was based on the charge that the sidewalk was improperly constructed. Mr. Vranizan testified that the sidewalk was built in 1908 and that it was built pursuant to the specifications of the board of works. There is not a particle of evidence in the record at variance with his testimony. It follows that the trial court did not err in granting the motion of said defendant.

[3-6] Taking up the motion of the Oregon Restaurant it is at once apparent that it had nothing whatever to do with the construction of the sidewalk and therefore under no circumstances was it liable on the third count. As lessee of the building it sublet No. 522 Front Street to L. Ferro Produce Company. The record discloses the subletting was done by an oral contract. The only witness who testified regarding the contents of that contract was Mr. Ferro. He testified that he made his contract with Mr. J. Vinci. The consideration was $100 and the term was from month to month. As we understand the record there was no claim the store was not rented. But an attempt was made by the plaintiff to show that the contract let to L. Ferro Produce Company the right to use the sidewalk for store purposes. However the trial court sustained objections stating to counsel the sidewalks were public property and, as the record then stood, the Vincis showed no authority in themselves to rent to the L. Ferro Produce Company any public property. It is also clear no duty was cast on the Oregon Restaurant to care for the sidewalk in front of L. Ferro Produce Company (Lucid v. Citizens' Investment Co., 49 Cal.App. 257, 193 P. 161), and it was not responsible for the manner in which the sidewalk in front of the store was maintained. Furthermore, as there was no evidence that Oregon Restaurant had any authority to act for the City and County of San Francisco, no duty devolved on it pursuant to the Statute of 1923, page 675. It follows there was no evidence under which any judgment could be entered against it under either the second count or the first count.

As to the motion of the City and County of San Francisco the record is short but requires the statement of additional facts. That the plaintiff was injured by falling on the sidewalk in front of the premises occupied by L. Ferro Produce Company is not disputed. Whether his case comes under the provisions of the statute above mentioned is the one issue presented by the briefs. Only one witness, Mr. Ferro, testified on the subject. He testified as follows: "I saw one hole. It was just between the Oregon Restaurant and my place of business. It was about one inch wide, or an inch and a half, and half an inch deep. * * * It had been there four or five years. It might not have been that big; if you walk on it you know it kind of wears. The condition of the sidewalk in front of my premises at 522 Front Street, San Francisco, as shown in that photograph, Plaintiff's Exhibit 5, is similar to the condition of the sidewalk as it existed on July 1, 1940."

Except as of the date of the accident no other witness testified regarding the hole. Hence there was no other evidence that would show notice to the defendant. There was no claim of actual notice and the case rests on whether the facts showed constructive notice. In Nicholson v. City of Los Angeles, 5 Cal.2d 361, at page 364, 54 P.2d 725, at page 726, the court said:

[7-8] "Constructive notice ordinarily involves, as an essential element, actual notice of facts or circumstances which are sufficient to put a prudent person on inquiry as to the existence of the fact with respect to which he is charged with constructive notice. It is so provided in our Code definition. Civ.Code, § 19. * * * Consequently there must be shown, in order to charge the city with constructive notice under these principles, some element of conspicuousness or notoriety so as to put the city authorities upon inquiry as to the existence of the defect or condition and its dangerous character. It is equally clear, we think, that, where the city is charged with constructive notice on the basis of a duty to inspect, it must be made to appear that a reasonable inspection would have disclosed the defect or dangerous condition; that is, that, had there been no neglect of duty, there would have been actual knowledge on the part of the city officers.

[9] "Under the rule contended for by respondent, the mere existence of a defect,

no matter how slight or obscure for a substantial period of time, would be sufficient to charge the city with notice and render it liable for injuries received on account thereof. It is well settled that a municipality is not an insurer of its public ways and is not bound to keep them so as to preclude the possibility of injury or accident." (Italics ours.)

In Rodkey v. City of Escondido, 8 Cal. 2d 685, at page 688, 67 P.2d 1053, at page 1054, the court said: "The mere existence of the minor defect caused by the slight sinking of the contiguous surface of the roadway was not alone sufficient to charge the city with constructive notice."

In Whiting v. National City, 9 Cal.2d 163, at page 165, 69 P.2d 990, at page 991, the court said: "It is a matter of common knowledge that it is impossible to maintain a sidewalk in a perfect condition. Minor defects are bound to exist. A municipality cannot be expected to maintain the surface of its sidewalks free from all inequalities and from every possible obstruction to travel. Minor defects due to continued use, or action of the elements, or other cause, will not necessarily make the city liable for injuries caused thereby. What constitutes a minor defect is not always a mere question of fact. If the rule were otherwise, the city could be held liable upon a showing of a trivial defect. * * * There is here present *no element of conspicuousness or notoriety* showing any dangerous character in the slight rise of a portion of the sidewalk, which would put the city authorities upon inquiry or place upon them the duty of remedying the defect or condition pursuant to the provisions of the statute. The holding in the Nicholson Case that the continued existence of a minor defect is in itself insufficient to impose liability upon the city for injuries resulting therefrom is recognized as the law in other jurisdictions." (Citing authorities.) (Italics ours.)

[10, 11] In Nicholson v. City of Los Angeles, supra, 5 Cal.2d at page 363, 54 P.2d at page 726, the court said: "This statute constitutes a modification of the rule of non-liability of municipalities for acts performed in a governmental capacity, and recovery thereunder is only possible where all the requirements conditioning the city's liability are supplied. It is not enough to show a dangerous condition of the property. 'The municipality must have had notice and have failed to exercise its opportunity to remedy the condition. The theory of the act seems to be that liability is imposed not alone for the dangerous condition, but for the failure to remedy it, upon knowledge or notice thereof. The elements of knowledge or notice are logically essential to show culpability in failure to remedy the condition, and proof of one or the other is necessary to recovery.' "

[12] In the case before us there was no "element of conspicuousness or notoriety showing any dangerous character" in the break in the sidewalk, nor was there any evidence that "the municipality must have had notice and had failed to exercise its opportunity to remedy the condition." It follows that the order granting the motion of the City and County for a nonsuit was properly entered as to the first count contained in the complaint.

[13] In the second count of plaintiff's complaint it was alleged that all of the defendants combined in maintaining a public nuisance. If they did that was a crime. Penal Code, sec. 374b. But it is presumed that everyone is innocent of crime or wrong. Code Civ.Proc. sec. 1963 sub. 1. Hence there was no indirect proof of the alleged acts. As to direct proof there was not a particle of evidence of any combination to commit said act or any act. There was no evidence that at the time Vranizan let to the Oregon Restaurant or when the latter sublet to the L. Ferro Produce Company that a nuisance existed. Nor was there any evidence that the lease from Vranizan to Oregon Restaurant or the sublease from the latter to the L. Ferro Produce Company did not vest in the lessee and sublessee respectively full possession and control of the property let thereunder. The record indicates that the contrary was the fact. Said lessee and sublessee under such circumstances were severally liable for their wrongful acts of omission and commission. Lucid v. Citizens' Investment Co., 49 Cal.App. 257, 260, 261, 193 P. 161. It follows the L. Ferro Produce Company only was liable under the second count, as to it the action has been dismissed by stipulation of the parties, and the several motions for nonsuit made by the other defendants as to the second count were properly granted.

[14] The nature of the third count has been specifically mentioned hereinabove. Mr. Vranizan, the owner of the lots and the building standing thereon, testified that he constructed the sidewalk in 1908. He fur-

ther testified that he constructed the sidewalk in compliance with the specifications of the city. The sidewalk was so constructed under a contract. Except as herein mentioned no witness testified that the city did any act of omission or commission regarding the construction of the sidewalk. It follows that the trial court did not err in granting the motion of the city with reference to the third count.

[15] When the assistant city engineer was on the stand as a witness the plaintiff propounded to him the question as to whether or not the hole in question was repaired October 7, 1940. The defendant city interposed an objection. The objection was sustained. We see no error in the ruling. 10 Cal.Jur. 829; Runyon v. City of Los Angeles, 40 Cal.App. 383, 180 P. 837.

[16] When the plaintiff was a witness in his own behalf he was asked if he had not been paid $3,175 by the defendant the L. Ferro Produce Company. He now asserts that the propriety of the question is not involved on this appeal, but he asks an expression of opinion for the guidance of the trial court in conducting a new trial. Under all of the circumstances we do not feel called upon to discuss the subject.

[17] Mr. Vranizan was called under section 2055, Code Civ.Proc., as a witness for the plaintiff. It was not shown by any evidence that under his contract with his lessees it was provided that he should repair minor breaks in the sidewalks. He was defending the third count which charged that the sidewalk was improperly constructed. The plaintiff asked him: "Q. Before July 1, 1940, did Mr. Ferro inform you that he had been injured by falling in this hole on the sidewalk and had been laid up for two weeks as a result of it?" The attorney for Mr. Vranizan objected on the ground the subject was incompetent, irrelevant, and immaterial. The objection was sustained. No offer of proof was made. The plaintiff now claims the ruling was erroneous. The point has no merit. Thompson v. Buffums' Inc., 17 Cal.App.2d 401, 404, 62 P.2d 171. For the same reason we find no error in the ruling sustaining the objection of the defendant to a question which was: "Q. Was a suit brought against you for damages by a man named Frank Colburn, who was injured on this same sidewalk on January 26, 1940?" As Mr. Vranizan had leased the property and no claim was made that the duty rested on him to repair the sidewalk he was not liable for injuries sustained by those using it. 15 Cal.Jur. 740.

We find no error in the record. The judgment is affirmed.

NOURSE, P. J., and SPENCE, J., concur.

62 Cal.App.2d 362

FACHADIO v. KROVITZ et al.

Civ. 12522.

District Court of Appeal, First District,
Division 2, California.

Jan. 17, 1944.

Hearing Denied March 16, 1944.

1. Automobiles 🔑181(1, 2)

Where, at time of automobile accident in which plaintiff was injured, plaintiff and driver were going on a trip in order to interview plaintiff's employer about getting driver a job, plaintiff was a "passenger" and not a "guest" and was entitled to recover from driver and owner of automobile, for ordinary negligence.

See Words and Phrases, Permanent Edition, for all other definitions of "Guest" and "Passenger".

2. Appeal and error 🔑1053(6)

In minor jockey's injury action, admission of jockey's testimony that he had a stepfather with whom he couldn't get along, so that he had to make his own way, was not prejudicial to defendants, where trial court limited the testimony to issue of jockey's ability to make a living in the event that he could not ride a horse after the accident.

3. Appeal and error 🔑930(2)

Reviewing court was required to assume that the jury followed trial court's instruction to disregard irrelevant argument of plaintiff's counsel.

◆

Appeal from Superior Court, San Mateo County; Maxwell McNutt, Judge.

Personal injury action by Ernest Fachadio, a minor, by William Hosea, his guardian ad litem, against Edwin Krovitz and another. From a judgment entered on a verdict for plaintiff and an order denying a motion for new trial, defendants appeal.

Appeal from order denying new trial dismissed. Judgment affirmed.

F. E. Hoffmann, of San Mateo, for appellants.

Paul J. Quigley, of Los Angeles, for respondent.

NOURSE, Presiding Justice.

The two defendants appeal from a judgment entered on the verdict of a jury and from the order denying their motion for a new trial in an action for personal injuries. No question is raised as to the sufficiency of the evidence to support the charge of negligence, but the sufficiency of the evidence to support plaintiff's status as a passenger rather than as a guest is attacked. No issue of intoxication or wilful misconduct is involved.

At the time of the accident plaintiff was riding with defendant Harry Krovitz in a car owned by Edwin Krovitz, who was joined as defendant in the trial; however, any reference made hereafter to "defendant" will apply only to Harry Krovitz. The evidence most favorable to plaintiff shows that at the time of the accident they were going to San Mateo from Bay Meadows in order to interview the plaintiff's employer about getting defendant a job as a jockey. The plaintiff had been trying, at defendant's instance, to get him a job with his employer for several months.

[1] The appellants contend that no tangible benefit was received by him for the ride and therefore plaintiff was a guest within the meaning of the statute. They point to the evidence that the defendant and plaintiff lived together, shared expenses and to plaintiff's testimony given on another hearing that the two were on their way to eat in San Mateo at the time of the accident. The respondent asserts that the test of benefit within the meaning of the statute is not whether the venture succeeds or not but the motive for the trip upon which the passenger is injured. We must assume from the verdict that the jury believed the testimony of plaintiff given at the trial, and, accepting that version, the case is controlled by Kruzie v. Sanders, 23 Cal.2d 237, 143 P.2d 704.

[2] The appellants also contend that they were deprived of a fair trial by reason of the admission of certain evidence and the argument of plaintiff's counsel to the jury. Upon the trial the plaintiff was permitted to testify that he had a stepfather with whom he couldn't get along so that he had to make his own way. The trial judge limited the testimony to the issue of plaintiff's ability to make a living in the event he could not ride a horse after the accident. The appellants contend that this testimony erroneously permitted evidence of poverty to get before the jury, but, with the limitations imposed by the trial court's instruction, we are satisfied that no prejudice resulted.

[3] In the course of the trial the defendants sought to impeach the plaintiff by his testimony at an inquest at which the plaintiff stated that at the time of the accident he and defendant were going to a place to eat in San Mateo. Defendants' counsel asked plaintiff's counsel to stipulate to the origin of the remark. Plaintiff's counsel then stated that he "had no objection to the entire record of the inquest going into evidence" and would offer it in evidence if defendants' counsel had no objection. The defendants' counsel said he had no objection. In his argument to the jury plaintiff's counsel read to the jury that portion of the inquest record in which defendant stood upon his statutory rights and did not testify, and pointed out that plaintiff had testified fully at that time. He also argued that he could have objected to the inquest testimony and the court would have ruled it out. The court cautioned the jury that plaintiff's testimony at the inquest was in the record for all it was worth and that no inference against this defendant could be drawn from his refusal to testify. The conduct of plaintiff's counsel had no bearing upon the issues, but the trial court carefully admonished the jury to disregard it, and we must assume that the jury followed the instruction.

We find no reversible error in the record.

The appeal from the order denying a new trial is dismissed. The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concur.

62 Cal.App.2d 241

PEOPLE v. ROATH et al.

Civ. 14236.

District Court of Appeal, Second District, Division 1, California.

Jan. 11, 1944.

Hearing Denied March 6, 1944.

1. Appeal and error 🔑161

Generally, a litigant is not entitled to accept benefits of a judgment and then appeal from it.

2. Appeal and error 🔑1172(1)

Where provisions of a judgment are interdependent, appellate court cannot reverse as to part of judgment complained of and permit remainder to stand.

3. Appeal and error 🔑161

Where a litigant accepts benefit of judgment and appeals for more relief in kind, he must seek a reopening of whole issue or be precluded by amount awarded.

4. Appeal and error 🔑161

Item for recovery of delinquent taxes and penalties and item for recovery of expenses in seizure of taxpayer's property, preserving it and advertising it for sale were not interdependent so as to preclude appeal by state from that part of judgment denying recovery for latter item without first seeking a reopening of whole issue. Gen.Laws 1937, Act 2964, § 4.

5. Appeal and error 🔑103, 870(5)

No appeal lies from orders of trial court striking a part of complaint and excluding evidence offered, since such orders are reviewable only on an appeal from judgment.

6. Appeal and error 🔑151(5)

A litigant may prosecute an appeal from a judgment in his favor when such appeal is for purpose of establishing a greater claim and it affirmatively appears that he is entitled to that which he has accepted, but is contending for something more.

7. Appeal and error 🔑162(2)

Where a litigant accepts payment of part of judgment favorable to litigant, but adverse part of judgment can be reversed without affecting favorable part, litigant is not estopped from prosecuting an appeal from adverse part of judgment.

8. Appeal and error 🔑162(2)

Where state's recovery of judgment against taxpayer's sureties for delinquent motor vehicle fuel license taxes and penalties was uncontested, but state was denied recovery for expenses in seizing taxpayer's property for sale, which claims were severable, state's acceptance of sureties' tender of amount of judgment did not estop state from appealing from adverse portion of judgment. Gen.Laws 1937, Act 2964, § 4; Code Civ.Proc. § 675.

9. Appeal and error 🔑162(2)

Where tender to appellant of amount of judgment recovered by appellant was to respondent's advantage in stopping the accrual of interest pending the appeal, and appellant could not avoid result by refusing to accept tender, respondents could not rely on appellant's acceptance to estop appellant from appealing from that portion of judgment denying recovery on a severable claim. Gen.Laws 1937, Act 2964, § 4; Code Civ.Proc. § 675.

◆

Appeal from Superior Court, Los Angeles County; Frank G. Swain and Emmet H. Wilson, Judges.

Action by the People against Marshall B. Roath, doing business as Cascade Oil & Refining Company, and others upon named defendant's bonds to recover unpaid motor vehicle fuel license taxes and penalties, and for other relief. From a judgment denying certain relief, plaintiff appeals. On defendants' motion to dismiss appeal.

Motion denied.

Robert W. Kenny, Atty. Gen., and H. H. Linney, Asst. Atty. Gen., for appellant.

Jennings & Belcher and R. P. Jennings, all of Los Angeles, for respondent Hartford Accident & Indemnity Co.

Nourse & Jones and Paul Nourse, all of Los Angeles, for respondent Standard Accident Ins. Co.

WHITE, Justice.

This is an action instituted by the People of the State of California upon bonds conditioned for the payment by defendant Roath "of all license taxes, penalties and other obligations of said principal arising out of" the State Motor Vehicle Fuel License Tax Act, Stats. 1923, page 571, as amended. Defendant Roath having incurred liability to the state for delinquent taxes and penalties in the sum of $25,118.76 and having failed to pay such amount, the State Controller endeavored to effect collection thereof by seizing the distributing plant and other personal property of Roath with a view to selling the same at public auction as authorized by section 4 of the above-mentioned act, Deering's General Laws 1937, Act 2964, page 1407. In connection with the seizure of defendant Roath's plant and advertising the same for sale the State Controller incurred a total expense of $2,262.60. No sale of the seized properties, however, was accomplished for the reason that prior to the sale date thereof Roath filed a petition in bankruptcy, in which proceeding an order was issued requiring the State Controller to surrender the property to the trustee in bankruptcy for administration in the federal court.

On or about July 31, 1941, the Attorney General, at the request of the State Controller, filed suit in the superior court of Los Angeles County against Roath and the two defendant surety companies on his bonds.

Paragraph V of the complaint set forth Roath's indebtedness for taxes and penalties in the sum of $25,118.76, while Paragraph VI alleged that the Controller in seizing the assets of said defendant and in advertising the same for sale pursuant to the provisions of the pertinent act, incurred costs and expenses in the amount of $2,262.60. After alleging that no part of the sums due for taxes and penalties or the amount due for the expenses of seizing and advertising for sale of the assets of defendant Roath, the prayer of the complaint was for judgment against the last-named defendant for the full amount allegedly due, and against the defendant surety companies for the amount of their respective bonds, but not exceeding the total amount claimed to be due from defendant Roath.

Defendant surety companies filed demurrers to the complaint which were overruled. However, their motion to strike from the complaint the allegations contained in the aforesaid Paragraph VI thereof was granted by Judge Frank G. Swain, sitting in the law and motion department of the court. Answers were filed by defendant surety companies generally and specifically denying for want of information or belief all of the allegations contained in the complaint save and except the stricken allegations contained in Paragraph VI. A motion subsequently made to reconsider and set aside the order previously made by the court, striking Paragraph VI from the complaint, was denied.

The cause came on for trial March 17, 1943, before Judge Emmet H. Wilson, at which time the plaintiff offered oral and documentary proof that the sum of $25,118.76 was due the State of California for taxes and penalties, and moved the court to restore and reinstate the aforesaid Paragraph VI to the complaint. Such motion was denied. Thereupon, the Attorney General made an offer to prove by the Supervisor of Tax Collections in the office of the State Controller, that the latter had expended the sum of $2,262.60 in his aforesaid unsuccessful effort to enforce payment of the delinquent taxes and penalties through seizure of defendant Roath's assets. Such offer of proof was objected to by counsel for defendant surety companies and the court sustained the objection.

Defendant surety companies offered no testimony at the trial and judgment was accordingly entered against them for their respective proportions of the delinquent taxes and penalties only. On June 1, 1943, plaintiff State of California filed its notice of appeal from the aforesaid judgment, and "specifically from that portion of said judgment which, by limiting plaintiff's recovery to the sum of $25,118.76, denied plaintiff recovery of the additional sum of $2,262.60 prayed for in its complaint".

Prior to the filing of the notice of appeal herein, defendant surety companies tendered to plaintiff State of California in payment of said judgment, costs and interest thereon, the full amount of said judgment, costs and interest, which tender of payment was accepted by the State. Thereafter, on motion of defendant surety companies, made pursuant to the provisions of section 675 of the Code of Civil Procedure, the judgment was, by order of the trial court, satisfied of record.

[1-3] Respondents now move to dismiss this appeal upon the ground that having accepted the fruits of the judgment appellant is estopped from prosecuting its appeal therefrom. The general rule undoubtedly is that a party is not entitled to accept the benefits of a judgment and then appeal from it. Turner v. Markham, 152 Cal. 246, 247, 92 P. 485. Where the judgment represents the complete award allowed to the prevailing party by the court and disposes of the whole issue, or in other words, where the provisions of a judg-

ment are interdependent, the appellate tribunal cannot properly reverse the judgment as to the part complained of and permit the remainder to stand. Sun Oil Co. v. Union Drilling, etc., Co., 208 Cal. 114, 119, 280 P. 535. It is where a party accepts the benefit of an award and appeals for more relief in kind that he must seek a reopening of the whole issue or be precluded by the amount awarded. Sun Oil Co. v. Union Drilling, etc., Co., supra.

In the instant case we are impressed that the two items enumerated in the complaint for which recovery was sought were not "interdependent". The main or principal item was for taxes and accrued penalties. At the trial respondents offered no evidence whatever in opposition to appellant's proof thereon and judgment was concededly ordered in accordance with the proof.

[4, 5] The sum of $2,262.60, also sought to be recovered, represented the expenditures incurred by the State Controller in seizing, preserving and advertising for sale the delinquent taxpayer's property. This item, which formed the basis of Paragraph VI of the complaint, was entirely separate and distinct from the tax item. The recovery of the $2,262.60 was in no way "dependent" upon recovery of any specific amount of taxes. The allegations in connection therewith contained in Paragraph VI, were stricken from the complaint, appellant contends, erroneously, and consideration of the latter's right in regard to such allegations was thereby completely barred at the trial. Instead of being "dependent" upon each other, the two items with which we are here concerned, viz., the taxes and the expenses occasioned by seizure of the distributor's assets, are wholly "independent" of each other. The question as to whether appellant is entitled to recover the item of $2,262.60 bears no relation whatever to its right to recover the amount of taxes sued for. No appeal lies from the orders of the trial court striking a part of the complaint and excluding evidence offered by appellant, and such orders are necessarily reviewable only on an appeal from the judgment.

We find no merit in respondents' contention that the instant case is but a single cause of action and a single judgment; that the appeal being from the whole of the judgment, "all of appellant's claims for taxes and penalties being controverted", the judgment is not severable, and this court, if it should find error in the rulings of the trial court, could only reverse the judgment in toto. Contrary to respondents' contentions, we are persuaded that in truth and in fact appellant's claim for taxes was not actually "controverted". True, the allegations of the complaint with reference thereto were denied, but only for lack of information and belief, while at the trial no contention was made by respondents against the validity of the tax claim. In fact one of respondents' counsel in the trial court stated, "We do not stipulate to the judgment, but I don't see what else your Honor can do under the evidence". The record in this case reflects no semblance of even a challenge, to say nothing of an actual controversy concerning the right of appellant to recover on its claim for taxes. The sole question raised by the notice of appeal herein has nothing to do with the tax item—in fact, excludes it; and concerns solely and alone the right of appellant to have a trial upon its claimed right to recover for expenditures incurred in seizing the distributor's property, which is an issue absolutely severable from and independent of appellant's right to recover on its claim for taxes and penalties.

[6-9] Finally, respondents assert that appellant having accepted the full benefit of the judgment rendered in its favor cannot appeal from that judgment. From what we have heretofore said it is at once apparent that respondents' claim in this regard cannot be upheld because an appellant is not precluded from prosecuting an appeal from a judgment in his favor when such appeal is for the purpose of establishing a greater claim and where, as here, it affirmatively appears that he is entitled to that which he has accepted, but is contending for something more. Preluzsky v. Pacific Co-op. Cafeteria Co., 195 Cal. 290, 232 P. 970. Furthermore, where as in the case at bar, appellant accepted payment of a part of the judgment which was favorable to it, but the part adverse to appellant can be reversed without affecting the part which was favorable, the appellant is not estopped from prosecuting an appeal from that part of the judgment which was against it. Preluzsky v. Pacific Co-op. Cafeteria Co., supra, 195 Cal. at page 293, 232 P. at page 971. As stated by the court in the case just cited: "Where the different portions of a judgment are severable, a party by voluntarily accepting the fruits of one portion thereof does not necessarily estop himself to attack other and

severable portions thereof upon appeal." Also, it may be said that the instant case is not one which presents a situation wherein the appellant by its election to accept a portion of the judgment favorable to it has changed the position of respondents, to the latter's injury, and the doctrine of estoppel by such election herein is therefore clearly inapplicable. Moreover, it was to respondents' benefit to tender the amount specified in the judgment because they thereby avoided possible liability for accruing interest thereon pending this appeal. And appellant could not have avoided this result by refusing acceptance of the tender. Ferrea v. Tubbs, 125 Cal. 687, 58 P. 308; Hancock v. Hunt, 34 Cal.App. 530, 168 P. 142. We do not feel justified in attempting to distinguish the several cases cited by respondents. They are not sufficient, in our judgment, to overturn the legal conclusion at which we have arrived that the conduct of appellant in accepting the benefits of a portion of the judgment, prior to noticing this appeal, was not inconsistent with the right to appeal.

From what we have herein stated, it follows that the motion to dismiss this appeal must be denied. It is so ordered.

YORK, P.J., and DORAN, J., concur.

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62 Cal.App.2d 365

YOUNG v. EVANS et al.

Civ. No. 12552.

District Court of Appeal, First District, Division 2, California.

Jan. 17, 1944.

1. Appeal and error 🔑110, 782

An order denying motion for new trial is not appealable, and purported appeal therefrom must be dismissed. Code Civ. Proc. § 963.

2. Negligence 🔑134(8)

In action by railroad agent against shipper for injuries, defendant's testimony that he paid no particular attention to stack of five sacks of barley which he was attempting to move with hand truck into railroad car and that one sack slipped out thereby forcing defendant against plaintiff authorized finding of negligence and a judgment for plaintiff.

3. Army and navy 🔑34

The Soldiers' and Sailors' Civil Relief Act must be liberally construed to accomplish its purposes. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix § 521.

4. Army and navy 🔑34

Soldiers' and Sailors' Civil Relief Act does not grant servicemen absolute right to a stay of proceedings, but vests in trial courts wide discretion in passing upon motions made thereunder. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix § 521.

5. Army and navy 🔑34

Where serviceman was named as a defendant, together with partnership to which he belonged and other individuals, but there was no showing that serviceman or partnership was served with process or that plaintiff was seeking a judgment against serviceman or partnership, a stay predicated on such service was properly denied. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix § 521.

6. Army and navy 🔑34

Where judgment against defendant resulted from a liability incurred solely because of his own negligence, contention that codefendant, who was in military service, might be liable for contribution so as to require a stay under Soldiers' and Sailors' Civil Relief Act was without merit. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix § 521.

7. Army and navy 🔑34

The fact that judgment against defendant might be satisfied by a charging order upon his interest in partnership of which a person in military service was a member did not authorize a stay under Soldiers' and Sailors' Civil Relief Act. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix § 521; Civ.Code. § 2422.

8. Continuance 🔑22

The right of a defendant to a continuance because of the absence in military service of a witness is measured by rules governing rights of an ordinary litigant to a continuance and not by provisions of Soldiers' and Sailors' Civil Relief Act. Soldiers' and Sailors' Civil Relief Act of 1940, § 201, 50 U.S.C.A.Appendix § 521.

9. Continuance ⚷46(8)

Where affidavit for continuance for absence of material witness failed to show nature of testimony which witness would give or that testimony would not be merely cumulative, or to show reasonable probability that testimony, if produced, would affect result of trial, affidavit was insufficient.

10. Appeal and error ⚷966(2)

Contention as to what testimony of absent witness might have been in absence of showing of what testimony would have been is insufficient to show an abuse of discretion in denial of motion for continuance.

◆

Appeal from Superior Court, San Joaquin County; C. W. Miller, Judge.

Action by Thomas O. Young against Ernest Evans and others for injuries sustained as a result of the alleged negligent operation of a hand truck by defendant Charles Evans while transferring freight from a semi-trailer to a railroad freight car. Judgment for plaintiff, and Charles Evans appeals.

Affirmed.

Neumiller & Ditz, of Stockton, for appellant.

Gumpert & Nazzera and Charles A. Zeller, both of Stockton, for respondent.

SPENCE, Justice.

[1] Plaintiff sought damages for personal injuries and, after a trial by the court sitting without a jury, recovered judgment against defendant Charles Evans for $3,050. Said defendant gave notice of appeal from the judgment and from the order denying his motion for a new trial. As the order denying the motion for a new trial is not an appealable order, Code of Civil Procedure, section 963, the purported appeal therefrom must be dismissed.

Defendant contends first, that the trial court committed prejudicial error in denying defendant's motions for a stay of proceedings, and second, that the evidence was insufficient to sustain the trial court's finding that defendant negligently operated the hand truck which caused plaintiff's injury. We will first consider the contention involving the alleged insufficiency of the evidence.

The accident occurred in the freight yard of the Southern Pacific Company at Tracy. Plaintiff was the local agent for the railroad company and it was his duty, among others, to see that all freight cars were loaded properly in order to prevent damage during shipment to the property loaded therein. On the day of the accident, defendant Charles Evans, his brother Ernest Evans and their employee Marcus Hanlon, sued herein as Jim Hanlon, were engaged in loading sacks of barley into a box car from a semi-trailer. The semi-trailer, which had a bed measuring 22 feet long and 7 feet 8 inches wide and which bed was approximately level with the bed of the box car, had been drawn up along side of and in close proximity to the doorway of the box car. A metal runway was then laid from the doorway of the box car to the side of the bed of the semi-trailer for the purpose of transporting the sacks of barley on a hand truck from the semi-trailer to the box car. Each sack of barley measured approximately 30 inches long, 12 inches thick and 18 inches wide and weighed 115 pounds. These sacks had been stacked on the semi-trailer on their sides in piles of five. The moving of a stack of five sacks, weighing 575 pounds, could be done by one man using a hand truck by first inserting the blade or lip of the hand truck underneath the bottom sack of the pile and then pulling the top sack toward the hand truck with one hand while pushing the handle downward with the other hand. The evidence showed that this operation required proper balance and control of the heavy load and that a hand truck could "get away" from a man "if the truck isn't properly loaded".

While the above-mentioned persons were loading the box car in question and after about 300 to 400 sacks had been loaded therein, plaintiff entered the box car and remained therefrom 5 to 10 minutes discussing the loading of the car with Ernest Evans. The question of the size of the car was raised in the discussion and plaintiff and Ernest Evans decided to go out to look at the description stenciled on the side of the car. Both men then walked out through the box car door onto the bed of the semi-trailer and to the rear thereof while plaintiff pointed out to Ernest Evans the stenciling. The two men continued their discussion in this position with their backs toward defendant Charles Evans for perhaps three or four minutes when the hand truck suddenly got away from defendant Charles Evans and struck plaintiff in the back throwing him off the rear end of the semi-trailer and causing his injuries.

The testimony of defendant Charles Evans covered his version of the manner in which the accident happened. He testified, "Well, shoved the blade of the hand truck under the bottom sack, hanging on with my right hand, reached over and pulled the pile back against the truck; in doing that the middle sack slipped forward and let the load go back and pushed the truck back." Again he testified, "Well, when I was loading the hand truck, I pulled the sacks back and the sacks buckled and pushed me back". He was asked, "And then the truck slipped and got away from you, is that what you say?" and he answered, "Well, the sack; when this sack slipped out. * * * It caused them to buckle, and slide me and the truck backwards. * * * It kind of swerved me around". Said defendant also gave the following answers in response to the questions propounded to him:

"Q. And you made no examination of the sacks prior to the time that you put them on the hand truck to determine whether they were straight or disorderly, or not? A. No; they appeared to be the same as the rest.

"Q. And you paid no particular attention to them, is that correct? A. Well, none other than they appeared to be in the same positions; no.

"Q. Did you or did you not pay any particular attention to them? A. No."

Again he testified with respect to the particular stack as follows: "Q. Well, you didn't examine it with any care before you shoved the truck, hand truck, under there, though? A. No, because presumably it was in the same position as the rest of them."

[2] While no other witness attempted to give a detailed account of the exact manner in which the accident happened, we believe it is apparent from the above excerpts from defendant Charles Evans' testimony that his evidence alone was sufficient to sustain the trial court's finding of negligence. It is therefore unnecessary for us to discuss plaintiff's further claim that the doctrine of res ipsa loquitur was applicable.

For the purpose of discussing defendant's contention that the trial court committed prejudicial error in denying defendant's motions for a stay of proceedings, it is necessary to present a further statement of facts. The accident occurred on September 6, 1941. Plaintiff filed this action on August 31, 1942, naming as defendants the defendant Charles Evans, who has taken this appeal, together with Ernest Evans, Jim Hanlon and Ernest Evans Trucking Co., a copartnership, consisting of Ernest Evans and Charles Evans. Before the filing of the complaint, Ernest Evans had entered the military service and had been stationed overseas and outside continental United States. It does not appear that summons was served on any of the named defendants. An answer to the complaint was filed by defendants Charles Evans and Jim Hanlon as individuals but neither Ernest Evans nor the Ernest Evans Trucking Co. appeared in the action. The cause proceeded to trial and the judgment was entered in favor of defendant Jim Hanlon and against defendant Charles Evans only. No judgment was sought or entered against Ernest Evans or the Ernest Evans Trucking Co.

On November 19, 1942, and shortly before the trial, defendant Charles Evans alone gave notice of motion to vacate the order setting the cause for trial and to stay further proceedings "for the period of military service of defendant, Ernest Evans, and for such further time thereafter as provided by law". It was stated therein that the motion would be made upon the ground that Ernest Evans was a person in the military service "as defined in the Soldiers' and Sailors' Civil Relief Act of 1940" and was stationed outside the United States, and upon the further ground that Ernest Evans "has a good and valid defense to the complaint on file herein, but will be unable because of said military service to personally attend the trial of the action now set for November 24, 1942, and would be greatly prejudiced by trial of this action without his presence, and upon the further ground that defendant, Charles Evans, likewise would be greatly prejudiced by trial of this action without the personal presence of said defendant, Ernest Evans". The affidavit of Charles Evans, filed in support of the motion, set forth the facts concerning the military service of Ernest

Evans and his inability to attend the trial at the time set and alleged "that affiant and said defendant, Ernest Evans, will each be greatly prejudiced by trial of the above-entitled action on November 24, 1942, and until such time as said defendant, Ernest Evans, is able to attend trial thereof in person. That said Ernest Evans was a witness to the accident mentioned in said complaint and his presence at said trial is vital to affiant's defense." The trial court heard the motion prior to the trial and denied the same. Defendant Charles Evans renewed the motion at the close of the testimony offered by plaintiff and the motion was again denied.

The consideraton of defendant's contention presents a two-fold aspect for the reason that defendant argues that the trial court committed prejudicial error (1) "because Ernest Evans was in fact a defendant in the action and his military service materially affected his ability to conduct his defense" (2) "because Ernest Evans was a material and indispensable witness and, without his testimony, a full and adequate defense of the action could not be presented." The first of these arguments is concerned with the rights of Ernest Evans under the act above mentioned and hereinafter discussed and the second of these arguments is concerned with the rights of defendant Charles Evans to a continuance without regard to the provisions of said act. We will consider these arguments in the order in which they are above set forth.

[3, 4] Section 201 of the Soldiers' and Sailors' Civil Relief Act of 1940, 50 U.S.C.A.Appendix § 521, provides that "At any stage thereof any action or proceeding in any court in which a person in military service is involved * * * as * * * defendant * * *, shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of * * * the defendant to conduct his defense is not materially affected by reason of his military service." This act, and a similar act adopted in 1917, 50 U.S.C.A.Appendix § 201 et seq., have been frequently considered by the courts and numerous authorities have been cited by the parties in their briefs. It has been uniformly held that while the act should be liberally construed to accomplish its purposes, it grants no absolute right to a stay of proceedings to persons in the military service but vests in the trial courts wide discretion in passing upon motions made thereunder. The general subject and numerous authorities have been discussed in two recent cases in which orders denying stays have been affirmed. Boone v. Lightner, 319 U.S. 561, 63 S.Ct. 1223, 87 L.Ed. 1587; Johnson v. Johnson, 59 Cal.App.2d 375, 139 P.2d 33.

[5] It seems entirely clear in the present case that Ernest Evans did not come within the letter of the act. He was not a "defendant" who had been called upon "to conduct his defense". There is nothing to show that either he or the partnership had ever been served with process. Neither had appeared and there is nothing to show that plaintiff, in opposing the motions for a stay, was seeking to proceed to trial and to obtain a judgment against any person other than defendants Charles Evans and Jim Hanlon, as individuals. In Modern Industrial Bank v. Zaentz, 177 Misc. 132, 29 N.Y.S.2d 969, at page 973, the court said: "But the papers before the court on the present motion are likewise silent as to whether Zaentz has been served with process in the action. Until he is served, he is not a party defendant." And in Patrikes v. J. C. H. Service Stations, City Ct., 41 N.Y.S.2d 158, at page 167, it was said, "The soldier's status does not operate to release the partners who are not called to service. The act does not expressly or by implication extend its benefits to any person other than the person entering the service and his dependents." As the only purpose of plaintiff in proceeding to trial was to obtain a judgment against the appearing defendants individually and as such judgment could not affect the rights of Ernest Evans any more than could a judgment entered against the appearing defendants in an action wholly unrelated to the partnership affairs, we are satisfied that no rights of Ernest Evans were affected by the orders denying the motions for a stay of proceedings.

Defendant cites and relies upon Ilderton v. Charleston Consol. & L. Ry. Co., 113 S.C. 91, 101 S.E. 282. In that case, the contentions of the parties likewise gave the discussion a two-fold aspect but we are concerned for the moment only with the rights of the person in the military service. In that case, such person was O'Quinn, the motorman. Despite the fact that O'Quinn had not even been named as a defendant in the action, the majority of the court held, under the peculiar circumstances there presented, that the railway company's motion for a continuance should have been granted. Insofar as the rights of O'Quinn were concerned, the court said at page 284, of 101 S.E., "We come now to view this case from the standpoint of the rights of the absent witness, O'Quinn, who, though not a party on the record, was deeply interested in the event of the action; for, as defendant's liability to plaintiff was predicated solely upon his conduct, his liability over to defendant will be affected by the judgment. Logan v. [Atlantic & C. A. L.] Ry. Co., 82 S.C. 518, 64 S.E. 515; Jones v. [Southern] Ry. Co., 106 S.C. 20, 90 S.E. 183. Although O'Quinn was not a party of record to this action, he had been notified of it, and had promised to give evidence in support of the defense. That being so, it follows that the judgment, if allowed to stand, will affect his rights in an action by the defendant against him for his liability over to defendant for the damages which defendant will be compelled to pay on account of his alleged negligent acts and omissions." In line with the policy of construing the act liberally, the court reasoned that under the circumstances there presented, O'Quinn "was practically a defendant in the case." The facts in the cited case are clearly distinguishable from the facts before us. It is sufficient to point out that here the judgment against defendant Charles Evans was predicated solely upon his own negligence and not upon any act of Ernest Evans for which there could be any liability over.

[6, 7] In practically every other authority cited by defendant, the person in the military service had appeared and any judgment which the trial court might have entered would have involved directly the rights of such person. Many of the authorities cited are either decisions of trial courts granting stays or decisions of appellate courts sustaining orders granting stays. Defendant has failed to cite any authority involving comparable facts in which an order denying a stay has been reversed. In arguing the claim that Ernest Evans was "practically a defendant in the case" and therefore within the spirit of the act, defendant Charles Evans suggests that Ernest Evans might be liable for contribution because of the judgment against defendant Charles Evans individually in this action. We find no merit in this suggestion as the judgment against defendant Charles Evans resulted from a liability incurred solely because of his own negligence. United Brokers' Co. v. Dose, 143 Or. 283, 22 P.2d 204. Said defendant further suggests that the judgment against him might be satisfied by a charging order upon his interest in the partnership of which Ernest Evans is a member. Civil Code, section 2422. This suggestion is likewise without merit as the same might be said of any judgment recovered against defendant Charles Evans in any action.

Before concluding this phase of the discussion, it is appropriate to state that we do not wish to be understood as indicating that the trial court would necessarily have abused its discretion in denying the motions even if Ernest Evans and the partnership had appeared in the action and plaintiff had sought judgment against them. That question is not before us and if it were, it might have become necessary to discuss plaintiff's further claim that liability in this case was covered by insurance. See Johnson v. Johnson, 59 Cal.App.2d 375, 391, 139 P.2d 33.

[8-10] Turning now to the arguments regarding the rights of defendant Charles Evans, it is claimed that a stay or continuance should have been granted because Ernest Evans "was a material and indispensable witness". On this phase of the discussion, it is clear that the rights which said defendant is attempting to assert on his own behalf are to be measured by the rules governing the rights of an ordinary litigant to a continuance and not by the provisions of the act above mentioned. As was said in Jones v. State, 205 Ark. 806, 171 S.W.2d 298, 301, "The Soldiers' and Sailors' Civil Relief Act of 1940, U.S.C.A. Title 50, Appendix, § 510 et seq., does not apply to persons not in the armed forces who merely want to bring soldiers and sailors back to court to testify as witnesses." Viewed as a motion for a continuance made by an ordinary litigant, the showing made by defendant Charles Evans in support of the motion was wholly insufficient as the basis of a claim that the trial court abused its discretion in denying the motion. There was no attempt made in defendant's affidavit to show the nature of the testimony which Ernest Evans would give; or to show that such testimony would not be merely cumulative; or to show any reasonable probability that the testimony of Ernest Evans, if produced, would affect the result of the trial. The only reference in said affidavit to Ernest Evans as a witness was as follows: "That said Ernest Evans was a witness to the accident mentioned in said complaint and his presence at said trial is vital to affiant's defense". It requires no elaborate discussion or citation of authority to demonstrate the insufficiency of this showing. 5 Cal.Jur. 991. But defendant Charles Evans argues that upon the renewal of the motion at the close of plaintiff's case, it was then evident that Ernest Evans was a material witness. Said defendant then argues as to what Ernest Evans' testimony might have been but there was no showing before the trial court as to what Ernest Evans' testimony would have been. In the absence of any such showing, it is futile on this appeal for said defendant to attempt to claim that the record discloses an abuse of discretion in denying the motion for a continuance.

For the reasons stated, the purported appeal from the order denying the motion for new trial is dismissed and the judgment is affirmed.

NOURSE, P. J., and STURTEVANT, J., concur.

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62 Cal.App.2d 374

WESSELL v. BARRETT et al.

Civ. No. 12583.

District Court of Appeal, First District, Division 2, California.

Jan. 17, 1944.

Rehearing Denied Feb. 16, 1944.

Hearing Denied March 16, 1944.

1. Appeal and error ⇨927(3)

On appeal from judgment granting defendants' motion for nonsuit, reviewing court in stating the facts would give to plaintiff the benefit of all presumptions and inferences most favorable to him.

2. Workmen's compensation ⇨206

The requisites for imposing compensation liability upon both general and special employer are a loaned employee situation in which an employee of one is sent to perform labor for another, a common or joint participation in the work and benefit to each from its rendition, and some power, not necessarily complete, of control over details in each.

3. Workmen's compensation ⇨206

Where at the time of the accident both general and special employer exerted some control over the injured person through their respective foremen or employees, both should be held liable for compensation to the injured person.

4. Workmen's compensation ⇨210, 2084

Where truck driver's orders from general employer were to report for instructions to defendant's foreman, and at time of accident in which driver was injured he and an employee of defendant were loading lumber on truck and both were under the control of defendant's foreman, driver was a "special employee" of defendant, and entitled to compensation from defendant, but was not entitled to damages. St.1937, p. 269, § 3601.

See Words and Phrases, Permanent Edition, for all other definitions of "Special Employee".

5. Workmen's compensation ⇨2133

In truck driver's injury action against his special employer such employer's failure to carry compensation insurance was for driver to plead and prove. St. 1937, p. 271, §§ 3706, 3710.

6. Workmen's compensation ⇨2136

Evidence did not sustain truck driver's burden to show that his special employer had failed to carry compensation insurance so as to entitle driver to prosecute injury action against such employer rather than a compensation proceeding. St.1937, p. 271, §§ 3706, 3710.

Appeal from Superior Court, City and County of San Francisco; Frank T. Deasy, Judge.

Personal injury action by Fred J. Wessell against J. F. Barrett and others. From a judgment granting defendants' motion for nonsuit and an order denying a new trial, plaintiff appeals.

Appeal from order denying new trial dismissed.

Judgment affirmed.

Fitz-Gerald Ames, of San Francisco, for appellant.

Redman, Alexander & Bacon, of San Francisco, for respondents.

NOURSE, Presiding Justice.

Plaintiff sued for personal injuries incurred while engaged in loading refuse lumber upon a truck operated by him. At the close of his case the trial court granted defendants' motion for a non-suit upon the ground that plaintiff was a special employee of Barrett & Hilp and that the Industrial Accident Commission had exclusive jurisdiction over compensation for the injuries. We refer herein to the copartnership Barrett & Hilp as respondent. The plaintiff has appealed from the judgment, and from the order denying him a new trial.

[1] The facts, of course, all come from the evidence offered by plaintiff, and, in stating them here we follow the general rule of giving to plaintiff the benefit of all presumptions and inferences most favorable to him. Plaintiff was a truck driver in the general employ of Sibley Grading and Teaming Company. Barrett & Hilp were general contractors engaged at the time in the construction of the National Broadcasting Company building at the corner of O'Farrell and Taylor streets in San Francisco. The terms of the contract between the Sibley concern and Barrett & Hilp are not disclosed in the evidence, but the parties assume that plaintiff followed his customary practice when he reported with his truck to the foreman or superintendent of Barrett & Hilp. The evidence is that on the morning of the accident he reported to the foreman of Barrett & Hilp pursuant to previous orders of his general employer—and these appear to be the only orders given him by his general employer for the day. He thereafter placed himself under the sole supervision and control of this foreman. The latter instructed him to place his truck under a chute on Taylor Street and load it with refuse lumber which other employees of Barrett & Hilp would send down the chute from the fourth floor. This foreman had a gang of four or five men working with him gathering the lumber on the fourth floor, and he assigned another employee to work with plaintiff in loading the truck. The foreman had complete control over the entire gang of workmen and had arranged with plaintiff and his helpers a system of signals by which those on the truck could warn those on the roof that the chute was clogged and that operations should stop until the chute was cleared. The foreman stood on the firewall of the fourth floor, received the signals from those on the truck to stop or go ahead, and issued orders to the gang on the roof accordingly. These operations continued in this manner throughout the day. As the truck was loaded plaintiff carried the lumber to a vacant lot, under orders of Barrett & Hilp's foreman, dumped it there and returned for another load. At about 4 P.M. the chute became clogged. Plaintiff gave the agreed signal to the foreman on the roof to stop, the signal was acknowledged, but while plaintiff and his helper were cleaning the bottom of the chute a piece of lumber came down and struck plaintiff on the hip causing the injuries complained of.

For these injuries the plaintiff sought and recovered through the Industrial Accident Commission compensation, including medical care and hospitalization, from his general employers, but did not ask for such compensation through the commission against Barrett & Hilp. The issue on this appeal is whether the evidence shows that Barrett & Hilp was the special employer of plaintiff at the time the injuries occurred and that plaintiff's exclusive remedy was to proceed against it before the Industrial Accident Commission in accordance with the terms of section 3601 of the Labor Code, St.1937, p. 269.

[2] The general principles relating to liability in cases of general and special employment are stated in Campbell on Workmen's Compensation, Vol. 1, sec. 457, where it is said: "The requisites for imposing liability upon both general and special employer are: (1) a loaned employee situation, in which an employee of one is sent to perform labor for another; (2) a common or joint participation in the work and benefit to each from its rendition; (3) some power, not necessarily complete, of direction and control over details in each."

[3] In Employers' Liability Assur. Corp. v. Industrial Accident Commission, 179 Cal. 432, 439, 177 P. 273, 276, the Supreme Court stated the principle as follows: "where, at the time of the accident, both the general and special employer exerted some measure of control over the injured person through their respective foremen or employes, both should be held liable." The rule has been followed and approved in many later cases some of which are: Famous Players Lasky Corp. v. Industrial Acc. Comm., 194 Cal. 134,

137, 228 P. 5, 34 A.L.R. 765; Independence Indemnity Co. v. Industrial Acc. Comm., 203 Cal. 51, 55, 262 P. 757; Umsted v. Scofield Eng. Const. Co., 203 Cal. 224, 227, 263 P. 799; Department of Water and Power v. Industrial Acc. Comm. 220 Cal. 638, 641, 32 P.2d 354; and Silberman v. Industrial Acc. Comm. 21 Cal. 2d 609, 611, 134 P.2d 228. In Entremont v. Whitsell, 13 Cal.2d 290, 89 P.2d 392, and Stewart & Nuss, Inc., v. Industrial Acc. Comm., 55 Cal.App.2d 501, 130 P.2d 985, emphasis is laid on the right to exercise direction and control, and in Guarantee Ins. Co. v. Industrial Acc. Comm., 22 Cal. 2d 516, 139 P.2d 905, 907, it is said that if the special employer had the right to exercise control over the employee "it would be immaterial whether she actually exercised the control." This principle was reaffirmed in National Automobile Ins. Co. v. Industrial Acc. Comm., 23 Cal.2d 215, 143 P.2d 481, citing Federal Mutual Liability Ins. Co. v. Industrial Acc. Comm., 190 Cal. 97, 210 P. 628, and Press Pub. Co. v. Industrial Acc. Comm., 190 Cal. 114, 210 P. 820.

[4] Here the appellant testified that respondent's foreman always gave him the orders relating to the loading of the truck, that when he finished the day's work he gave the foreman a receipt to show he had been "working for Barrett & Hilp," that the foreman gave him all his orders while he was working on the job, that he had no orders from his general employer except to report for instructions to this foreman, that at the time of the accident he was working with an employee of Barrett & Hilp loading and straightening the lumber on the truck, and that both were then under the direction and control of respondent's foreman. Upon these facts which make the case presented by appellant there can be but one conclusion and that is that, at the very time of the accident, appellant was a special employee of respondent. As such he was entitled to compensation under the Labor Code and is not entitled to prosecute this action for damages.

[5, 6] It is suggested by appellant that there was insufficient proof that respondent carried insurance as required by the Labor Code. But that was a matter for him to plead and prove. Section 3706 of the Labor Code provides that: "If any employer fails to secure the payment of compensation, any injured employee * * * may bring an action at law" for damages. Section 3710 of the same Code declares a failure of an employer to secure payment of compensation to be a misdemeanor. In view of the presumption of innocence of crime and the presumption that the law has been obeyed, it was incumbent upon appellant to plead a case within the statute. But, in any event, there is here evidence tending to show that respondent had an "insurance carrier" and appellant does not dispute respondent's assertion that it was in fact insured for "the payment of compensation" under the Labor Code.

The appeal from the order denying a new trial is dismissed, the judgment is affirmed.

STURTEVANT and SPENCE, JJ., concur.

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62 Cal.App.2d 260

VAUGHN v. VAUGHN.

Civ. 14210.

District Court of Appeal, Second District, Division 1, California.

Jan. 12, 1944.

1. Marriage 🔑5

The Arizona statute prohibiting marriage between males under 18 years of age and females under 16 raised the age of consent from the common-law level of 14 years and 12 years respectively, and, being in derogation of the common law, must be strictly construed. Code Ariz.1939, § 63-102.

2. Marriage 🔑3

A marriage between a male over 18 years of age and a female over 16, being valid under Arizona law where performed, was valid in California. Code Ariz.1939, § 63-102; Civ.Code Cal. § 63; § 82, subd. 1; § 83, subd. 1.

3. Marriage 🔑3

A marriage between a male over 18 and female over 16 years, to which parental or guardians' consent had not been procured, not being invalid under Arizona law where performed, was not invalid under

California law. Civ.Code Cal. §§ 63, 69; Code Ariz.1939, § 63-104.

4. Marriage ⚷13

In the absence of statute declaring marriages not solemnized in a prescribed manner, or between parties of certain ages, absolutely void, all marriages regularly made according to the common law are valid and binding though contracted in violation of statute. Civ.Code, § 63.

5. Marriage ⚷58(1)

A marriage which contravenes no law and is valid in all respects when contracted cannot be annulled. Civ.Code, § 63; § 82, subd. 1; § 83, subd. 1.

6. Marriage ⚷1

A "marriage" is not merely a "civil contract" which a minor may disaffirm, but is a status based upon and arising out of a pre-existing contract. Civ.Code, § 55.

See Words and Phrases, Permanent Edition, for all other definitions of "Civil Contract" and "Marriage".

◆

Appeal from Superior Court, Los Angeles County; Roy V. Rhodes, Judge.

Action by Katie Vaughn, as parent and natural guardian of Lafayette Vaughn, a minor, against Annabelle Vaughn for annulment of a marriage. From a decree denying annulment, plaintiff appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

J. H. O'Connor, Co. Counsel, and S. V. O. Prichard, Asst. Co. Counsel, both of Los Angeles, amici curiae.

WHITE, Justice.

Appellant herein, Katie Vaughn, as parent and natural guardian of Lafayette Vaughn, a minor, appeals from a decree of the superior court denying an annulment of the marriage of her minor son, Lafayette Vaughn, to Annabelle Vaughn. The defendant Annabelle Vaughn was served with summons but failed to appear and her default was duly entered.

The facts surrounding this litigation may be epitomized as follows: Lafayette Vaughn, son of the appellant, was married to the defendant, Annabelle Vaughn, at Yuma, Arizona, on September 23, 1942. On the latter date Lafayette Vaughn was eighteen years of age, having been born on January 7, 1924. Prior to the marriage a license was secured from the license clerk at Yuma, but no written or other consent of the mother of Lafayette Vaughn, who had his custody and control, was presented to the license clerk prior to the issuance of such license, as is prescribed by the statutes of Arizona. The marriage was duly solemnized pursuant to such license. According to the record the parties separated on or about September 30, 1942. Appellant filed this action on February 20, 1943, to annul her son's marriage under the provisions of section 82, subdivision 1, and section 83, subdivision 1, of the Civil Code. After taking some evidence in the case, the trial court denied the annulment on the grounds that the complaint did not state facts sufficient to constitute a cause of action for annulment; that the marriage was valid and not void or voidable. Leave was granted to amend the complaint so as to state a cause of action for divorce but the record discloses the filing of no such amended pleading.

To support the decree of the trial court denying an annulment of this marriage it must be held that under the laws of the state of Arizona such marriage was legal and valid, for section 63 of the Civil Code of California validates all marriages contracted without this state which would be valid by the laws of the place where the same were contracted.

Section 63-102 of the Arizona Code (1939), of which we may take judicial notice (subdivision 3, section 1875, California Code of Civil Procedure) reads: "Males under eighteen (18), or females under sixteen (16) years of age shall not marry. Where, however, a female under sixteen (16) years of age is, or is about to become the mother of a child, she may, with the consent of the parent or guardian having her custody, and with the approval of any superior court judge in the state, marry the father of her child; any female who is, or is about to become the mother of a child, may marry the father of the child under eighteen (18) years of age, with the consent of his parent or guardian having his custody, and the approval of the judge of any superior court; they may not intermarry if prohibited by the statute relating to miscegenation."

[1, 2] The common law is the law of the state of Arizona. Section 1-106, Ari-

zona Code. At common law the age of consent to marriage was fourteen (14) years for males and twelve (12) years for females. Therefore, it is at once apparent that the above quoted section 63-102 of the Arizona Code is a statute in derogation of the common law and is to be strictly construed. Richardson v. Ainsa, 11 Ariz. 359, 95 P. 103. Courts are not authorized to construe statutes as having an effect beyond that which is to be gathered from the plain and direct import of the terms used in declaring them. As we read the above quoted section 63-102 of the Arizona Code, its only effect, pertinent to this case, is to raise the age of consent from the common law level to the level provided by such statute. By the Arizona statute males under the age of eighteen years and females under the age of sixteen years are absolutely prohibited from entering into a contract of marriage. Manifestly, therefore, both contracting parties to the marriage herein had complete and unqualified capacity to enter into the marital relationship so far as age is concerned.

[3] Appellant, however, relies strongly upon the provisions of section 63-104 of the Arizona Code which provides as follows: "The clerk shall not issue a license without the consent of the parents or guardians of the parties applying, unless the parties applying shall be the male, twenty-one (21) years of age, and the female, eighteen (18) years of age. When both parents are living, the consent of the father alone is sufficient, except when the parents are living apart, and then the consent must be given by the one who has the custody of the minor." To us it seems immediately apparent that the section just quoted is a prohibition against the right, authority or capacity of the clerk of the superior court to issue a marriage license. It resembles and is similar to section 69 of the California Civil Code. It is noteworthy that while section 63-109 of the Arizona Code makes it a misdemeanor for the clerk of the superior court to knowingly issue a marriage license to a male person under the age of twenty-one years or to a female person under the age of eighteen years without the consent in writing of the parent or guardian lawfully entitled to give such consent, no penalty whatever is visited upon the contracting parties to the marriage; nor does any provision of the Arizona law declare that a marriage of persons over eighteen and sixteen years respectively, to which the parental or guardian's consent has not been procured, shall in any wise be impaired or invalidated because of the failure of the clerk to procure such consent. Section 63-107 of the Arizona Code declares what marriages are void in that state, but nowhere does it appear therein that a marriage wherein consent shall be required, and is not obtained, is either void or voidable.

[4] There is respectable authority for the statement that laws such as the one with which we are here concerned, providing that under certain conditions the clerk shall not issue a marriage license without the written consent of parents or guardians; laws requiring publication of banns; attestation by witnesses; recordation of notices of solemnization of marriages, are construed as merely directory. In the absence of any provision declaring marriages not solemnized in a prescribed manner, or between parties of certain ages, absolutely void, it is held that all marriages regularly made according to the common law are valid and binding, though contracted in violation of any of the aforesaid and similar specific regulations imposed by statute. Meister v. Moore, 96 U.S. 76, 78, 24 L.Ed. 826; Cushman v. Cushman, 80 Wash. 615, 142 P. 26, L.R.A.1916C, 732.

[5] So far as we have been able to discover, the Arizona courts have not passed upon the main and precise question presented upon this appeal, i.e., the validity of the marriage of a minor male over the age of eighteen years without the consent of his natural parent or legal guardian, and as we have heretofore pointed out the legislature of Arizona has not made any specific provision in its statutes relative to the validity or invalidity of such a marriage; and neither has the legislature of California enacted any statute that such marriages shall have no validity here. It is fundamental that a marriage cannot be annulled unless there is something legally wrong with it in its inception, and the language of section 82 of the Civil Code of this state provides for the granting of an annulment only for causes "existing at the time of the marriage." A marriage which contravenes no law and is valid in all respects when contracted can never be annulled. McDonald v. McDonald, 6 Cal.2d 457, 58 P.2d 163, 104 A.L.R. 1290.

The case of Vaughan v. Gideon, 56 Cal. App.2d 158, 132 P.2d 529, cited by appellant does not aid her. In that case the minor was fifteen years of age at the time of her marriage. She was married in Arizona after having falsely sworn that she was eighteen or twenty-one years of age. The pertinent Arizona statute (§ 63-102, Ariz.1939 Code Annotated) reads: "Males under eighteen (18), or females under sixteen (16) years of age shall not marry. * * *" Manifestly, a marriage in violation of such prohibitory statute would be invalid and the court in the cited case, at page 161 of 56 Cal.App.2d, at page 531 of 132 P.2d, held that: "Unless and until the courts of Arizona give a different construction to the statute of that state, to which we have referred, there is nothing in the comity rule to prevent the courts of this state from interpreting that statute as directly prohibiting such a marriage as that here in question. Under such circumstances, the rule applied in the majority opinion in McDonald v. McDonald, supra, has no application here."

The facts confronting us in the case at bar are practically identical with those present in the case of Johnson v. Alexander, 39 Cal.App. 177, 178 P. 297, 298, which was decided in 1918 prior to the amendment of section 56 of the Civil Code in 1921, and when the age of legal consent for females, not otherwise disqualified, as being capable of consenting to and consummating marriage, was fifteen years. At that time section 56 of our Civil Code prescribed fifteen years as the age of legal consent, and section 69 of the same code required that "if the male is under the age of twenty-one years or the female is under the age of eighteen years, and such person has not been previously married, no license must be issued by the county clerk unless the consent in writing of the parents of the person under age, or one of such parents, or of his or her guardian, is presented to him, duly verified by such parents, or parent, or guardian; and such consent must be filed by the clerk, and he must state such facts in the license." The court sustained a demurrer to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action. The appellate court, in affirming the trial court's decision, stated, at page 179 of 39 Cal.App., at page 298 of 178 P.:

"It will be noted that section 56 [of the] Civil Code specifies fifteen years as the age at which females are capable of 'consenting to' and consummating marriage. Section 82 [of the] Civil Code provides for an annulment in cases where a party was 'under the age of legal consent.' It seems from the language of these two sections to be clear that an annulment would be possible under subdivision 1 of section 82 [of the] Civil Code, only when the party seeking it was under the age of fifteen years at the time of the marriage and the consent of her parents or guardian had not been previously obtained.

"By section 69 [of the] Civil Code, the duty of the county clerk is clearly defined, *but we are of the opinion that if he fails in this, either willfully or through mistake, and issues the license to a female under the age of eighteen years without the consent of parent or guardian, and the marriage is afterward solemnized, that such marriage is not void or voidable because of the failure of the clerk to perform his duty as prescribed.*"

The court then cites with approval the Matter of Guardianship of Ambrose, 170 Cal. 160, 149 P. 43, where the same sections of the code were considered and stated at page 180 of 39 Cal.App., at page 298 of 178 P.: "That it is only when the marriage is contracted by a minor who is incapable of consenting thereto by reason of being under the age of consent provided and designated in section 56 of the Civil Code, and the consent of his or her parents or guardian has not been secured, that the marriage may be annulled under the provisions of subdivision 1 of section 82 of the Civil Code." In support of the holding that a marriage is neither void nor voidable because of the failure of the clerk to obtain the requisite consent of parents or guardian prior to the issuance of a license, it is said in Cushman v. Cushman, 80 Wash. 615, 142 P. 26, 28, L.R.A.1916C, 732: *"It might be added that the fact that license is issued for the marriage of infants, upon the written consent of their parents, is a recognition of the fact that infants are capable of giving their own consent thereto; for assuredly the law would not give its sanction to a marriage between parties whom it did not regard as capable of giving their consent thereto, and the requirement of parental consent is not to be regarded as meaning that infants are incapable of assenting to their own marriage.* Infants may consent to contract marriage even though such consent, like their other executory contracts, may not be enforced against them. *Parental consent adds nothing to the age or consenting capacity* *of the infant.* Requirement of such consent simply means that infants may not be licensed to marry upon their own consent alone but that the consent of their parents must be added thereto; lack of such consent, however, not affecting the validity of a marriage, but only subjecting those who have neglected to acquire it to the penalties of the law." (Emphasis added).

Appellant directs our attention to the case of Southern Pacific Co. v. Ind. Commission, 54 Ariz. 1, 91 P.2d 700, in which it was held that marriages in Arizona which are merely voidable as well as those which are void are subject to annulment. This case is not helpful because neither in it nor in any other Arizona case, so far as we can find, has it ever been held that a marriage is voidable in the state of Arizona because of the failure of the licensing clerk to perform a duty which devolves upon him by statute. As we have heretofore pointed out, it is the general rule that marriages are not subject to annulment merely because of either a willful or unintentional dereliction of duty on the part of a licensing clerk. 38 Corp.Jur. 1306, note 78, citing cases from a majority of the states of the Union. Furthermore, when we look to the statutes of Arizona governing the annulment of marriages we find the statute pertinent thereto, section 27-801 (1939) reading as follows: "Annulment of marriage.—The superior courts may dissolve a marriage, and may decree the marriage to be null and void, where the cause alleged shall be an impediment rendering such contract void."

[6] Finally, appellant urges that the marriage sought to be annulled was a contract made by a minor and as such may by him be disaffirmed. It is further argued that the personal representative of the infant may take advantage of such infancy and disaffirm his contracts. We are unwilling to hold that the doctrine of disaffirming civil contracts may be so broadly applied to the subject of marriage. Marriage is something more that a mere civil contract and, as declared by section 55 of the Civil Code of this state "is a personal relation arising out of a civil contract". Marriage is, therefore, a status based upon and arising out of a pre-existing contract. A complete and very apt answer to appellant's argument in this regard is made by Mr. Bishop in his work on Marriage and Divorce, section 586, wherein it is said: "No special public harm is done when a minor promises marriage, then breaks his promise and pleads his nonage. But it would be a public scandal, an enormous abscess on the body politic, and a private curse to permit minors to come together in actual matrimony, then leave each other because of their nonage, then pair off differently, and continue the process until they were twenty-one years old."

The marriage with which we are here concerned, being legal and valid under the laws of the state of Arizona, we therefore conclude that the decree denying an annulment thereof must be affirmed. It is so ordered.

YORK, P. J., and DORAN, J., concur.

62 Cal.App.2d 268

PEOPLE v. GORDON.

Crim. No. 3740.

District Court of Appeal, Second District,
Division 1, California.
Jan. 12, 1944.

1. Constitutional law 🔑48

One attacking constitutionality of statute must not only overcome strong presumption in favor of its validity, but must show that by necessary import of the language the statute is clearly in conflict with Constitution.

2. Criminal law 🔑13

The Sabotage Prevention Act, providing for punishment of person who tampers with property with "reasonable grounds" to believe that act will interfere with war effort, is not unconstitutional for failure to describe meaning of quoted words as applied to flight academy employee who cut the wings of airplanes being used to train air cadets for the United States Army. St.1941, p. 1240, § 2.

3. Insurrection and sedition 🔑2

Evidence sustained conviction of violating the Sabotage Prevention Act by cutting the wings of airplanes being used to train air cadets for the United States Army. St.1941, p. 1240.

Appeal from Superior Court, Ventura County; Ernest D. Wagner, Judge.

Jesse Lee Gordon was convicted of violating the Sabotage Prevention Act, and he appeals.

Affirmed.

Walter L. Gordon, Jr., of Los Angeles, for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

YORK, Presiding Justice.

On March 3, 1943, by an information containing two counts, appellant was charged with violations of the Sabotage Prevention Act, Stats.1941, Ch. 184, p. 1240; Deering's 1941 Supp. to Gen.Laws, Act 8427.

Count I of said information charged that appellant on February 18, 1943, did "intentionally and maliciously injure and impair one Stearman Airplane properly designated as number 40—1693, the property of the United States Army used by the Mira-Loma Flight Academy on the Ventura County Airport at Oxnard for the training of air cadets for the United States Army Air Force, by cutting the under wing surface of said plane", said appellant "then and there well knowing that said act would interfere with the preparation of the United States for war, to-wit: the training of said air cadets for the United States Army Air Force * * *."

Count II charged an identical violation, except that the damage there charged occurred to another and different plane, No. 40—1644.

This appeal is prosecuted from the judgment of conviction of the offenses as charged which was rendered by the court sitting without a jury.

It is here urged (1) that the Sabotage Prevention Act, upon which the instant prosecution is based, is unconstitutional; and (2) that the evidence is insufficient to justify the decision.

The charge of unconstitutionality is directed toward section 2 of said Act, to-wit: "Whoever intentionally and maliciously destroys, impairs, injures, interferes or tampers with real or personal property with reasonable grounds to believe that such act will hinder, delay or interfere with the preparation of the United States or of any of the States for defense or for war, or with the prosecution of war by the United States, shall be punished by imprisonment for not more than 10 years, or by a fine of not more than ten thousand dollars ($10,000), or both; provided, if such person so acts with the intent to hinder, delay or interfere with the preparation of the United States or of any of the States for defense or for war, or with the prosecution of war by the United States, the minimum punishment shall be imprisonment for not less than one year."—it being urged "that a person of common intelligence cannot understand just what is meant by 'reasonable grounds' in the Statute. The law as enacted leaves it to a Court or Jury to determine whether the Defendant had reasonable grounds to believe his act would hinder the war effort. Under the law as enacted a different Court or Jury might under the same set of facts arrive at two entirely different conclusions. For the act to be constitutional, the 'reasonable grounds' should be enumerated * * *."

The purpose of the Model Sabotage Act, which was drafted by a nation-wide group aiming to guard against sabotage, is stated as follows in 54 Harvard Law Review 602: "The prevention of sabotage is a vital cog in the machinery of national defense. Sabotage is far more dangerous now than it has ever been in the past, because in the mechanized war of today the products of the factory are essential to the success of the army. In the First World War, armies required quite some mechanical equipment, but today the need not only for guns but for airplanes, tanks and trucks as well is many times as great. If our country is to prepare for a possible modern war and is actively to pursue its now openly-avowed policy to assist England in defeating the Axis powers, every available factory must work at top speed. Destruction of machinery, factories and utilities will spell defeat just as surely as rout in the field."

The Sabotage Prevention Act, supra, was enacted by the California legislature as an emergency measure, and in section 16 thereof is contained a statement of the facts constituting the necessity for its enactment, i. e.: "An emergency exists in the United States and the State of California in providing adequate armies and facilities of defense. There is need of the full capacity of factories, warehouses and transportation in order to effect the rapid rearmament of the Nation, and any injury or damage to these facilities would seriously affect the security of the United States and the State of California, and it is therefore necessary that this act take effect immediately."

The language used in section 31 of the Federal Espionage Act, 50 U.S.C.A., is comparable to that used in section 2 of the California Sabotage Prevention Act here under consideration: "Whoever, for the purpose of obtaining information respecting the national defense with intent or reason to believe that the information to be obtained is to be used to the injury of the United States * * *, or (b) whoever for the purpose aforesaid, and with like intent or reason to believe, copies * * * anything connected with the national defense; or (c) whoever, for the purpose aforesaid, receives * * * any document * * * connected with the national defense, knowing or having reason to believe, at the time he receives * * * it * * * that it * * * will be * * * disposed of by any person contrary to the provisions of this title * * *."

The case of Gorin v. United States, 312 U.S. 19, 27, 61 S.Ct. 429, 433, 85 L.Ed. 488, 494, decided January 13, 1941, considered the Federal Act which was therein challenged on constitutional grounds, it being claimed that the statute was uncertain. As to this contention the court held as follows: "But we find no uncertainty in this statute which deprives a person of the ability to predetermine whether a contemplated action is criminal under the provisions of this law. The obvious delimiting words in the statute are those requiring 'intent or reason to believe that the information to be obtained is to be used to the injury of the United States * * *'."

[1] It is stated in 5 Cal.Jur. 632, that: "One who assails the constitutionality of a statute must not only overcome the strong presumption in favor of its validity, but must show that by the natural and necessary import of the language it is clearly in conflict with the supreme law." Appellant has not met this requirement.

[2] Any person of ordinary intelligence should realize, i. e., have reasonable grounds to believe, that the act of cutting the wings of an airplane then being used to train air cadets for the United States Army would result not only in rendering such plane useless, but as well cause injury or loss of life to those cadets attempting to use such plane without knowledge that it had been damaged.

There is no merit in appellant's point that "for the act to be constitutional, the 'reasonable grounds' should be enumerated."

Appellant, as an employe of the flight academy, was in a position to know that the partial destruction of the two planes would interfere with the training of the air cadets, and thus hinder the preparation of the United States for war.

[3] Appellant also contends that the evidence is insufficient to sustain his conviction because (1) of failure to show that he had reasonable grounds to believe his act would hinder the war effort; and (2) no evidence was offered to show how or in what manner the war effort would be hindered by the rips found in the planes.

In this connection, appellant points out that the witness Wagner testified that "sometimes upon examination of planes coming out of the air they would find holes or tears in the wings due to weather conditions. This being true, the fact that appellant, if he did stick a hole in the airplane wing negates any theory that this act did hinder the war effort. Also, the witness testified that one of the planes that was supposedly slashed had been in the air that same morning and no testimony was adduced or offered to show that the war effort was in any manner impeded."

The witness Wagner was the Chief Aircraft Inspector for the Army at the Mira Loma Flight Academy. He testified that on February 18, 1943, he examined plane number 40—1644 (known as field No. 3) and found "a cut on the upper surface of the right elevator approximately 7 inches in length"; also, that he examined plane number 40—1693 (field No. 4) and discovered that "The under surface of the lower left wing was cut approximately twelve feet in length, which is almost the entire length of the wing. * * * It was cut intermittently the entire length." He also testified that these planes were being used on the date in question "for training air cadets for the United States Army", and were lined up in rows across the field with a parking space between each plane of approximately four feet.

Plane No. 3 to which the damage was limited to a seven inch cut did go into the air that morning, but plane No. 4, the wing of which had been cut almost its entire length—a distance of twelve feet—did not go into the air.

The witness Wagner on cross-examination testified that:

"Occasionally we find a hole punctured in the fabric or a tear, because in the wooden structure the wires would break off, but it was all caused by a specific cause.

"Q. I am not asking that, I am just asking what you found. You say you have found tears in planes coming out of the air, outside of these four ships, what is the longest tear you have found previous to this? A. I would say a tear of approximately 5 inches, more of a ragged tear."

The record discloses that appellant was employed in August of 1941 at the flight academy as a washer of planes. On November 21, 1942, "he was on the line cranking planes" when he walked off the job and was discharged. On December 4, 1942, he was rehired and went on officially as a mechanic's helper. "The duties of a cranker are to be on the line when the ships need cranking. They crank them and then check them for any damage which might have occurred during a flight, keep the windshield clean and various jobs to keep the plane flying on the flight line." Appellant worked a shift from 5:00 a. m. to 1:30 p. m., and the squadrons of cadets in training start flying about 8:00 a. m., it taking about 15 or 20 minutes to get them into the air. When the crankers have completed their duties of cranking, they keep the planes serviced and perform such other duties as are necessary. The crew chief assigns them to a flight and they stay on the home field at Oxnard or one of the auxiliary fields.

John Smith, a co-worker, testified that when he and appellant were cranking the ships on February 18, 1943, appellant told him "He said he thought he was going to cut some ships." That he saw appellant go around toward plane No. 3 and the witness heard something tear; that then appellant walked around toward the fourth plane, and the witness "heard something else tear." Appellant then rejoined said Smith and said "'You didn't see nothing', and I said 'No'." Appellant took the stand in his own defense, and accused the witness John Smith of having damaged the two planes in question.

There was also evidence attempting to show that appellant was disgruntled because he did not progress as fast as he believed he should, and that he cut the planes in order to get even with Mr. Cooper, his superior officer, who was aircraft mechanic superintendent of units at the flight academy.

There were many conflicts in the evidence, but an examination of the entire record reveals sufficient substantial evidence to support the judgment of conviction. Moreover, the effect of cutting the wings of an airplane is self-evident.

For the reasons stated, the judgment appealed from is affirmed.

DORAN and WHITE, JJ., concur.

62 Cal.App.2d 328

CAPITAL NAT. BANK OF SACRAMENTO et al. v. SMITH et al.

INTERNATIONAL METALS DEVELOPMENT CO. v. SAME.

Civ. 6911.

District Court of Appeal, Third District, California.

Jan. 14, 1944.

As Modified Feb. 10, 1944.

Hearing Denied March 13, 1944.

1. Stipulations 🔑17(2)

A written stipulation of facts regarding distribution of funds did not bind parties who were not asked to sign the document and who were not interested in such funds.

2. Appeal and error 🔑877(2)

A party not aggrieved by court's failure to accept the entire stipulation of facts could not complain of the omission.

3. Attorney and client 🔑104

An attorney was charged with knowledge that client had not signed stipulation of facts, did not rely upon stipulation, and was not bound thereby, and hence client could not complain of court's failure to accept the facts contained in stipulation.

4. Continuance 🔑12, 37

The refusal of continuance for party's absence because of illness was not error, where it did not appear that party was prejudiced and no formal application for continuance was made.

5. Trial 🔑5

The failure to object to designated time of trial amounted to a consent to try the case on that date.

6. Trial 🔑6(3)

After due notice of original date of trial, defendant's attorney had duty to exercise diligence to inform himself of subsequent continuances of the trial. Rules Regulating the Business of the Superior Courts, rule 1.

7. Appeal and error 🔑900

In absence of showing to the contrary, appellate court must assume that court rule requiring filing of memorandum was complied with. Rules Regulating the Business of the Superior Courts, rule 1.

8. Appeal and error 🔑181

An objection that court rule requiring filing of memorandum was not adhered to could not be made for first time on appeal. Rules Regulating the Business of the Superior Courts, rule 1.

9. Appeal and error 🔑925(1)

Where judgment recites that due notice of time and place of trial was given to all parties, appellate court must assume that provision of court rule with respect to setting cases for trial was fully complied with. Rules Regulating the Business of the Superior Courts, rule 1.

10. Trial 🔑408

Even in absence of notice of time and place of trial, the presence at trial and participation therein by counsel for interested party waived such notice in absence of showing of prejudice. Rules Regulating the Business of the Superior Courts, rule 1.

11. Continuance 🔑7

Liberality should be exercised in granting continuances when they are not prejudicial to other parties. Code Civ. Proc. § 595.

12. Appeal and error 🔑966(1)
Continuance 🔑7

The grant or denial of continuance is within discretion of trial judge, whose order will not be disturbed except for abuse of discretion. Code Civ.Proc. § 595.

13. Continuance 🔑44

An application for continuance should be supported by affidavits or other valid proof satisfactorily showing necessity for presence of absent party or witness, and reasonable assurance that party or witness may be present at future specified date to which trial may be continued. Code Civ.Proc. § 595.

14. Continuance 🔑44

If continuance is sought to procure evidence of a party or witness, due diligence and materiality of evidence must be shown by affidavits. Code Civ.Proc. § 595.

15. Continuance 🔑44

Refusal of application for continuance was not an abuse of discretion, where no affidavits were filed and no oral evidence was adduced in support of application, and no showing of prejudice because of refusal was shown. Code Civ.Proc. § 595.

16. Trial 🔑395(5)

A finding that purchaser of mine defaulted in performance of conditions, and that vendor terminated contract of sale on that account, and that all of purchaser's rights were thereby terminated, was a sufficient determination of ultimate fact that contract was terminated for breach of covenants to pay installments at specified times.

17. Trial 🔑395(5)

Ultimate facts only should be found, and it is usually improper to incorporate evidentiary facts in findings.

18. Appeal and error 🔑1071(1)

A finding determining ultimate fact that contract for purchase of mine was terminated for breach of covenant to pay installments at specified times presented no reversible error even if finding might be deemed to lack definite application, where adoption of more specific findings would necessarily be adverse to objecting defendant.

19. Action 🔑6

Evidence sustained finding that purchaser of mine failed to make installment payments at dates designated or on extended dates warranting termination of contract of purchase for breach of covenants.

20. Stipulations 🔑8

A stipulation of facts was not void because it failed to determine all of the facts with relation to issues of consolidated cases, but was binding on parties who authorized it to be signed to extent that it determined facts and amounts to which each party was entitled, notwithstanding other parties to litigation who were not interested did not sign the stipulation.

21. Trial 🔑2

Two or more cases consolidated for trial constitute a single cause of action, and but one set of facts is ordinarily required.

22. Stipulations 🔑18(7)

While court was bound by stipulation of facts between parties interested therein, court could adopt findings not in conflict therewith upon other issues necessary to determination of rights of other litigants who failed to sign the stipulation, and adoption of findings determining further facts did not render stipulation void.

23. Appeal and error 🔑1152
Stipulations 🔑18(7)

A stipulation of facts was binding on court with respect to all essential agreements therein contained between interested parties who signed stipulation, and hence judgment would be modified to conform to stipulation.

24. Stipulations 🔑18(6)

The court may not adopt findings in conflict with stipulated facts.

25. Stipulations 🔑17(1, 3)

A stipulation of counsel at trial agreeing that specified material facts upon essential issues may be considered as evidence, and that judgment shall be rendered accordingly, is binding upon respective parties and upon the court.

26. Stipulations 🔑14(10), 18(7)

A written stipulation of facts authorizing rendering of judgment accordingly should be construed with and is controlling over the pleadings with which the stipulation merges.

27. Trial 🔑388(4)

When issue is admitted by stipulation, a finding thereon ordinarily becomes unnecessary.

28. Appeal and error 🔑1122(1)

Where stipulation was binding upon parties, and trial court adopted findings but failed to accept all of stipulated facts, the appellate court to avoid necessity of reversal, and in view of constitutional and statutory provisions authorizing appellate courts to make findings, would adopt a supplemental finding to include remaining stipulated facts. Code Civ.Proc. § 956a; Const. art. 6, § 4¾.

29. Appeal and error 🔑977(1)
New trial 🔑6

Motions for new trial are addressed to sound discretion of court, whose rulings may not be disturbed except for abuse of discretion.

◆

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by Samuel Ginsberg and another against Theo. Smith and others, to partition a mine and for an accounting, wherein, after the death of named plaintiff, the Capital National Bank of Sacramento, as executor of the last will of the deceased, and other parties, were substituted as plaintiffs. Defendant Barbara G. de Bles filed a cross-action. Action by the International Metals Development Company against Theo. Smith and others for declaratory relief and that the court should construe contracts and determine the interests of the various parties involved, wherein Barbara de Bles also filed a cross-action. From judgments the plaintiffs in the first action, Barbara G. de Bles and others appeal.

Modified and, as modified, affirmed.

Thomas B. Leeper, of Sacramento, Burt W. Busch, of Lakeport, A. M. Mull, Jr., of Sacramento, and Samuel I. Jacobs, of San Francisco, for appellants Capital Nat. Bank of Sacramento and others.

George I. Lewis, of Sacramento, for appellant Barbara de Bles.

James D. Meredith and H. N. Mitchell, both of Sacramento, for Margaret R. Johnson.

Bronson, Bronson & McKinnon, of San Francisco, for respondent International Metals Development Co.

Ralph V. Devoto, of Lakeport, for respondents Theo. Smith and others.

A. G. Bailey, of Woodland, for respondents Rablin & Turner Estate.

THOMPSON, Justice.

Certain parties have appealed on various grounds from a judgment which was rendered against them in the above entitled actions which were consolidated for the purpose of trial. The suits involve title to a quicksilver mine and distribution of the proceeds from the sale thereof. The mine is situated in Lake County and was formerly owned by Alpha Quicksilver Company.

The first action was commenced in 1938 by Sam Ginsberg and Sacramento Pipe Works against Theo. Smith et al. It seeks to partition the quicksilver mine or to sell it and apportion the proceeds thereof, and also asks for an accounting and distribution of the rents, issues and proceeds to the parties entitled thereto. After the commencement of that suit Mr. Ginsberg died and Capital National Bank of Sacramento, as executor of the last will of said deceased, and other parties were substituted as plaintiffs.

The second action was brought in November, 1940, by International Metals Development Company, the purchaser of the mine, pursuant to contract, against the plaintiffs in the first suit and numerous other parties claiming interests in the mine or in the proceeds of sale thereof. It seeks declaratory relief under Section 1060 of the Code of Civil Procedure, and asks the court to construe two contracts for the purchase of the mine and to determine the interests of the various parties involved therein.

The first contract was executed September 27, 1936, between Theo. Smith, as the holder of title to the mining property in trust for some forty claimants who contributed various sums of money for the maintenance and operation of the mine, and Barbara de Bles, the first conditional contract purchaser thereof. The consideration named in that contract was $100,000, payable in specified installments. It is alleged that after payments of installments aggregating about $14,000, Barbara de Bles defaulted in the covenants of her contract, which, on that account, was therefore terminated by Mr. Smith.

Theo. Smith, as trustee, then executed a similar contract of sale of the mining property to International Metals Development Company on June 20, 1940, for the sum of $100,000, payable in installments. It is alleged that all of said installments were paid in accordance with the contract and that the plaintiff has fully performed the covenants of its agreement. All installments falling due after the commencement of that action have been paid into court subject to its order and judgment. The complaint asserts that a controversy exists between the parties to said contracts regarding the validity of each of them, the alleged termination of the Smith-de Bles agreement for breach of covenants, and the respective shares of the proceeds of sale to which the numerous claimants are entitled. The court is asked to determine those issues. All interested defendants appeared by counsel, in several separate groups, and answered the material allegations of both complaints. Barbara de Bles appeared separately and filed her answer and cross-complaint in both actions, setting forth the execution and validity of her contract to purchase the mine, her alleged title thereto and a claim to all payments made by International Metals Development Company. She asks for judgment accordingly.

During the trial Barbara de Bles, through her attorney, moved for a continuance of the trial on the ground of her illness, which motion was denied. Her attorney remained and participated in the trial, but offered no evidence in support of her contentions.

After submission of the cause and adoption of findings by the court the plaintiffs in the partition suit moved the court to be relieved from responsibility of a stipulation of facts which they had signed and filed in the consolidated cases, on the ground that they had been misled and substantially injured by the court's failure to adopt said stipulation of facts in toto and by failure to render a judgment in accordance therewith. That motion was denied. Plaintiffs' motion for new trial was also denied.

At the trial, which occurred in May, 1941, oral and documentary evidence was adduced by the respective parties, except that no evidence was offered in behalf of Barbara de Bles. In addition to the oral and documentary evidence, a twenty-five page typewritten stipulation of facts and an agreement for judgment, signed by the attorneys representing all interested parties except International Metals Development Company and Barbara de Bles, was filed. It recites with elaborate details the various transactions with relation to the issues involved in the consolidated actions, and concedes the validity of the contract of sale from Theo. Smith, as trustee, to International Metals Development Company, and the fulfillment of its terms and conditions. It also concedes the termination of the Smith-de Bles contract for breach of covenants, but asserts that Barbara de Bles claims that her contract is in full force and that she is entitled to its fulfillment and to the proceeds derived from the subsequent contract. The stipulation definitely fixes, determines and authorizes payments to forty or more named claimants and attorneys of specified sums of money advanced for operating and maintaining the mine in the aggregate amount of $17,118.81, together with interest thereon from the respective dates of payments. It also agrees to specified amounts of other expenses paid by named individuals incident to the operation of the mine in a sum aggregating several thousands of dollars and to the value of services rendered by ten different attorneys in this litigation and incident to said mining enterprise, in the total sum of $11,843, all of which amounts are authorized to be paid. That document provides for the rendering of judgment accordingly, in the following language:

"It is stipulated and agreed by and between those parties in the foregoing entitled actions who are signatory hereto, as follows, towit:

"That the Findings of Fact and the Decree of the Court shall be in accordance with the terms hereof."

On the theory that the stipulation of facts is not binding for the reason that it was neither signed nor agreed to by all interested parties, the court adopted detailed findings on all material issues raised by the pleadings in the consolidated cases. The court specifically found that Theo. Smith held title to the mining property as trustee for forty named claimants who duly authorized him to sell the mine and account to them for the proceeds thereof; that Barbara de Bles' agreement to purchase the mine had been terminated for breach of the covenants of her contract, and that she had no further interest therein; that the agreement for sale of the mine to International Metals Development Company was valid and binding, and that upon fulfillment of its contract that company will be entitled to a good and sufficient deed of conveyance thereto; that specified installments had been paid by the company; that forty named claimants were entitled to the sums of money contributed by them in the amounts set opposite their respective names, aggregating $17,118.81, and that the balance of the purchase price of the mine shall be paid to Theo. Smith as trustee for the parties entitled thereto. Judgment was rendered accordingly.

It must be conceded the court rejected the written stipulation of facts and the consent to render judgment accordingly. While most of the issues in the consolidated cases were determined in accordance with the stipulations, several of them were disregarded. For instance, the court allowed the respective sums of money conceded to have been contributed by the forty claimants, but disallowed the agreed interest thereon, together with other stipulated sums furnished by named claimants for payment of taxes, costs, and maintenance in an amount aggregating more than $9,000. The court also refrained from allowing attorneys' fees in accordance with the stipulation, or at all.

From the judgment which was rendered the plaintiffs in the partition suit and several of the defendants in both actions have appealed. Separate briefs on appeal have been filed in behalf of different parties and groups of litigants. Barbara de Bles contends that her motions for a continuance and for a new trial were erroneously denied, and that the findings and judgment are not supported by the evidence. The plaintiffs in the partition suit assert that they were misled into believing that the judgment and findings would be governed by their stipulation of facts, and that the findings adopted by the court and the judgment are not supported by the evidence. They claim that the stipulation of facts is either binding in toto, or it is absolutely invalid, in which latter case the judgment should be reversed because the court disregarded the stipulation upon which the parties thereto relied. The defendants, Viola Rablin and the administrator of the estate of John Tanner, deceased, take the position that the stipulation is binding on all parties interested therein and that the trial court should be directed to render judgment in complete accordance therewith. Some of the respondents argue that the judgment as rendered should be affirmed. The International Metals Development Company asserts that the court properly determined from evidence adduced, independently of the stipulation of facts, that Theo. Smith holds title to the mining property as trustee, with authority to sell the property; that he executed a valid binding contract with that company which has been fulfilled in every respect, entitling it to a good and sufficient deed of conveyance; that the company is in no way interested in distributing to the beneficiaries of that trust the $100,000, which it has paid Smith for the property, and that the court properly determined from the oral and documentary evidence adduced that the former contract of purchase with Barbara de Bles was terminated for breach of covenants, and that neither she nor the company was a necessary party to the stipulation of facts. The company therefore urges this court to affirm the judgment in the declaratory relief case in so far as it determines the validity of its contract and title to the mining property.

[1-3] We are of the opinion the written stipulation of facts was not intended to and that it does not bind the International Metals Development Company or Barbara de Bles. Neither of them was asked to sign that document. Neither of them is interested in the distribution of the funds received from the sale of the property. If the court had adopted the stipulation of facts in toto, the result would not have affected the rights of either of the last mentioned parties. Neither of them is aggrieved by the court's failure to accept the entire stipulation of facts. Barbara de Bles may therefore not complain of that omission, and International Metals Development Company does not complain on that account. No one contends that the company is interested in the manner of distribution of the funds which it paid for the purchase of the mining property. The findings which were adopted by the court, and the judgment, are adequately supported by oral and documentary evidence which was adduced, independently of the stipulation of facts. Barbara de Bles was represented at the trial by her attorney, and had the opportunity to offer any evidence in support of the issues presented by her answer or cross-complaint. She failed to do so. Her attorney was charged with knowledge that she had not signed the written stipulation of facts; that she did not rely upon that document and was not bound thereby. She may not now complain of the court's failure to accept the facts contained in that instrument.

We will address ourselves to the issues presented on appeal by Barbara de Bles.

[4] The court did not err in setting the case for trial, upon notice, or in refusing to continue the trial on application of the attorney for Barbara de Bles, on account of her absence, on the ground of illness, for the reason that it does not appear the defendant was thereby prejudiced, and because no formal application for the continuance was made as required by law.

[5] The complaint in the last mentioned case was filed in September, 1940. March 24, 1941, the defendant Barbara de Bles filed a demurrer to that complaint. Upon notice duly served by mail upon Charles L. Gilmore, attorney for said defendant, and upon the other defendants, the case was first set for trial for May 5, 1941. On the last mentioned date the attorneys for all defendants except Mr. Gilmore, were present. The case was then continued to May 26th, at which time Mr. Gilmore was also absent. Mr. Harold Ropers, an attorney for plaintiff, was then sworn and testified that he notified Mr. Gilmore in April that "the case is set for trial on May 5th", and that the demurrer of defendant Barbara de Bles should be disposed of; that Gilmore then told him he would have the demurrer overruled and that he would file his client's answer within ten days. No objection to the designated time of trial was made. This amounted to a consent to try the case on that date. The answer and cross-complaint of defendant Barbara de Bles was in fact filed April 28, 1941. On May 17th, Mr. Ropers again notified Gilmore by mail of the continuance of the trial to May 26th. Ropers' affidavit to that effect was filed. No appearance was made in behalf of Barbara de Bles on May 26th, and no formal application for continuance was then made. The cause was however partially tried and then continued to June 16, 1941, at which time all parties were represented in court by counsel. Mr. Gilmore then orally moved for a further continuance on account of the alleged illness of his client. The certificates of two physicians were filed, but no affidavit in support of the motion was filed, and no oral evidence in support thereof was adduced. An objection to the requested continuance was made by one of the attorneys for defendants, on the ground that the motion was not supported by affidavits or other proper evidence. In effect, the motion was denied for lack of a proper showing therefor. The court then proceeded with the trial of the consolidated cases. Charles L. Gilmore was present during the trial. The court found that "due notice of time and place of trial having been given *to all parties* to said causes," and that "Charles L. Gilmore, Esq. appearing for

the defendant Barbara de Bles," on June 16, 1941, the trial should proceed at that time.

[6] Mr. Gilmore was legally notified of the time of trial on May 5th, and of the date May 26th to which the trial was continued. He made no objection to either date of trial. On the contrary his conduct amounted to consent thereto. After due notice of the original date of trial it became the duty of said defendant's attorney to exercise diligence to inform himself of subsequent continuances of the trial. In Re Estate of Bell, 58 Cal.App.2d 333, at page 336, 136 P.2d 804, at page 806, it is said: "After notice has been properly given in the first instance, it becomes the duty of all interested parties to keep themselves informed by diligent inquiry of subsequent continuances of the hearing." Langdon v. Blackburn, 109 Cal. 19, 28, 41 P. 814; Abels v. Frey, 126 Cal.App. 48, 14 P.2d 594; 11b Cal.Jur. 573, sec. 1118.

[7, 8] There was a substantial compliance with the provisions of Rule I, of Rules Regulating the Business of the Superior Courts. 213 Cal. lxxxi. We are not informed as to whether the memorandum required by said rule of court was actually filed. In the absence of a showing to the contrary, we must assume the rule was complied with. The formal adherence to the provisions of that rule was waived by the defendant under the circumstances of this case. That objection may not be made for the first time on appeal. In Helbush v. Helbush, 209 Cal. 758, on page 764, 290 P. 18, on page 21, it is said: "Whether in a given case the disregard of the rule would amount to a reversible error or irregularity would necessarily depend on the facts and circumstances of that particular case."

[9, 10] Where the judgment recites that due notice of the time and place of trial was given to all parties, as it does in the present case, we must assume that the provisions of the rule of court with respect to setting cases for trial was fully complied with. Johnston v. Callahan, 146 Cal. 212, 214, 79 P. 870. Even in the absence of such notice, the presence at the trial and participation therein by counsel for an interested party waives that notice in the absence of a showing of prejudice thereby. Horstmyer v. Trial Board of the City of Sacramento, 21 Cal.App.2d 533, 538, 69 P.2d 1021. There is no merit in the contention that the court erred in setting the case for trial or in continuing it to the later date of June 16th, when the trial was actually completed.

[11-15] Likewise there is no merit in the contention that the court erred in refusing to grant the motion of defendant Barbara de Bles for a continuance of the trial, which was orally made on June 16th. No affidavits were filed and no oral evidence was adduced in support of that motion. No showing of prejudice to that defendant on account of the denial of said motion was shown. The convenience of numerous attorneys and other interested parties and the expeditious proceedings of the court would have been injuriously affected by that requested continuance. It is true that liberality should be exercised in granting continuances when they are not prejudicial to the interests of other parties to the actions. Ross v. Thirlwall, 101 Cal.App. 411, 281 P. 714; Canal Oil Co. v. National Oil Co., 19 Cal.App.2d 524, 66 P.2d 197; Callegari v. Maurer, 4 Cal.App.2d 178, 40 P.2d 883. The granting or denial of a motion for continuance of the trial is within the sound discretion of the trial judge, and such an order will not be disturbed on appeal except for an abuse of discretion. Canal Oil Co. v. National Oil Co., supra; Callegari v. Maurer, supra; 2 Bancroft's Code Pr., 1511, sec. 1058. An application for continuance should be supported by either affidavits or other valid proof satisfactorily showing the necessity for the presence of the absent party or witness; the fact that the interest of the party will suffer by his absence, and reasonable assurance that the party may be present at a future specified date to which the trial may be continued. Ross v. Thirlwall, supra; 2 Bancroft's Code Pr., 1517, sec. 1064. If the postponement is sought to procure the evidence of a party to the action or other witness, due diligence and the materiality of the evidence must be shown by affidavits. Sec. 595, Code Civ.Proc.; Ross v. Thirlwall, supra. None of the foregoing necessary requirements for the granting of a continuance were complied with. It does not appear that the defendant was prejudiced thereby. The court therefore did not err in refusing the application for a continuance.

For the foregoing reasons the motion of Barbara de Bles for a new trial on those same grounds was properly denied.

[16, 17] The appellant Barbara de Bles challenges finding number XII as an insufficient determination of her breach of contract with Smith, dated September 27, 1936, for the reason that said finding merely states "conclusions of law". It is further asserted that finding is not supported by the evidence, for the reason that deferred payments under the contract were thereafter accepted, constituting a waiver of the prescribed times for making payments. The brief fails to point out any evidence of acceptance of such deferred payments.

The challenged finding specifically determines that the defendant Barbara de Bles defaulted in performance of the terms, covenants and conditions of the Smith-de Bles agreement, and that Smith terminated that contract on January 24, 1940, on that account; that all of the rights of said defendant under the contract were thereby terminated, and that she thereafter held no assignable or other interest in said property. Finding number XII is a sufficient determination of the ultimate facts to the effect that the contract of Barbara de Bles, dated September 27, 1936, was terminated for breach of covenants to pay installments at specified times, that she is possessed of no interest in the property, and that title to said property was subsequently conveyed by a valid contract of sale to International Metals Development Company. It is evident that if more specific findings upon that subject were adopted, they would necessarily be adverse to that defendant. It is the established rule that ultimate facts, only, should be found. It is usually unnecessary and improper to incorporate evidentiary facts in the findings. Weger v. Rocha, 138 Cal.App. 109, 113, 32 P.2d 417; 24 Cal.Jur. 968, sec. 203. In the Weger case last cited, the syllabus correctly states the foregoing principle in part as follows: "The finding that a release signed by plaintiff was void and was secured by fraud, duress, menace and undue influence, was not subject to the objection that it was only a conclusion of law and not sufficient even though it was sustained by the evidence."

[18] Furthermore, the inferences which this court may draw in support of the judgment necessarily lead to the conclusion that the trial court correctly determined that the contract of Barbara de Bles was terminated for failure to pay stipulated installments pursuant to that agreement, and that she thereafter had no title in the property. That objection to the findings is not reversible error even though it may be deemed to lack definite application, for the reason that the adoption of more specific findings on that subject would necessarily be adverse to that defendant. Hulen v. Stuart, 191 Cal. 562, 572, 217 P. 750; Boas v. Bank of America, 51 Cal.App.2d 592, 598, 125 P.2d 620; Mammoth Gold Dredging Co. v. Forbes, 39 Cal.App.2d 739, 753, 104 P.2d 131; 24 Cal.Jur. 944, sec. 188.

[19] The challenged finding is adequately supported by the evidence. While it is true that the dates for payments of certain installments were extended, it sufficiently appears that they were not paid on or before the extended dates. We are pointed to no evidence warranting an inference that the times of payments of installments were waived.

Theo. Smith testified at the trial that he acquired title to the property and entered into an agreement with Barbara de Bles, in September, 1936, to sell the mine, and that she subsequently defaulted in payments of certain installments, but that, in September, 1939, he extended the times within which those deferred payments might be made, but that she again defaulted in those payments, on account of which, after due notice and demand, he terminated her contract. He also testified that thereafter he executed a similar contract in June, 1940, to sell the mine to International Metals Development Company, upon the same terms, the covenants of which agreement were fully performed by the company.

J. A. Falkenstein testified that he was secretary of the Creditors' Committee, and that Theo. Smith was employed by it to hold title to the mining property in trust for the benefit of the creditors; that the Committee authorized Mr. Smith to terminate the agreement of purchase with Barbara de Bles on account of her breach of covenants, which he did, and that he was thereafter authorized to, and did subsequently enter into a similar contract to sell the mine to International Metals Development Company for the sum of $100,000, to be paid in specified installments, that the Company fulfilled the covenants of its agreement, and that Mr. Smith accounted to the Committee for all payments received on that account.

Doctor A. Johnston testified that he was a member of the Creditors' Committee, which held title to the mining property, and that the Committee authorized Mr. Smith to terminate the contract with Barbara de Bles for breach of covenants, which he did, and that he was thereafter authorized to and did execute a similar agreement with International Metals Development Company, the terms of which were fully complied with, and that Mr. Smith accounted to the Committee for all payments received on that account.

The findings which were adopted by the court with respect to the title to the mining property, the cancellation of the Smith-de Bles contract for breach of covenants, the execution and fulfillment of the subsequent agreement with International Metals Development Company, and the validity of its title to the property, are adequately supported by the evidence, independently of the stipulation of facts.

[20] The adopted findings are not in conflict with the stipulation of facts. That stipulation is not void merely because it fails to determine all of the facts with relation to the numerous issues of both consolidated cases. It is valid and binding on the parties who authorized it to be signed, to the extent that it determines the facts and amounts to which each of them is entitled from the proceeds of sale of the property, regardless of the fact that two other parties to the litigation who are not interested in the disposition of said proceeds, did not sign the stipulation. Neither Barbara de Bles nor International Metals Development Company was interested in that phase of the litigation, or in the distribution of the proceeds of the sale. The Company is interested only in fulfilling its contract, paying to the parties entitled thereto the agreed purchase price, and in procuring a good and sufficient deed of conveyance and title to the mine. For that reason all installments which became due after the commencement of its action for declaratory relief were paid into court for the benefit of the parties entitled thereto. It was not necessary for the two parties last mentioned to join in the stipulation to render it valid and binding.

[21, 22] It is true that when two or more cases are consolidated for trial they are deemed to constitute a single cause of action, only, and that, under such circumstances, but one set of facts is ordinarily required. Stanton v. Superior Court, 202 Cal. 478, 484, 261 P. 1001. However, we know of no rule which precludes the court from adopting findings upon issues not determined by a stipulation of facts. It follows that while the court in this case was bound by the stipulation of facts between the parties interested therein, it was authorized to adopt findings, not in conflict therewith, upon other issues necessary to the determination of the rights of other litigants who failed to sign the stipulation. The adoption of findings determining further facts does not render the stipulation void.

[23] We are of the opinion the stipulation which was filed in these consolidated cases is binding on the court with respect to all essential agreements of facts therein contained between the interested parties who signed the same and that the judgment should be modified to conform to that stipulation, including the allowance and distribution of proceeds of said sale of property to the various named claimants and attorneys in the agreed sums specified.

[24, 25] It has been uniformly held the court may not adopt findings in conflict with stipulated facts. Wilson v. Mattei, 84 Cal.App. 567, 573, 258 P. 453. A stipulation of counsel at the trial of a case, agreeing that specified material facts upon essential issues may be considered as evidence, and that a judgment shall be rendered accordingly, is binding upon the respective parties thereto and upon the court. Haese v. Heitzeg, 159 Cal. 569, 114 P. 816; People v. Gabriel, 57 Cal.App.2d 788, 792, 135 P.2d 378; 23 Cal.Jur. 816, secs. 7 and 12; 2 Jones Comm. on Evidence, 2nd ed., 1759, sec. 9551; 60 C.J. secs. 68–78. In the authority last cited it is said on page 83 thereof: "An agreed statement of facts on which the parties submit the case for trial is binding and conclusive on them, and they will not be permitted to deny the truth of the facts stated, nor be heard to claim that there are other facts that the court may presume to exist; and the burden is on the party seeking to recover and show his right from such facts. So, also, *the court is conclusively bound by the facts stated and must render judgment according as the facts agreed upon require.* Such a stipulation does not embrace and include the law of the case, but only the facts." (Italics added.)

The trial court should have adopted the entire stipulation of facts, since it was authorized to be and was actually signed by the attorneys of all the parties who are interested in the distribution or partition of the proceeds of the sale of the mining property, and it therefore became binding on the court. In addition to the findings which were adopted, the court should also have allowed each interested party named in the stipulation the several amounts together with interest thereon which were expended by them incident to the maintenance of said mining enterprise, and also the agreed attorneys' fees for services performed, according to the express terms of the stipulation. The stipulation also designates the Capital National Bank of Sacramento as the "Depositary and Escrow Holder of all moneys, funds and documents herein referred to, and the payee of all payments which hereafter may be made by said International Metals Development, Inc." It appears that all installments have been fully paid under the contract of the last mentioned company. The record contains no evidence in conflict with that stipulation. Judgment should be rendered accordingly.

[26] When a written stipulation of facts authorizes the rendering of judgment accordingly, that agreement should be construed with and it becomes controlling over the pleadings. It has been held the stipulation merges with the pleadings and is controlling with respect to the agreed facts therein contained. Alderson v. Cutting, 163 Cal. 503, 126 P. 157, Ann.Cas.1914A, 258; 60 C.J. 82, sec. 75. In the authority last cited it is said in that regard: "The legal effect of a stipulation as to facts, it has been held, is to incorporate into the pleadings all the facts agreed upon as one of the allegations thereof; * * * Where judgment is based not on the pleadings alone, but on pleadings and a stipulation admitting a designated fact, the stipulation is controlling, regardless of any allegations of denial thereof in the pleadings."

[27] When an issue is admitted by stipulation, a finding on that subject ordinarily becomes unnecessary. Alderson v. Cutting, supra; Wilson v. Mattei, 84 Cal.App. 567, 572, 258 P. 453. In the present consolidated cases, however, the entire facts with respect to all of the issues were not stipulated. The court adopted findings, but failed to accept all of the stipulated facts.

[28] To avoid the necessity of a reversal, we are disposed to adopt a supplemental finding including therein the remaining undisputed items of expenditures and the amounts of attorneys' fees which were agreed upon in the stipulation of facts.

In accordance with Article VI, Section 4¾ of the Constitution, and Section 956a of the Code of Civil Procedure, this court adds to Finding Number XIII, the following determination of facts based on the stipulation which was filed in these consolidated cases, towit: "The aforesaid claimants and beneficiaries are also entitled to payment of the amounts appearing opposite their respective names on pages 2 and 3 of the written stipulation, as accrued interest on the several sums allowed from the dates of payments thereof; the various claimants and beneficiaries named on pages 6, 7, 8, 9, 10 and 11 of said stipulation have expended and are entitled to the amounts and interest appearing opposite their respective names, to reimburse them for moneys expended for costs, and maintenance incident to the operation of said mining property; the parties and claimants named on page 12 of the stipulation have expended and are entitled to recover the amounts appearing opposite their respective names, to reimburse them for services performed and for moneys expended, as approved by the Committee, incident to the operation of said mine; the trustee, Theo. Smith, has expended and is entitled to recover the aggregate sum of $877, to compensate him for payment of property and income taxes on the mine as itemized on page 12 of the stipulation; the attorneys named on pages 13 and 14 of the stipulation have expended and are entitled to recover the amounts appearing opposite their respective names, as costs and disbursements incident to the litigation in these suits; the attorneys named on pages 12 and 13 of the stipulation have performed legal services of the specified values, and are entitled to recover the agreed sums appearing opposite their respective names, as compensation for professional services rendered incident to the litigation in these actions."

[29] The motions of plaintiffs in the partition suit to set aside the stipulation of facts authorized by them to be signed, on the ground of mistake, to open the case for the introduction of further evidence, and the motion for new trial on the same ground, were properly denied. Those motions were addressed to the sound discretion of the court. Its rulings on said motions may not be interfered with, except for an abuse of discretion. No such abuse

of discretion appears from the record on appeal.

The judgment is modified by adding thereto the adjudication that the named parties and attorneys referred to in the foregoing findings are entitled to recover and they shall be paid the respective sums of money from the proceeds of sale of the mining property specified in the written stipulation of facts; that the Clerk of the Superior Court of Lake County is directed to pay to The Capital National Bank of Sacramento, the designated depositary and escrow holder, the balance of all money paid into court in these consolidated cases; that the balance of all money remaining on hand after payment of the specific sums heretofore authorized shall be paid out by the depositary and escrow holder to the parties entitled thereto as provided in the stipulation of facts; that The Capital National Bank of Sacramento, as the agreed depositary and escrow holder of all funds and documents is authorized and directed to make all said payments of money in accordance with said stipulation of facts and the amended findings as previously stated; and that Theo. Smith is authorized and directed to execute and deliver to said depositary for the purchaser thereof a good and sufficient deed of conveyance of the mining property as provided in Paragraph H on page 23 of said stipulation of facts.

As so modified the judgment is affirmed.

ADAMS, P. J., and PEEK, J., concur.

23 Cal.2d 478

PEOPLE v. SISCHO.

Sac. 5615.

Supreme Court of California.

Dec. 23, 1943.

1. Officers 🔑30

The constitutional provision that no person holding lucrative office under United States shall be eligible to any civil office of profit under the state cannot be applied so as to discourage public employees from rendering military or naval service, deter them from answering or inducing them to evade call to such service, or impede federal government's efforts to mobilize citizenry to meet major emergency. Const. art. 4, § 20.

2. Officers 🔑30

The constitutional provision that no person holding lucrative office under United States shall be eligible to any civil office of profit under the state was inapplicable to superior court judge whose holding of such office was suspended while he was rendering services in the United States Armed Forces. Const. art. 4, § 20.

3. Judges 🔑7

The constitutional provision prohibiting Legislature from granting leave of absence to any judicial officer, and providing that any such officer who shall absent himself from state for more than 60 consecutive days shall be deemed to have forfeited his office, does not preclude Legislature from granting, or judges from being absent on, military leave of absence when they are serving in armed forces. Const. art. 6, § 9.

4. Judges 🔑7

The section of the Military and Veterans Code authorizing any state officer or employee, who is a member of the National Guard or Naval Militia, or a member of the reserve corps in the federal military, naval, or marine service, to absent himself from his duties while engaged in performance of ordered military or naval duty, was applicable to superior court judge who received commission in the United States Armed Forces. St.1939, p. 2709, § 395.

5. Army and navy 🔑18

The national policy as declared by Congress is designed to promote the so-called voluntary enlistments and acceptance of commissions in the armed forces. Selective Training and Service Act of 1940, §§ 1–18, 8, 50 U.S.C.A. Appendix, §§ 301–318, 308; Service Extension Act of 1941, §§ 1–12, 7, 50 U.S.C.A. Appendix §§ 351–362, 357.

6. Constitutional law 🔑1
States 🔑4

The Federal Constitution and all laws enacted pursuant to the powers conferred by it on Congress are supreme law of the land to same extent as though expressly written into every state law. U.S.C.A. Const. art. 6, cl. 2.

7. War 🔑2

The power to wage war conferred by Federal Constitution on Congress is not restricted to winning of victories in the field and the repulse of enemy forces, but it extends to every matter and activity so related to war as substantially to affect its conduct and progress.

8. States 🔑51

The section of the Military and Veterans Code authorizing any state officer or employee, who is a member of the National Guard or Naval Militia or a member of the reserve corps in the federal military, naval, or marine service, to absent himself from his duties while engaged in performance of ordered military or naval duty, is designed to aid and expedite the recruiting service of the United States. St.1939, p. 2709, § 395.

9. States 🔑4, 5

The state has no power to declare a superior court judge ineligible to occupy an office in another state or under the federal government.

10. Statutes 🔑228

A "proviso" is used in a statute to limit that which immediately precedes it and to expressly negative a construction that would prevail in absence of the proviso.

See Words and Phrases, Permanent Edition, for all other definitions of "Proviso".

11. Statutes 🔑228

Generally, that which is excepted from operation of a statute by a proviso would, in absence of the proviso, have been included within general words of the statute.

12. Officers 🔑30

The constitutional provision making Justices of Supreme Court and of District

Court of Appeal and judges of superior courts and municipal courts ineligible to any other office of public employment during term for which they have been elected or appointed relates exclusively to state offices and state employments, and is inapplicable to superior court judge who accepted a commission in the United States Armed Forces. Const. art. 6, § 18.

13. Officers ⚿55(2)

The section of political code providing for offices becoming vacant upon more than 60 days' unauthorized absence from state by officeholder or upon his ceasing to discharge duty of his office for period of three consecutive months, except when prevented by sickness or when absent from state by permission of Legislature, was inapplicable to superior court judge who accepted a commission in the United States Armed Forces. Pol.Code, § 996, subds. 6, 7.

14. Officers ⚿55(1)

A temporary, as distinguished from a permanent or complete, vacancy in an office may exist.

15. Officers ⚿56

The constitutional provision authorizing Governor to fill a vacancy by granting a commission, which shall expire at end of next session of Legislature, when any office shall, from any cause, become vacant, and no mode is provided by Constitution or law for filling such vacancy, would be construed as giving Governor power to fill a temporary vacancy in a term, caused by absence of a state officer while on military leave. Const. art. 5, § 8.

16. Judges ⚿8

The only "vacancy" contemplated by constitutional provision prescribing mode for filling a vacancy in office of superior court judge is a permanent or complete vacancy as distinguished from a mere temporary one, and hence Governor is authorized to fill a temporary vacancy in such office of appointment. Const. art. 5, § 8; art. 6, § 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Vacancy".

17. Judges ⚿8
Officers ⚿55(2)

Where superior court judge, who was commissioned in United States Armed Forces, was absent on military leave, there existed a "temporary vacancy" for duration of his leave, and, no mode being prescribed for filling such vacancy, Governor was authorized to grant a commission which would expire at end of next session of Legislature or at next election of the people, if judge on leave did not sooner return and resume his office. St.1939, p. 2709, § 395; Const. art. 5, § 8; art. 6, § 8.

See Words and Phrases, Permanent Edition, for all other definitions of "Temporary Vacancy".

In Bank.

Appeal from Superior Court, Merced County; Stanley Murray, Judge.

Proceeding in quo warranto by the People against Ranse R. Sischo, to test title to office of Judge of Superior Court. From a judgment enjoining the defendant from exercising functions of the office, the defendant appeals.

Reversed.

Gilbert H. Jertberg, of Fresno, for appellant.

Robert W. Kenny, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is a proceeding in quo warranto brought pursuant to the provisions of Chapter V, Title 10, Part 2, of the Code of Civil Procedure to test the claim of Ranse R. Sischo to the office of Judge of the Superior Court in the County of Merced. Defendant Sischo's title to the office depends upon the question as to whether there was a vacancy in the office at the time of his asserted appointment to it, and the existence of a vacancy is in turn dependent upon the legal effect to be attributed to the fact that the previously elected and qualified incumbent, the Honorable James D. Garibaldi, accepted a temporary or reserve commission in the Army of the United States and thereafter, in obedience to the orders of competent military authority, departed, from the State of California, and failed to perform any judicial duties for more than ninety days.

The trial court, on stipulated evidence, found that the office had not become vacant in any sense and entered judgment enjoining Judge Sischo from exercising its functions.

Defendant has appealed and as grounds for reversal of the judgment urges four propositions which he states as follows:

"A. The fact that Judge Garibaldi was commissioned as an officer, to wit, a captain, in the United States Army automatically created a vacancy in the office held by him. [See Cal.Const. art. IV, sec. 20.]

"B. The acceptance by Judge Garibaldi of such commission is deemed to be a resignation from his office as Superior Judge. [See Cal.Const. art. VI, sec. 18.]

"C. The failure of Judge Garibaldi to discharge the duties of his office as said judge for a period of three consecutive months automatically created a vacancy in the office held by him. [See Pol.Code, sec. 996, subd. 7.]

"D. The absence of Judge Garibaldi from the State of California for more than sixty consecutive days ipso facto operated as a forfeiture of his office. [See Cal. Const. art. VI, sec. 9; Pol.Code, sec. 996, subd. 6.]"

James D. Garibaldi was elected to the office in question (Judge of the Superior Court of the State of California in and for the County of Merced) in 1938 for the term expiring January 8, 1945. He qualified and entered upon the performance of the duties of the office. On December 7, 1941, territorial possessions of the United States of America were attacked by armed forces of the Empire of Japan, and within a few days thereafter our Nation was in a state of war not only with Japan but also with Germany and Italy. Unwillingly, we had been drawn into a world-wide conflict for survival, precipitated by the aggressor nations, Germany, Italy, and Japan. At the beginning of the war Judge Garibaldi held no commission or other membership in any organized military or naval establishment. By the terms of the Selective Training and Service Act of 1940, 50 U.S.C.A.Appendix, §§ 301–318, and the Regulations promulgated pursuant thereto, he was at all times concerned, as a judge of a state court, entitled to claim deferment from active training and service duty under that act. On June 20, 1942, presumptively by reason of special skills and other qualifications on his part, he was tendered, and he accepted, a temporary or reserve officer commission in the United States Army Air Corps. Shortly thereafter, on July 4, 1942, he was ordered to active duty at Merced, California, and upon going on active duty under orders on July 4 he became entitled to pay for his services at a rate in excess of $500 per annum. Throughout the period of time involved since that date he has been under the orders of competent military authority and pursuant thereto has remained on active duty and has continued to receive compensation at such rate. He has performed no services as a superior court judge since some time in July, 1942, and has accepted no pay as a judge since July 31, 1942. On or about October 16, 1942, in obedience to competent army orders, Judge Garibaldi left California and reported to a post in New Mexico. Pursuant to further orders, he returned to California on November 16 and remained here until November 30, when he was again sent to New Mexico, where he remained until after defendant's purported appointment.

On December 31, 1942, the Honorable Culbert L. Olson, as Governor of California, issued a commission to the defendant Sischo, purporting to appoint him to the mooted office "vice James D. Garibaldi, ineligible." It is stipulated that Judge Sischo possessed all of the qualifications required by law for appointment to the office and to his credit it is noted that the record before us discloses the avowal, in open court, by his counsel, of an intention expressed by Judge Sischo to the effect that in the event he was held entitled to the office he would offer his resignation therefrom upon Judge Garibaldi's return prior to expiration of the appointive term. A further stipulation was made that Judge Sischo, on January 2, 1943, took the oath of office required of judges of the superior court and purported to enter upon the duties of the office.

[1,2] 1. *Inapplicability of Section 20 of Article IV of the State Constitution.*

Section 20 of article IV of the California Constitution provides that: "No person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this State; *provided,* that officers in the militia, who receive no annual salary, local officers, or Postmasters whose compensation does not exceed five hundred dollars per annum, shall not be deemed to hold lucrative offices." On behalf of defendant it has been contended that the quoted section ipso facto operated to forfeit all of Judge Garibaldi's right and title to his judicial office immediately upon his being placed on active and compensated duty in the United States Army forces.

In the case of McCoy v. Board of Supervisors, 18 Cal.2d 193, 114 P.2d 569, we were confronted with a problem similar in basic principles but different in the precise question to be determined. That case was a proceeding in mandamus "to compel a board of supervisors to declare vacancy in office and to fill the vacancy." Page 194 of 18 Cal.2d, page 570 of 114 P.2d. The purpose of the proceeding was to determine whether the "Chief Engineer of Building and Safety of the County of Los Angeles," William J. Fox, who was then a major (now a colonel) in the United States Marine Corps Reserve, forfeited his state office (the position mentioned was deemed to be a state office) when, having obtained a leave of absence from the board of supervisors, he entered active duty with the Marine Corps. It was there urged that by going on such active duty he completely forfeited his office and that it became vacant in the sense of a complete and permanent vacancy. We were not there considering any question as to the right of the appointing power to fill the vacancy temporarily during the ordered absence of the incumbent. The controlling question actually decided was that by entering on active duty under the circumstances there depicted Colonel Fox did not forfeit his office. This court stated (page 196 of 18 Cal.2d, page 571 of 114 P.2d): "It was never the intent or purpose of article IV, section 20, of the Constitution of this state to discourage public employees from rendering military or naval service, to deter them from answering, or induce them to evade such a call, or to tend to impede the federal government in its effort to mobilize the citizenry, or interfere with efforts to meet a major emergency. The constitutional provision can neither be construed nor applied to effect such a result. * * * [P. 197 of 18 Cal.2d page 571 of 114 P.2d] Under the circumstances shown, it can only be concluded that during the period of his leave he is not holding or claiming eligibility to a 'civil office of profit under this State', as that term is used in the constitutional provision, but that his occupancy or holding of such office is suspended."

[3, 4] 2. *Inapplicability of Section 9 of Article VI of the State Constitution and the Applicability of Section 395 of the Military and Veterans Code, St.1939, p. 2709.*

The above-quoted principles from the McCoy case apply with equal force in this case now before us. It is argued, however, that the decision in that case was predicated upon the fact that Colonel Fox obtained a leave of absence, and that it can have no application to the present case since the provisions of section 9, article VI, of the Constitution prevented the Legislature from granting Judge Garibaldi a leave of absence. The last-cited section provides that "The Legislature shall have no power to grant leave of absence to any judicial officer; and any such officer who shall absent himself from the State for more than sixty consecutive days shall be deemed to have forfeited his office. * * *" But if the provisions of section 20 of article IV "can neither be construed nor applied" to effect the result of discouraging public employees from rendering military or naval service, or of tending "to impede the federal government in its effort to mobilize the citizenry," then neither should the provisions of section 9 of article VI be given any such effect. In other words, we do not believe that by the provisions of section 9 of article VI it was ever intended to preclude the Legislature from granting, or judges from being absent on, *military leaves* of absence *when they are serving in the armed forces of the Nation* and are subject to military orders. A reading of the constitutional debates (The Debates in the Convention of California, J. Ross Browne (1850); California Constitutional Convention, Willis and Stockton (1881)) discloses no intention by the delegates to so limit the Legislature.

It is apparent that the Legislature of this state does not believe that it is so limited. The provisions of section 395 of the Military and Veterans Code contain no exception as to judicial officers. That section provides:

"*Every officer* and employee *of the State,* or of any county, municipal corporation, school district, irrigation district, water district, or other district, *who is a member of* the National Guard or Naval Militia, or a member of *the reserve corps or force* in the Federal military, naval, or marine service, *shall be entitled to absent himself from his duties or service while engaged in the performance of ordered military or naval duty* and while going to and returning from such duty. [Italics added.]

"If he has been in the service of the State or of any one of the political subdivisions enumerated in this section for a period of not less than one year prior to the date upon which his absence begins, no such officer or employee shall be subjected by any person directly or indirectly by reason of such absence to any loss or diminution of vacation or holiday privilege or be prejudiced by reason of such absence with reference to promotion or continuance in office, employment, reappointment to office, or reemployment.

"During the absence of any such officer or employee, while engaged in the performance of ordered military or naval duty as a member of the National Guard, Naval Militia, or reserve corps or force in the Federal military, naval, or marine service, he shall receive his salary or compensation as such officer or employee, if the period of such absence in any calendar year does not exceed thirty days and if he has been in the service of the State or of any one of the political subdivisions enumerated in this section for a period of not less than one year prior to the date upon which his absence begins."

It is to be noted that in drafting the above quoted law the Legislature very carefully and strictly confined its application to state officers and employees "while engaged in the performance of ordered military or naval duty and while going to and returning from such duty." Such a military leave is substantially different from an ordinary leave of absence. It amounts, in effect, to an interruption of the tenure or exercise of the office. It does not authorize the employee to absent himself from his civilian duties for any purpose personal to himself or under any circumstance or at any time when the projected absence is within his control. He is given no discretion whatsoever as to the duration of his absence or as to his activities during the absence. Rather does such "military leave" merely recognize the paramount obligation, immediate or potential, of all citizens to render military service in the armed forces of the Nation during times of war or declared national emergency.

There is in the Constitution no provision expressly forbidding the Legislature to grant "military leaves" to judges and we do not believe that section 9 of article VI should be construed to have that effect. In Martin v. Riley, 20 Cal.2d 28, at page 34 et seq., 123 P.2d 488, this court declared a distinction between civil officers and military officers. The same distinction may be drawn between civil leaves of absence and military leaves of absence. While leaves of absence may not be granted to judges for reasons personal to themselves there does not appear to be any compelling reason why they alone, of all the officers and employees of the state, should be discouraged from rendering military or naval service in time of war, and prohibited therefrom, under penalty of forfeiture of office.

3. *Laws Protecting the Civil Rights of Public Employess in the Armed Forces.*

As to the attitude of state governments, and courts generally, on the question of public employees entering the military services, this court said in the McCoy case, page 196 of 18 Cal.2d, page 571 of 114 P.2d: "These emergency measures [referring to certain measures passed at the 1941 legislative session] show clearly that it was and is the policy of the legislature to expedite and encourage the enlistment of public employees in the armed forces of the United States, and to insure the restoration of their positions to them upon return to civil life. A study of similar enactments in other jurisdictions, of various soldiers' and sailors' relief acts, and of the trend of judicial decision, reveals a growing recognition of the necessity of protecting those in military or naval service against the loss of civil rights, and of the potency of a national emergency to justify broad and appropriate relief. Not only have state and national legislative bodies been alert to meet the need for special protective measures, but state and federal courts have kept pace and have evinced a firm intention to take a liberal view of these emergency enactments in order that their protective purposes may be fulfilled without undue imposition of constitutional limitations or hindrance through narrow judicial construction."

Many cases could be cited to show that this policy has been even more pronounced generally in the Nation since the McCoy case decision than before it. The case of Baker v. Dixon, Sept. 28, 1943, 295 Ky. 279, 174 S.W.2d 410, deals with an inductee's rights and hence might be distinguished to some extent on that ground, but as in its discussion of the problem it declares the weight of authority and epitomizes many of the more recent cases which deal with commissioned personnel, we quote from it (page 412 of 174 S.W.2d):

"The same question has been presented to courts of other states, and the decisions thereon are in conflict, although the vast majority are in conformity with our opinion. In Re Opinion of Justices, 307 Mass. 613, 29 N.E.2d 738, it was held that the simultaneous holding of the offices of Justice of the Superior Court of Massachusetts and of member of local draft or appeal board under the Selective Training and Service Act of 1940, 50 U.S.C.A.Appendix § 301 et seq., was not within the prohibition of the Massachusetts Constitution, providing that no person who holds a judicial office under the United States shall hold any judicial office of the Commonwealth of Massachusetts, and such simultaneous holding of the offices there under consideration did not violate any principle of the common law with reference to the holding of incompatible offices. In Martin v. Smith, 239 Wis. 314, 1 N.W.2d 163, 140 A.L.R. 1063, it was held that the President of the State University was not prohibited from serving as an administrator of the Selective Training and Service Act under the constitutional provision that: 'No * * * person holding any office of profit or trust under the United States * * *, shall be eligible to any office of trust, profit or honor in this state.' Const., Wis. art. 13, § 3. In Re Advisory Opinion to Governor, 150 Fla. 556, 8 So.2d 26, 140 A.L.R. Annotation p. 1481, it was held that the induction of the sheriff of a county as Captain into the United States Army Reserve does not constitute the holding or the exercise of the functions of an officer under the government of the United States, so as to disqualify him from holding an office under a constitutional provision that: 'No person holding or exercising the functions of any office under any foreign Government, under the Government of the United States, or under any other State, shall hold any office of honor or profit under the government of this State.' Const.Fla. Art. 16, § 15. The decision in that particular instance was based upon the fact that militia officers were excepted from the constitutional provision, even as they are in our own jurisdiction; and that opinion further holds that the induction of a county superintendent of public instruction into the military service of the United States is governed by the same consideration. In the case of McCoy v. Board of Supervisors of Los Angeles County, 18 Cal.2d 193, 114 P.9d 569, it was held that the County Engineer did not vacate his office when he was ordered to active duty as a Major in the Marine Corps Reserve of the United States, under the constitutional provision that: 'No person holding any lucrative office under the United States, or any other power, shall be eligible to any civil office of profit under this State.' Const. Cal. Art. 4, § 20. The Court commented that the occupancy by the incumbent was merely suspended and the office was not vacated. In State ex rel. McGaughey v. Grayston, 349 Mo. 700, 163 S.W.2d 335, it was held that a Circuit Judge who was called into the military service of the United States as a Colonel in the National Guard, did not thereby vacate his position, since he did not become the holder of an office of profit within the meaning of a constitutional provision that: 'No person holding an office of profit under the United States, shall, during his continuance in such office, hold any office of profit under this state.' Mo.R.S.A. Const. Art. 14, § 4. The opinion pointed out that professional service in the regular Army would be incompatible with a civil office, but that temporary military service rendered to meet the exigencies of a military emergency is not incompatible with holding civil office under the State. In Gullickson v. Mitchell, 113 Mont. 359, 126 P.2d 1106, the Court held that induction into the military service of the United States did not vacate the office of State Attorney General. In State ex rel. Thomas v. Wysong, W.Va., 24 S.E.2d 463, it was held that a person holding a temporary appointment as an officer in the United States Army in time of war, as distinguished from a professional soldier, did not render him ineligible to hold the office of Attorney General under a constitutional provision similar to ours.

"The thoughts permeating the opinions in the above-styled cases are likewise upheld by the Supreme Court of the United States, as expressed in Carpenter v. Sheppard, 135 Tex. 413, 145 S.W.2d 562, in which case a writ of certiorari was denied in 312 U.S. 697, 61 S.Ct. 734, 85 L.Ed. 1132. Therein it was held that the Chairman and Executive Director of the State Unemployment Compensation Commission of the State of Texas did not vacate his office when he was called into the service and appointed a Major in the United States Army under a State constitutional provision to the effect that, 'No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust under this State.' Vernon's Ann.St.Tex.Const. art. 16, § 12. In Critchlow v. Monson [102] Utah [378], 131 P.2d 794, the Court held that a constitutional provision to the effect that, 'No person, while holding any office under the United States' government, shall hold any office under the State government,' Const. Utah, art. 7, § 23, was not directed against officers in the military service of the United States, who are to serve only for the duration of the war, and who will return to their civil pursuits on the cessation of hostilities. This Court in Kennedy v. Cook, 285 Ky. 9, 146 S.W.2d 56, 132 A.L.R. 251, did not have the precise question before it, but therein we held that a Captain of the National Guard inducted into the military service of the United States under the National Defense Act, 32 U.S.C.A. § 81 et seq., did not forfeit his position as Circuit Clerk. The service for the Federal Government in that case was mere training and for the duration of one year only, and during which time the office holder was serving under a commission issued by the Governor of the State.

"A few jurisdictions have held to the contrary, viz., Commonwealth ex rel. Crow v. Smith, 343 Pa. 446, 23 A.2d 440; State ex rel. Cooper v. Roth, 140 Ohio St. 377, 44 N.E.2d 456; Perkins v. Manning, Ariz., 122 P.2d 857."

The cases of State ex rel. McGaughey v. Grayston, supra, 349 Mo. 700, 163 S.W.2d 335, and Critchlow v. Monson, supra, 102 Utah 378, 131 P.2d 794, both involved judges of courts of record who had gone on active duty in the armed forces and in both cases it was held that the pertinent constitutional provisions had no application under such circumstances.

[5-7] 4. *National Policy as Declared by Congress.*

The national policy has been declared by Congress in the Selective Training and and Service Act of 1940, 50 U.S.C.A.Appendix, §§ 301–318. That act provides not only for the selection and training and service of members of the unorganized militia of the several states and the Nation, but also as a part of the general plan for organizing and disciplining such forces makes provision for their return to civilian pursuits. It provides, as to those who have satisfactorily completed the training and service exacted of them, that (Selective Training and Service Act of 1940, sec. 8, 50 U.S.C.A.Appendix, § 308): "(b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ of any employer and who (1) receives such certificate [of satisfactory completion of his period of training and service], (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within forty days after he is relieved from such training and service—(A) if such position was in the employ of the United States Government, its Territories or possessions, or the District of Columbia, such person shall be restored to such position or to a position of like seniority, status, and pay; (B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; (C) *if such position was in the employ of any State or political subdivision thereof, it is hereby declared to be the sense of the Congress that such person should be restored to such position or to a position of like seniority, status, and pay.*" (Italics added.)

By the Service Extension Act of 1941, 50 U.S.C.A.Appendix, §§ 351–362, Pub.Law 213, 77th Cong., the Congress provided (sec. 357 of 50 U.S.C.A.Appendix) that: "Any person who, subsequent to May 1, 1940, and prior to the termination of the authority conferred by section 2 of this joint resolution, * * * shall have entered upon active military or naval service in the land or naval forces of the United States shall be entitled to all the reemployment benefits of section 8 of the Selective Training and Service Act of 1940 * * * to the same extent as in the case of persons inducted under said Act: * * *."

The national policy is designed and intended to promote recruiting—the so-called voluntary enlistment and acceptance of commissions—as well as to expedite administration of the Selective Service Act. To hold section 395 of the Military and Veterans Code unconstitutional in its application to any public employees or officers would be contrary to the national policy. The Constitution of the United States and all laws enacted pursuant to the powers conferred by it on the Congress are the supreme law of the land (U.S.Const. art. VI, cl. 2) to the same extent as though expressly written into every state law. See Hauenstein v. Lynham, 100 U.S. 483, 490, 25 L.Ed. 628, 631; State of Florida v. Mellon, 273 U.S. 12, 17, 47 S.Ct. 265, 266, 71 L.Ed. 511, 515. "The power to wage war is the power to wage war successfully. The framers of the constitution were under no illusions as to war. They had emerged from a long struggle which had taught them the weakness of a mere confederation, and they had no hope that they could hold what they had won save as they established a Union which could fight with the strength of one people under one government entrusted with the common defence. In equipping the National Government with the needed authority in war, they tolerated no limitations inconsistent with that object, as they realized that the very existence of the Nation might be at stake and that every resource of the people must be at command. * * * 'The idea of restraining the legislative authority, in the means of providing for the national defence, is one of those refinements which owe their origin to a zeal for liberty more ardent than enlightened.' * * * It was in this view that plenary power was given to Congress to wage war and to raise armies." War Powers under the Constitution, Charles E. Hughes, 42 A.B.A.Rep. 232, 238, 239. In the article above quoted from, the former Chief Justice quotes from an unpublished opinion prepared by President Lincoln which sets forth the grounds for sustaining the power of the Congress to pass a Conscription Act. President Lincoln, it appears, in discussing the power of the Congress to raise and support armies, said, "The power is given fully, completely, unconditionally. It is not a power to raise armies *if State authorities consent;* nor if the men to compose the armies are entirely willing; but it is a power to raise and support armies given to Congress by the Constitution without an 'if'." (Italics added.) Lincoln's Works, vol. II, p. 388. Descriptive of the war power of the national government, our United States Supreme Court in the recent case of Kiyoshi Hirabayashi v. United States, 320 U.S. 81, 63 S.Ct. 1375, 1382, 87 L.Ed. 1774, decided on June 21, 1943, said that such power "is not restricted to the winning of victories in the field and the repulse of enemy forces"; rather, "It extends to every matter and activity so related to war as substantially to affect its conduct and progress."

[8] Section 395 of the Military and Veterans Code obviously is designed to, and reasonably should, aid and expedite the recruiting service of the United States. To hold it inapplicable and void as to judges would reasonably tend to discourage them from enlisting or accepting commissions. Upon the conclusion we have reached in holding that section 9 of article VI applies to judicial officers as such but does not operate to curtail the powers vested in the Legislature to grant military leaves of absence to public employees in the armed forces during time of war, even though the latter also hold judicial office, we avoid giving section 9 such effect as might tend to obstruct the recruiting service of the United States, and we sustain the People of this State, acting through the Legislature, in their translation of the national policy into section 395 of the Military and Veterans Code. In so doing we are obeying with respect to our state Constitution the admonition sounded long ago (in McCulloch v. Maryland, 1819, 4 Wheat. 316, 407, 415, 4 L.Ed. 579, 601, 603) relative to the national Constitution and reiterated so recently by the United States Supreme Court (in Kiyoshi Hirabayashi v. United States, 1943, supra, 320 U.S. 81, 63 S.Ct. 1375, 1385, 87 L.Ed. 1774), "We must never forget, that it is *a constitution* we are expounding," "a constitution intended to endure for ages to come, and, consequently, to be adapted to the various *crises* of human affairs."

[9-12] 5. *Inapplicability of Section 18 of Article VI of the State Constitution.*

Section 18 of article VI of the California Constitution reads: "The justices of the supreme court, and of the district courts of appeal and the judges of the superior courts and the municipal courts shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they shall have been elected or appointed, and no justice or judge of a court of record shall practice law in or out of court during his continuance in office; *provided,* however, that a judge of the superior court or of a municipal court shall be eligible to election or appointment to a public office during the time for which he may be elected, and the acceptance of any other office shall be deemed to be a resignation from the office held by said judge." (Italics added.)

It is clear that the State of California cannot, by its Constitution or otherwise, determine eligibility or prescribe qualifications for offices other than its own state offices. This section of the Constitution is not intended to, and does not relate to federal offices. (The federal office provisions are found in section 20 of article IV, previously discussed.) It will be observed, as pointed out by respondent, that this section in the portion appearing before the proviso declares that judges shall be ineligible to any other office or public employment than a judicial office or employment during the term for which they have been elected. Manifestly, the only office or employment for which the Constitution of California can declare the conditions of eligibility or ineligibility of a person is an office or employment under the authority of the State of California. This state has no power, by Constitution or otherwise, to declare that a judge of the superior court is ineligible to occupy an office in another state or under the government of the United States. It is therefore obvious that sec. 18 of article VI relates exclusively to the eligibility of judges to hold or occupy other offices which exist under the authority of the State of California. After ordaining such ineligibility, the section contains a proviso declaring that, notwithstanding the preceding provisions, a judge of the superior court shall be eligible to election or appointment to public office during the term for which he was elected and that "the acceptance of any other office shall be deemed to be a resignation from the office held by said judge." It is an accepted rule of statutory construction that a proviso is used to limit and qualify that which immediately precedes it and to expressly negative a construction that would prevail in the absence of the proviso. Likewise, the general rule is that that which is excepted from the operation of the statute by the proviso would, in the absence of the proviso, have been included within the general words of the statute. It is obvious that the subject matter of the proviso clause is the same as that of the preceding portion of the section; i. e., eligibility to offices within the control of the state, and the proviso was not intended to enlarge the operation of the statute. The "any other office," acceptance of which "shall be deemed to be a resignation from the office held by said judge," must, consistently, be an office for which the proviso makes a judge eligible notwithstanding the previously enunciated and otherwise operative declaration of ineligibility. This section of our Constitution, then, must be construed to relate exclusively to state offices and state employment.

In construing a similar constitutional provision of the State of Montana, the Supreme Court of that state ruled as follows: "Defendant further contends that John W. Bonner's office of attorney general is vacated by reason of the provision of Article VII, section 4, of the state Constitution, that 'no officer mentioned in this section (including the attorney general) shall be eligible to, or hold any other public office, except member of the state board of education during his term of office.' The contention is that Bonner's appointment in the military service as a Major in the Judge Advocate General's Department is inconsistent with his retention of any right in connection with the office of attorney general, not because of incompatibility of the offices but because of the constitutional provision above-mentioned. While the authorities are divided, it seems very doubtful that a military officer holds a public office within the meaning of the constitutional provision. However, since the provision relates to eligibility to office, it can have no application to offices under the federal authority (Foltz v. Kerlin, 105 Ind. 221, 4 N.E. 439, 5 N.E. 672, 55 Am.Rep. 197), eligibility to which depends on federal laws. *Both the ineligibility and the prohibition against holding other public office necessarily refer to the same offices and neither can refer to others than those under the laws of Montana.*" (Italics added.) Gullickson v. Mitchell, supra, 113 Mont. 359, 126 P.2d 1106, 1114.

[13] 6. *Inapplicability of Section 996 of the Political Code.*

Section 996 of the Political Code provides that: "An office becomes vacant on the happening of either of the following events before the expiration of the term: * * * 6. His [the incumbent officer's] absence from the state without permission of the legislature beyond the period allowed by law; 7. His ceasing to discharge the duties of his office for the period of three consecutive months, except when prevented by sickness, or when absent from the state by permission of the legislature."

The office of judge of the superior court is a constitutional office and it may be doubted whether the Legislature can provide any method for the removal of a judge, or the forfeiture of his office, other than as prescribed in the Constitution

(State Bar of California v. Superior Court, 207 Cal. 323, 338, 278 P. 432; 21 Cal.Jur. 979, sec. 144; see also the discussion of this problem in People v. Craig, Cal.Sup., 61 P.2d 934, 935, which opinion was vacated, 9 Cal.2d 615, 72 P.2d 135, when the question became moot, but the reasoning in which is pertinent. Hence, it is doubtful whether section 996 of the Political Code could have any efficacy in this case, but even if the court should assume for purposes of the decision that it is valid in its application to the constitutional office of judge of the superior court, it still would be inapplicable here for the same reasons that the constitutional provisions, previously discussed, are inapplicable. Furthermore it is obvious that if the Legislature had power to enact section 996 of the Political Code it also had power to enact section 395 of the Military and Veterans Code.

[14] 7. *Existence of Vacancy.*

As previously mentioned, in the McCoy case (McCoy v. Board of Supervisors, supra, 18 Cal.2d 193, 114 P.2d 569) we were concerned only with the question as to whether Colonel Fox had forfeited his state office by entering upon active, compensated duty in the United States Marine Corps. That was a mandamus action to compel the declaration of a vacancy in a total sense and to compel the appointment of a successor adversely to the incumbent's rights. We held that we could not declare the office "vacant" in the sense of precluding the absent Marine Corps officer from retaining and exercising "the right to reoccupy such office at the termination of his period of leave" (page 198 of 18 Cal. 2d, page 572 of 114 P.2d) but that during his absence on ordered military service he was *not* "holding" an office of trust or profit under the state within the meaning of the constitutional prohibition. This, in effect, amounted to a ruling that the office was temporarily vacant in relation to the actual holding or exercise thereof, and, if the board of supervisors had appointed a substitute to hold and exercise the office during the period of the marine officer's absence, we have no doubt that we should have sustained the title of the substitute insofar as it was not adverse to the absentee's rights as so declared. In the McCoy case, at page 198 of 18 Cal.2d page 572 of 114 P.2d, we specifically referred to an earlier decision and said: "The effect of a leave of absence was considered in the case of Whitehead v. Davie, 189 Cal. 715, 209 P. 1008, and this court there approved the theory that under certain circumstances it may be held that *one who is on leave of absence is not actually holding an office but is merely retaining the right to reoccupy such office at the termination of his period of leave.*" (Italics added.) An examination of the Whitehead case discloses that the court there recognized that the position of the employee who was absent on leave could be temporarily filled. At page 720 of 189 Cal., at page 1010 of 209 P., appears the following statement: "These rules mean nothing more or less than that during the period while the battalion chief is acting as chief of the fire department, * * * his position of battalion chief shall be deemed to be temporarily filled by his successor, and he retains the right to permanently occupy that place whenever his incumbency as chief of the fire department is terminated. The chief of the fire department did not hold two positions or draw two salaries or perform the duties of the two officers because of such leave of absence. The civil service rule in question is merely for the purpose of establishing that the chief of the fire department is continuously eligible to reappointment as a permanent battalion chief and also that his successor is appointed *to fill a vacancy in that permanent employment* existing by reason of the temporary transfer of the battalion chief to the higher office. * * *" (Italics added.) It thus appears that this court has recognized that a temporary, as distinguished from a permanent or complete, vacancy in an office may exist.

Here we do not have a case of two persons acting simultaneously, each under a claim of right. Judge Garibaldi is not *acting,* and the most that he could claim, under the theory of the McCoy and Whitehead cases and under section 395 of the Military and Veterans Code, is the right to reassume his office when and if he is released from active duty with the armed forces, and if such release occurs before the expiration of his elective term. During the period of his absence, only defendant Sischo is actually exercising the duties of the office, and Judge Garibaldi's occupancy of the office is in abeyance.

[15, 16] There are two pertinent articles of the State Constitution which contain sections dealing with the Governor's power to make appointments to fill vacancies in office: Article V, section 8 and article VI,

section 8. Section 8 of article V provides that "When any office shall, *from any cause,* become vacant, and *no mode* is provided by the Constitution and law for filling *such vacancy,* the Governor shall have power to fill *such vacancy* by granting a commission, which shall expire at the end of the next session of the Legislature, or at the next election by the people." (Italics added.) We think that the broad language of this section should properly be construed to give the Governor power to fill a temporary vacancy in a term, caused by the absence of a state officer while on military leave, as well as to fill a permanent vacancy in an office as to which "no mode is provided by the Constitution and law for filling such vacancy." Section 8 of article VI does specifically prescribe a mode for filling a *permanent vacancy* in the office of judge of the superior court. It provides that "The term of office of judges of the superior courts shall be six years from and after the first Monday of January after the first day of January next succeeding their election. *A vacancy in such office* shall be filled at the next succeeding general State election after the first day of April next succeeding the accrual of such vacancy by the election of a judge *for a full term* to commence on the first Monday of January after the first day of January next succeeding his election. The Governor shall appoint a person to hold *such vacant office until the commencement of such term.*" (Italics added.) It appears from the language above quoted that the only vacancy contemplated by that section is a permanent or complete vacancy as distinguished from a mere temporary one. Previous to amendment in 1926 the Constitutional provision fixing the term of office was found in section 6 of article VI, which, after fixing the normal term at six years "from and after the first Monday of January, next succeeding their election," provided that "If a vacancy occur * * * the governor shall appoint a person to hold the office until the election and qualification of a judge to fill the vacancy, which election shall take place at the next succeeding general election, and the judge so elected shall hold office *for the remainder of the unexpired term.*" (Italics added.)

[17] The sections as so constituted (prior to 1926) left a hiatus between the expiration of the term of the appointed judge (at the time of the "election and qualification of a judge to fill the vacancy") and the beginning of the new elected term if such new elected term was a full term. In other words, those provisions would sometimes leave a very short unexpired term to elapse between the date of the election and the date of commencement of the *new* term. The short unexpired term had to be filled by election to that specific term. It was, in part, to eliminate such undesirable feature that the amendment of 1926 was adopted. It eliminated the necessity of election to fill an unexpired term in those cases where a permanent or complete vacancy existed and provided instead for election to a new full term. But the necessity for election to fill the unexpired term (or such part thereof as the state officer may be absent on ordered military or naval duty) has not been eliminated in this isolated and unusual case by the amendment above quoted because the unexpired term is the only one, in this case, in which the temporary "vacancy" may be said to exist. A new full term here cannot commence until the expiration of Judge Garibaldi's unexpired term. Hence it appears that section 8 of article VI contemplates only the filling of a *full* term "by the election of a judge for a full term" and that the power of the Governor to fill the temporary vacancy with which we are concerned must be deemed to derive from the provisions of section 8 of article V, rather than from section 8 of article VI. The case we have here is precisely what is contemplated by the former provision; viz., it is a case in which "no mode is provided by the Constitution and law for filling *such vacancy.*" (Italics added.)

As previously mentioned, it is to be borne in mind that we are not here concerned with a case in which two persons are simultaneously claiming the right to exercise the same office or to receive the emoluments attached thereto. Section 395 of the Military and Veterans Code impliedly requires that an officer or employee of the state who shall be absent on ordered military or naval duty for more than thirty days in any calendar year, shall receive no compensation from the state while so absent from his duties. As hereinabove stated, Judge Garibaldi has claimed no compensation from the state in violation of the provisions, express or implied, of said section 395. We are satisfied, therefore, that absence on military leave, under the provisions of that section (Mil. & Vet. Code, sec. 395) creates a distinct and isolated situation wherein, with both the exercise or "holding" of the office and all right to the compensation attached to that office being unclaimed and suspended for the duration of the leave, and the office not being ministerial in character, a temporary vacancy may be said to exist, within the meaning of section 8 of article V of the state Constitution.

By virtue of the provisions of the last cited section of the Constitution the commission issued by the Governor would expire "at the next election by the people," if the absent state officer did not sooner return and reassume the exercise of the office. It follows that the Governor's commission to defendant Sischo is valid but that it will expire at the date of the next general state election if Judge Garibaldi does not sooner return and reassume his office, and that at such election (and at the preceding primary election) qualified persons may be candidates for election to the unexpired term (expiring January 8, 1945), subject to the right of Judge Garibaldi to return and reassume the duties of the office prior to the expiration of his term.

The judgment is reversed.

CURTIS and EDMONDS, JJ., did not participate.

23 Cal.2d 499

WEINBERGER v. RILEY, State Controller.

S. F. 16909.

Supreme Court of California.

Dec. 23, 1943.

1. Judges 🔑8

Officers 🔑55(2)

Where superior court judge, who was a retired officer of the United States Navy, was recalled to active duty, there existed a "temporary vacancy" for duration of his leave, and Governor was authorized to appoint a qualified person with de jure title to fill such vacancy during period of judge's absence, not, however, beyond next general state election. St.1935, p. 1363, § 395.

See Words and Phrases, Permanent Edition, for all other definitions of "Temporary Vacancy".

2. Mandamus 🔑107

One appointed by Governor to fill temporary vacancy during absence of superior court judge, who was recalled to active duty in United States Navy, was entitled to writ of mandate directing state controller to pay to him the compensation incident to the office. St.1935, p. 1363, § 395.

In Bank.

Proceeding in mandamus by Jacob Weinberger against Harry B. Riley, as State Controller, to compel the respondent to issue and direct warrant for payment of salary due petitioner for his services as judge of a superior court.

Writ granted.

Eugene W. Miller, of Los Angeles, and Dempster McKee and Miller, Higgs, Fletcher & Glen, all of San Diego, for petitioner.

Robert W. Kenney, Atty. Gen., and Clarence A. Linn, Deputy Atty. Gen., for respondent.

PER CURIAM.

This is an original application for a writ of mandate directing respondent, as Controller of the State of California, to issue and deliver a warrant for the payment of salary allegedly due petitioner for his services as judge of the superior court of the State of California, in and for the County of San Diego. Respondent, who has appeared by both demurrer and answer, refuses to issue a warrant on the ground that petitioner is not a duly qualified judge in that there was no vacancy in the office at the time of his asserted appointment.

[1] The facts are stipulated and (except as to the character of the proceeding) are similar in all essential circumstances to those involved in People v. Sischo, 144 P.2d 785, our opinion in which case has this day been filed and which is determinative of this matter insofar as the question as to vacancy in office is concerned. We are satisfied that the Honorable Arthur L. Mundo, who was elected to the disputed office, who qualified for and entered upon, the term expiring January 8, 1945, and who, as a retired officer of the United States Navy, was recalled to active duty by competent orders effective September 8, 1942, and has since that date been engaged exclusively in the performance of his naval duties, must be deemed to be ab-

sent on military leave from his state office during the period while he is "engaged in the performance of ordered military or naval duty and while going to and returning from such duty" (Military and Veterans Code, sec. 395, St.1935, p. 1363). Hence, upon the authority of People v. Sischo, supra, 144 P.2d 785, we conclude that the office was vacant in the sense that it was not being exercised or held during such period, and that the governor could properly appoint a qualified person with de jure title to fill such temporary "vacancy" during the period of Judge Mundo's absence, not however beyond the next general state election.

[2] Petitioner holds and exercises the de jure title and possession of the office during Judge Mundo's absence. Under those circumstances he is entitled to the compensation incident to the office.

For the reasons stated, the demurrer to the petition is overruled and it is ordered that a peremptory writ of mandate issue as prayed.

CURTIS and EDMOND, JJ., did not participate.

23 Cal.2d 532

TURNIPSEED v. HOFFMAN.

L. A. 18758.

Supreme Court of California.

Jan. 14, 1944.

1. Negligence 🔑32(1)

Where evidence shows that injury was sustained by some overt act negligently done by a person sought to be charged with responsibility for it, rule concerning duty owed a licensee does not apply.

2. Automobiles 🔑155

Repairman, called to fix electric motor in defendant's garage which was at end of driveway used by defendant's customers, while working on such motor, was a "business visitor" to whom defendant owed duty to operate truck in driveway with ordinary care to avoid injury.

See Words and Phrases, Permanent Edition, for all other definitions of "Business Visitor".

3. Automobiles 🔑245(4)

Whether defendant exercised ordinary care to avoid injury to plaintiff, a business visitor, when defendant backed truck into driveway with sufficient force to move two automobiles, thereby knocking plaintiff from platform on which he was working, was for jury.

4. Damages 🔑130(1)

$3,796 as general damages for injuries sustained when plaintiff was knocked from a platform was not excessive.

5. Appeal and error 🔑1004(1)

An appellate court may not reverse a judgment for excessive damages unless amount awarded is so large as to shock one's sense of justice or raise presumption that it was fixed as result of passion or prejudice on part of trier of facts.

In Bank.

Appeal from Superior Court, Tulare County; Frank Lamberson, Judge.

Action by Harley Turnipseed against Stanley F. Hoffman for injuries sustained by defendant's negligent operation of a truck. Judgment for plaintiff, and defendant appeals.

Affirmed.

Prior opinion 136 P.2d 355.

McFadzean & Crowe, of Visalia, for appellant.

Russell & Heid, of Tulare, for respondent.

EDMONDS, Justice.

In an action to recover damages, the court found that certain personal injuries had been caused by the negligent operation of an automobile and rendered judgment accordingly. Upon appeal, the trial judge's findings are challenged as not being supported by the evidence.

At the time of the accident, Stanley F. Hoffman conducted a milk distributing business in the rear of his home. A driveway extended from the street along the side of the house to a garage on the rear of the lot. In the garage there was machinery used for refrigerating milk. An electric motor was out of order, and Hoffman called a service company to make necessary repairs.

A repairman responded but was unable to do the work required. However, he told

Hoffman that he would send some one else to put the motor in order. Hoffman then left to deliver milk. Shortly afterward Harley Turnipseed appeared. He took the motor to his shop and, after making repairs, returned with it about six o'clock in the evening. To replace the motor it was necessary to back an automobile a few feet out of the garage. Standing upon an improvised platform of boxes which he placed between this automobile and the machinery, he proceeded with the work.

During this time Hoffman returned to his home driving a panel truck. It was then about seven o'clock in the evening. He testified that he looked up the driveway and, seeing no vehicle standing in it, backed his truck toward the rear of the house and the garage. Driving at a speed which did not exceed one or two miles per hour, he said, he held the door of his truck open with one arm and continuously looked backward under his arm or over his shoulder.

To reach the loading platform which was his destination, it was necessary to change the course of the vehicle at the corner of the house. Just as he was about to do this, his truck struck the rear end of a small unlighted truck which Turnipseed had left in the driveway near the garage. The force of the impact drove this truck the short distance of about three feet, which separated it from the automobile which had been backed out of the garage, and carried that vehicle into the platform upon which Turnipseed was standing, causing him to fall from it. By this fall he claims to have sustained the injuries for which damages were awarded.

Although in appealing from the judgment the appellant does not state the points upon which he relies (Rules on Appeal, rule 15[a], formerly rule VIII [2], he argues that the respondent, although coming upon his premises as a business visitor, by obstructing the driveway with two unlighted and unguarded motor vehicles, changed his status to that of a mere licensee. Toward a licensee, he says, he owed only the duty to see that his premises were in a reasonably safe condition and he was not required to give warning of obvious danger. The danger of working after dark at the rear end of a narrow driveway was obvious to the repairman, says the appellant, as was the greater danger of working in front of two parked automobiles having no lights. For these reasons, Hoffman concludes, the accident was brought about by Turnipseed's own conduct. Moreover, he insists, he had no reason to believe that any repairman would be working on his premises "long after all reasonable working hours."

Justifying the judgment, the respondent answers that he was employed by Hoffman to repair a motor; that he was in the proper place for the performance of work which he had been employed to do and that Hoffman drove an automobile, from which at best it was most difficult to see in a backward direction, and without looking in the direction, of the place the work was being done. The record shows, says Turnipseed, that the panel truck was operated with such speed and force as to move two automobiles, both in reverse gear, forward with sufficient force to topple plaintiff off of the platform upon which he was standing.

[1-3] The rule concerning the duty owed to a licensee does not apply to conduct amounting to active negligence, that is, where the evidence shows that injury was sustained by reason of some overt act negligently done by the one sought to be charged with responsibility for it. The distinction is clearly explained in Colgrove v. Lompoc, etc., Club, 51 Cal.App.2d 18, 124 P.2d 128, and Yamauchi v. O'Neill, 38 Cal. App.2d 703, 102 P.2d 365. Turnipseed was a business visitor and was upon a part of Hoffman's premises where the owner knew, or had good reason to believe, that he might find such a person. Not only had Hoffman requested Turnipseed to make repairs on the motor but the driveway was used by the customers of his business. Under such circumstances it was Hoffman's duty to operate the truck he was driving with ordinary care to avoid injury to any person who might be in the driveway. Whether at the time of the accident, he used such care was an issue of fact which the trial judge decided against him and there is substantial evidence to support the finding in that regard.

[4, 5] The appellant has suggested that the damages awarded are excessive. The trial judge allowed an amount which included loss of wages medical expense and $3,796 as general damages. Considering the testimony relating to the injuries, the judgment carries no implication that it was not based upon a fair consideration of the evidence. Only when the amount awarded is so large as to shock one's sense of justice or raise the presumption that it was fixed

as the result of passion or prejudice on the part of the trier of fact, may an appellate court reverse a judgment because of the amount allowed as adequate damages for personal injuries. Crane v. Smith, 144 P. 2d 356.

The judgment is affirmed.

GIBSON, C. J., and SHENK, CURTIS, CARTER, TRAYNOR, and SCHAUER, JJ., concurred.

23 Cal.2d 390

PEOPLE v. RICCIARDI et al.

L. A. 17826.

Supreme Court of California.

Dec. 21, 1943.

Rehearing Denied Jan. 17, 1944.

1. Eminent domain 🔑**90**

In condemnation proceeding, not every depreciation in value of property not taken can be made basis of an award of damages. Const. art. 1, § 14.

2. Eminent domain 🔑**93**

In awarding damages in a condemnation proceeding, only the value of and damage to property, itself, may be considered. Const. art. 1, § 14.

3. Highways 🔑**85**

An abutting property owner has right to free and convenient use of an access to highway on which his property abuts.

4. Eminent domain 🔑**106**

Damage to landowner's right of ingress and egress is a "damage" to land itself within constitutional provision under which owner is entitled to compensation. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Damage".

5. Eminent domain 🔑**85**
Highways 🔑**85**

An abutting landowner on public highway has a special right of easement in public road for access purposes, and it is a "property right", which cannot be damaged or taken away from him without due compensation. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Property Right".

6. Eminent domain 🔑**90**

For purposes of awarding damages in condemnation proceeding, actionable interference with a property right is no different from substantial impairment of the right. Const. art. 1, § 14.

7. Highways 🔑**85, 86**

Property owners had no property right in any particular flow of traffic over highway adjacent to their property, but owners possessed right of direct access to through traffic highway and an easement of reasonable view of their property from highway. Const. art. 1, § 14.

8. Eminent domain 🔑**2(6)**

The re-routing or diversion of traffic is not a "taking" or "damaging" of a property right within constitutional provision requiring payment of compensation for property damaged or taken for public use. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Damaging" and "Taking".

9. Eminent domain 🔑**106**

In condemnation proceeding, court properly allowed damages to be based on interference with property owners' right of access resulting from circuity of travel to which owners were subjected as result of construction of public improvement. Civ.Code, § 658, subds. 1–3; § 662; Code Civ.Proc. § 1248 et seq.; Const. art. 1, § 14.

10. Eminent domain 🔑**295**

Where property owner brings an action for compensation for taking or damaging of his property or both, he assumes the burden of alleging and proving his property right and the infringement thereof. Const. art. 1, § 14.

11. Pleading 🔑**193(5)**

In action by property owner for compensation for taking or damaging of property or both, question whether allegations are sufficient may be determined on demurrer. Const. art. 1, § 14.

12. Eminent domain 🔑**134**

Market value is the "actual value" which must be awarded for property taken or damaged in condemnation proceeding. Civ.Code, § 658, subds. 1–3; § 662; Code Civ.Proc. § 1248 et seq.; Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Actual Value".

13. Eminent domain ⚷203(1, 2)

In condemnation proceeding, where only part of property is taken, damages may be shown by proving market value of remainder before and after the taking or by competent evidence of severance damages in a lump sum. Civ.Code, § 658, subds. 1–3; § 662; Code Civ.Proc. § 1248 et seq.; Const. art. 1, § 14.

14. Eminent domain ⚷221, 223

In condemnation proceeding, all issues except the sole issue relating to compensation are to be tried by the court, and, if court does not make special findings on those issues, its findings thereon are implicit in verdict awarding compensation. Civ.Code, § 658, subds. 1–3; § 662; Code Civ.Proc. § 1248 et seq.; Const. art. 1, § 14.

15. Eminent domain ⚷221

In proceeding to condemn land for widening state highway, question whether landowners' right of direct access would be substantially impaired was within province of trial court, but, if access would be so impaired, extent of impairment was for jury. Civ.Code, § 658, subds. 1–3; § 662; Code Civ.Proc. § 1248 et seq.; Const. art. 1, § 14.

16. Evidence ⚷524

In proceedings to condemn land for widening state highway, expert witness was properly permitted to testify to effect on market value of property not taken by reason of contemplated improvement and consequent requirement that owner must thereafter take another route to reach through traffic lane which before improvement was immediately in front of his premises. Civ.Code, § 658, subds. 1–3; § 662; Code Civ.Proc. § 1248 et seq.; Const. art. 1, § 14.

17. Eminent domain ⚷221

In proceeding to condemn land to effectuate, by means of underpass, separation of grade of highways at intersection, where service roads provided for furnished property owners only a circuitous means of access to highway, whether owners possessed a right which had been damaged was for trial court, but how much the service roads would mitigate the damages was for jury. Civ.Code, § 658, subds. 1–3; § 662; Code Civ.Proc. § 1248 et seq.; Const. art. 1, § 14.

18. Eminent domain ⚷221

In proceeding to condemn land to effectuate, by means of an underpass, separation of grade of highways at intersection, whether obstruction caused by underpass would unreasonably cut off defendant's property from visibility by travelers on main highway was for trial court and amount of damage was question for jury. Civ.Code, § 658, subds. 1–3; § 662; Code Civ.Proc. § 1248 et seq.; Const. art. 1, § 14.

19. Eminent domain ⚷150

Award of $15,000 severance damages in proceeding for condemnation of land to effectuate, by means of underpass, separation of grades of highways at intersection was not excessive. Civ.Code, § 658, subds. 1–3; § 662; Code Civ.Proc. § 1248 et seq.; Const. art. 1, § 14.

20. Appeal and error ⚷1064(2)
Trial ⚷199

In condemnation proceeding, the giving of instruction, that question whether defendants had suffered infringement of their rights in property not sought to be condemned was question for jury, was error, but no prejudice resulted where record showed that defendants would suffer such an impairment. Civ.Code, § 658, subds. 1–3; § 662; Code Civ.Proc. § 1248 et seq.; Const. art. 1, § 14.

21. Eminent domain ⚷222(5)

In condemnation proceeding, instruction that any depreciation in market value of property not sought to be condemned by construction of improvement in manner proposed would be of a general nature and not special and peculiar to defendant's property was properly refused. Civ.Code, § 658, subds. 1–3; § 662; Code Civ.Proc. § 1248 et seq.; Const. art. 1, § 14.

22. Eminent domain ⚷2(6)

In proceeding to condemn land for highway purposes, no question of exercise of police power by state was involved. Civ.Code, § 658, subds. 1–3; § 662; Code Civ.Proc. § 1248 et seq.; Const. art. 1, § 14.

EDMONDS, CURTIS, and TRAYNOR, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; Caryl M. Sheldon, Judge.

Action in eminent domain by the People against Antonino Ricciardi and others to condemn land for widening of a state highway. Judgment for defendants, and plaintiff appeals.

Affirmed.

Prior opinion, App., 107 P.2d 647.

Lincoln V. Johnson, Clifford D. Good, Holloway Jones, and George C. Hadley, all of San Francisco, and C. R. Montgomery and Robert E. Reed, both of Sacramento, for appellant.

Ray L. Chesebro, City Atty., William H. Neal and Frederick von Schrader, Asst. City Attys., and Charles F. Reiche, Deputy City Atty., all of Los Angeles, amici curiae for appellant.

Holbrook & Tarr and Leslie R. Tarr, all of Los Angeles, for respondents.

SHENK, Justice.

In this action in eminent domain the plaintiff appeals from a judgment on a verdict fixing the compensation to be paid to the defendants for the land taken and for damages to the remainder by reason of the severance and the construction of the improvement in the manner proposed.

The purpose of the condemnation proceeding is to acquire land sufficient to effectuate, by means of an underpass, the separation of the grade of Rosemead Boulevard at its intersection with Ramona Boulevard in Los Angeles County. The double tracks of the Pacific Electric Railway Company traverse Ramona Boulevard on the route from Los Angeles to San Bernardino and cross Rosemead Boulevard at the intersection.

The defendants are the owners of property located at the northeast corner of Rosemead and Ramona Boulevards, both of which are state highways. The property of the defendants is improved with a modern slaughter house and retail meat market, both set back from the highways so as to afford parking facilities. A residence with a large storage basement faces Rosemead Boulevard. Ingress and egress is afforded the entire property along both boulevards, with driveways leading into the property from the two highways.

At present Rosemead Boulevard fronting on defendants' property is 60 feet wide. By the proposed improvement it is intended to make this boulevard 280 feet wide. It will consist of four lanes, two in the underpass, and two outer lanes on each side thereof, designated as service roads, the latter being 30 feet wide. Rosemead Boulevard will commence to pass under Ramona Boulevard at a point southerly thereof and will come to grade northerly thereof at Glendon Way, the latter of which is the first cross or intersecting street north of defendants' property, approximately 525 feet north of Ramona Boulevard. The underpass will reach a maximum depth of seventeen feet. Visibility of traffic in that portion of the underpass directly in front of the defendants' remaining property on Rosemead Boulevard will be entirely cut off. Between the underpass and the remaining property a lane designated as a service road thirty feet in width is provided for at grade. A ten-foot sidewalk strip between the service road and the defendants' property is also provided for. A dividing strip 50 feet wide at Glendon Way narrowing to 25 feet at the covered portion of the underpass is between the service road and the easterly wall of the underpass. This strip is left for support and landscaping purposes.

The highway plans show that the portion of Ramona Boulevard to the north of the railway right of way is to have a 35 foot freeway for westbound fast traffic and an outer lane 30 feet wide, also called a service road, for local traffic. To the south of the railway right of way a similar freeway for eastbound fast traffic is provided for. The service road on Rosemead Boulevard and the service road on Ramona Boulevard will connect at the southeast corner of the defendants' property and at that point there is access to the westbound traffic on Ramona Boulevard. The service road on Rosemead extends to Glendon Way, which is the next intersecting street to the north. There is a conflict in the evidence as to whether the service road paralleling Ramona Boulevard extends to the next intersecting street to the east. The service roads are at the grade of defendants' property. When the underpass is constructed upon the westerly portion of the property taken from the defendants the grade of Rosemead Boulevard will be changed so as to effectively block all ingress and egress to and from the main highway except by traversing the service road to Glendon Way and then making a left turn into the boulevard.

A verdict was rendered awarding the defendants $9,000 for the taking of parcel 1, and damages to the remainder by reason of the severance and the construction of the improvement in the manner proposed in the sum of $15,000. For the taking of parcel 2, the sum of $350 was allowed with no severance damages.

The main attack on the judgment is the award for severance damages. During the course of the trial witnesses were produced to prove market values. On the examination of the defendants' witnesses the plaintiff took the position and now asserts that considerations of interference with the defendants' right of access to the main highway resulting from the construction of the improvement and the consequent enforced circuity of travel to and from the property to the main highway as proposed may not properly be taken into account in fixing severance damages; also, that the defendants' claimed loss of visibility to and from the main highway as proposed could not be taken into consideration as affecting market value. At the instance of the plaintiff the trial court at first excluded all evidence relating to those subjects, but finally was persuaded by the defendants' counter position that under the facts presented such interference with access and loss of visibility should be taken into consideration in determining market value. Accordingly, the court admitted evidence bearing on those issues and submitted the question of the extent of the severance damages caused thereby to the jury. One of the principal contentions of the plaintiff on the appeal is the asserted error of the trial court in admitting that evidence.

[1,2] Not every depreciation in the value of the property not taken can be made the basis of an award of damages. In the absence of a declaration by other competent authority the courts have been called upon to define rights claimed to be infringed in violation of section 14, article I, of the Constitution; also to place limitations on the extent of those rights and to declare when and under what circumstances recovery may be had by the property owner for a violation thereof. The courts have assumed the burden and responsibility of defining those rights and of limiting their extent because of the necessity of safeguarding the constitutional rights of private parties on the one hand and on the other hand of seeing to it that the cost of public improvements involving the taking and damaging of private property for public use be not unduly enhanced. The law on the subject of the nature and extent of the rights of the property owner abutting on a public highway and of the infringement of those rights is therefore, in substantial part, case law. For example, it has been held in this state that injury to the business of the owner or occupant of the property does not form an element of the compensating damages to be awarded. City of Oakland v. Pacific Coast Lumber, etc., Co., 171 Cal. 392, 153 P. 705. This is so because it is only the value of, and the damage to, the property itself, which may be considered. A particular business might be entirely destroyed and yet not diminish the actual value of the property for its highest and best use. See 10 Cal.Jur. 341, sec. 55. It has also been held in this state that an abutting owner has no right to compensation by reason of diversion of traffic away from his property. Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505; People v. Gianni, 130 Cal.App. 584, 20 P.2d 87; City of Stockton v. Marengo, 137 Cal.App. 760, 31 P.2d 467.

Neither in the Constitution nor in statutes do we find any declaration of the incidents of ownership or elements of value which specifically creates or defines or limits the two rights which are involved here. But we do find general provisions of law which are basic to our consideration. Section 658 of the Civil Code declares that "Real or immovable property consists of: 1. Land; 2. That which is affixed to land; 3. That which is incidental or appurtenant to land * * *", and section 662 of the same code defines appurtenances in general language as follows: "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or watercourse, or of a passage for light, air, or heat from or across the land of another." Section 1248 and related sections of the Code of Civil Procedure, which prescribe the procedure in condemnation actions, do not assume to create rights of ownership, or to define the incidents thereof or the elements of value. It is, therefore, necessary for this court to determine whether the claimed items are, or shall be, included among the incidents or appurtenances of real property within the purview of the general definition of appurtenances above quoted, and are therefore to be considered as elements of value attaching to private property and for which compensation must be paid when the same is taken or damaged for a public use in eminent domain proceedings.

[3, 4] The courts of this state, from time immemorial and in cases too numerous to mention, have declared and enforced the abutting property owner's right to a free and convenient use of and access to the highway on which his property abuts. Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 617, 37 P. 750, 42 Am.St.Rep. 149; Geurkink v. City of Petaluma, 112 Cal. 306, 308, 44 P. 570; O'Connor v. Southern Pacific R. Co., 122 Cal. 681, 55 P. 688; Brown v. Board of Supervisors, 124 Cal. 274, 280, 57 P. 82; Eachus v. City of Los Angeles, 130 Cal. 492, 62 P. 829, 80 Am.St.Rep. 147; Smith v. Southern Pacific R. Co., 146 Cal. 164, 79 P. 868, 106 Am.St. Rep. 17; Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330; Wilcox v. Engebretsen, 160 Cal. 288, 299, 116 P. 750; Lane v. San Diego Elec. R. Co., 208 Cal. 29, 33, 280 P. 109; McCandless v. City of Los Angeles, 214 Cal. 67, 71, 4 P.2d 139; Rose v. State, supra, 19 Cal.2d 713, 727, 123 P.2d 505; Lewis, Eminent Domain, 3d Ed., p. 177; McQuillin, Municipal Corporations, 2d Ed., vol. 4, pp. 79, 85; Nichols, Eminent Domain, 2d Ed., p. 503. It was declared in the case of Eachus v. Los Angeles, etc., Ry. Co., supra, 103 Cal. 614, at page 617, 37 P. 750 at page 751, 42 Am.St.Rep. 149, that this right of ingress and egress attaches to the lot and is a right of property as fully as is the lot itself and any act by which that easement is destroyed or substantially impaired for the benefit of the public, is a damage to the lot itself, within the meaning of the constitutional provision under which the owner is entitled to compensation.

[5] It is also the settled law that: "An abutting owner has two kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally; * * *. An abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken away from him without due compensation. [Citing cases.]" Lane v. San Diego Elec. R. Co., 208 Cal. 29, 33, 280 P. 109, 111.

But as we view the record in this case we are not called upon to declare new rights of property in the abutting owner but to define the extent of existing rights, to determine whether the trial court committed error in its rulings on the admission of evidence on the subjects of impairment of access and loss of visibility as affecting the market value of the defendants' existing property rights and whether the findings and conclusions of the trial court on those subjects are supported by sufficient evidence.

The plaintiff does not take the position that the evidence is insufficient to support some award of severance damages based on other elements bearing on market value. There is evidence of substantial severance damages on account of a reduction in size of the remaining land, of the severance of the remaining land into an irregular strip, of the curtailment of the remaining parking area, of the reduction of the commercially zoned portion of the property which corners upon the two highways, and of the impairment of the use of the property as a functioning unit caused by the taking of integral parts of the operating plant. No complaint is made of the consideration of those matters in fixing severance damages. But it is insisted by the plaintiff that no actionable interference with the right of access results from so-called circuity of travel to which an abutting owner may be subjected as the result of the construction of a public improvement; that such an interference is but an inconvenience suffered only in common with the general public; that it has no proper relation to the abutting property owner's easement of ingress and egress and that it cannot therefore be a right special and peculiar to his right of property. Counsel for the plaintiff apparently concede that if the interference is actionable it is a proper matter to be considered in fixing compensation, for it is said in that behalf that "under the California 'or damages' clause compensation is not allowed except for an actionable interference with a property right."

[6] "Actionable interference" with a property right can be no different from "substantial impairment" of the right as that phrase is so familiarly used in the cases.

[7-9] The contention that the disputed elements of damage—the taking or impairment of the right of direct access to the through highways and the taking or impairment of the right of visibility to and from the one highway (Rosemead Boulevard) in relation to the remaining property—are noncompensable as being the result

of police power regulation, cannot be sustained under the facts and law applicable here. We recognize that the defendants have no property right in any particular flow of traffic over the highway adjacent to their property, but they do possess the right of direct access to the through traffic highway and an easement of reasonable view of their property from such highway. If traffic normally flowing over that highway were re-routed or if another highway were constructed which resulted in a substantial amount of traffic being diverted from that through highway the value of their property might thereby be diminished, but in such event defendants would have no right to compensation by reason of such re-routing or diversion of traffic. The re-routing or diversion of traffic in such a case would be a mere police power regulation, or the incidental result of a lawful act, and not the taking or damaging of a property right. But here we do not have a mere re-routing or diversion of traffic from the highway; we have, instead, a substantial change in the highway itself in relation to the defendants' property; i.e., a re-routing of the highway in relation to defendants' property rather than a mere re-routing of traffic in relation to the highway. Defendants' private property rights in and to that highway are to be taken and damaged. It is only for such private property rights that compensation has been assessed. The court allowed no damages to be predicated on any diversion of traffic from the highway but it did properly allow damages to be based on diversion of the highway from direct access to defendants' property.

[10, 11] Prior to the enactment in 1879 of section 14 of article I of the Constitution the problem of compensating for damages to the remainder where the whole parcel was not taken did not arise. Compensation for the land taken for public use was the only matter for consideration. In Reardon v. City and County of San Francisco, 66 Cal. 492, 6 P. 317, 56 Am. Rep. 109, it was held for the first time that the addition of the words "or damaged" embraced more than the "taking" provided for in the Constitution of 1849, art. 1, § 8 and gave to the property owner a remedy which he did not previously have. The addition of the "or damaged" phrase in the present constitutional provision has given rise to many difficult problems with reference to the extent of the rights of the owner of property damaged where none is taken and where part of a larger parcel is taken and the remainder is claimed to be damaged by reason of the severance and the construction of the improvement in the manner proposed. Where the whole is taken no question of severance damages is, of course, involved. When compensation is claimed either for a taking or a damaging the issues may be presented for adjudication in at least two forms of action. In one there is an absence of a proceeding in eminent domain. In that form of action the property owner seeks relief by bringing an action for compensation for a taking or a damaging of his property or both, as the case may be. Illustrative of that class of cases with many others in our reports are McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139, the more recent case of Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505, and the current case of Bacich v. Board of Control, Cal.Sup., 144 P.2d 818.

The other form of action is, as here, a proceeding in eminent domain in which the procedure is laid down by section 1248 and related sections of the Code of Civil Procedure. In both actions the result is the same in that in each the property owner receives compensation for the invasion of his private right; but the procedure in arriving at the result is different. In the one case the property owner assumes the burden of alleging and proving his property right and the infringement thereof, and the question whether his allegations in that behalf are sufficient may be determined on demurrer. In the other case the condemning authority, in commencing the proceeding, affirmatively alleges ownership in the defendants, the contemplated taking and severance, and seeks a determination by the court of issues confided by the law to the decision of the court and also seeks a determination by the jury, unless one be waived, of the compensation which should be paid to the property owner.

It is provided in section 1248 of the Code of Civil Procedure that the jury "must hear such legal testimony as may be offered by any of the parties to the proceedings, and thereupon must ascertain and assess: 1. The value of the property sought to be condemned, and all improvements thereon pertaining to the realty, and of each and every separate estate or interest therein * * *. 2. If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned, by reason of its severance from the portion sought to be condemned, and the construction of the improvement in the manner proposed by the plaintiff." Section 1249 provides that for the purpose of assessing compensation and damages the "actual value" thereof at the date specified "shall be the measure of compensation for all property to be actually taken, and the basis of damages to property not actually taken but injuriously affected."

[12, 13] The law has adopted market value as establishing actual value. Sacramento, etc., R. Co. v. Heilbron, 156 Cal. 408, 104 P. 979. The court said in that case at page 409 of 156 Cal., at page 980 of 104 P., that as to the land actually taken "the rule is of universal acceptance that the measure of this damage is the market value; that is to say, the highest price estimated in terms of money which the land would bring if exposed for sale in the open market, with reasonable time allowed in which to find a purchaser, buying with knowledge of all of the uses and purposes to which it was adapted and for which it was capable." As to the damages to the remainder by reason of the severance, an instruction in that case was approved which laid down the rule that such damages should be determined by ascertaining the market value of the portion not sought to be taken (as of the date fixed by statute, which in this case was November 23, 1938) and by deducting therefrom the market value thereof after the severance and the construction of the improvement in the manner proposed by the plaintiff. This measure of damages is in accordance with the provisions of the code sections referred to. Such damages may be shown by proving the market value of the remainder before and after the taking and leaving the computation of the difference to the jury, or by competent evidence of severance damages in a lump sum as was done by the testimony of witnesses in this case. Of course, as above indicated, in applying this rule damages may not be allowed for diminution of property value resulting from highway changes causing diversion of traffic, circuity of travel beyond an intersecting street, or other noncompensable items. See Rose v. State of California, supra; Bacich v. Board of Control, supra.

[14] When the proceeding comes on for hearing all issues except the sole issue relating to compensation are to be tried by the court, and if the court does not make special findings on those issues its findings thereon are implicit in the verdict awarding compensation. Vallejo, etc., R. Co. v. Reed Orchard Co., 169 Cal. 545, 556, 147 P. 238; City of Oakland v. Pacific Coast Lumber, etc., Co., supra, 171 Cal. 392, at page 397, 153 P. 705. In the Vallejo case, 169 Cal. at page 556, 147 P. at page 244, the court said: "A condemnation suit is a special proceeding. It is not included in the classes mentioned in section 592 [Code of Civil Procedure] in which a jury is required. That section is expressly made applicable to condemnation suits. Code Civ. Proc. § 1256. It follows that, except those relating to compensation, the issues of fact in a condemnation suit, are to be tried by the court, and that if the court submits them to a jury, it is nevertheless required to make findings either by adopting the verdict thereon or by making findings in its own language." In the Oakland case the point was urged that the question whether the parcels of land involved constituted one parcel within the meaning of section 1248 of the Code of Civil Procedure must be submitted to the jury for determination. The court said at page 397 of 171 Cal., at page 707 of 153 P.: "But neither the state nor any of its mandatories nor any other person or corporation exercising the power of eminent domain, is compelled to submit to the determination of a jury every question of fact (Vallejo, etc., R. Co. v. Reed Orchard Co. [169 Cal. 545], 147 P. 238), and this question of fact (namely, whether or not, the probative facts being without controversy, the resultant fact establishes the existence of a parcel from which a portion is to be taken) is essentially a question of law for the determination of the court. It is only the 'compensation,' the 'award,' which our Constitution declares shall be found and fixed by a jury. All other questions of fact, or of mixed fact and law, are to be tried as in many other jurisdictions they are tried, without reference to a jury. Const., art. I, § 14." The law declared in these two cases has been followed in this state without deviation.

[15] It was therefore within the province of the trial court and not the jury to pass upon the question whether under the facts presented, the defendants' right of access will be substantially impaired. If it will be so impaired the extent of the impairment is for the jury to determine. This is but another way of saying that the trial court and not the jury must decide whether in the particular case there will be an actionable interference with the defendants' right of access. This the trial court did when it ruled on the admission of evidence and in its instructions to the jury.

[16, 17] In admitting the evidence objected to by the plaintiff the trial court was necessarily guided by the settled law with reference to an abutter's rights and by the facts presented in the case. The record is voluminous and consists of a large relief map, numerous other maps and many volumes of transcribed testimony. This evidence was before the court at the close of the defendants' case at which time the ruling was made permitting the expert witnesses to testify to the effect upon the market value of the property not taken by reason of the contemplated improvement and the consequent requirement that the owner must thereafter take another route to reach the through traffic lane which before the improvement was immediately in front of his premises. To sustain the plaintiff's position would require a ruling by this court to the effect that although a landowner's easement of access has been substantially impaired, under no circumstances should circuity of travel occasioned thereby enter into a computation of the damages to be awarded. Such a ruling obviously would be beyond the bounds of propriety. Certainly the plaintiff would not contend that if the underpass be constructed as proposed and no means of access to Rosemead Boulevard be provided for, the defendants would be without redress. It is too plain to admit of argument that if the underpass be constructed as proposed and the service roads were not provided for in the contemplated improvement, the defendants' right of access to Rosemead Boulevard would be practically destroyed. In providing for the service roads the state must be deemed to have proceeded in frank recognition of the private right of access possessed by the defendants, that such right would be invaded, and intended by means of those service roads to minimize and entirely absorb the damages to which the defendants would otherwise be entitled. But in any event the question whether the defendants possessed a right which was damaged was for the trial court to determine. As to how much the service roads would mitigate the damage, i.e., how much would be the net damage, was a question of fact for the jury. See Knox County v. Le Marr, 20 Tenn.App. 258, 97 S.W.2d 659, 661.

[18] It is also the position of the state that evidence of loss of visibility has not been justified in this case as a part of access and that it can be justified on no other theory. The weight of authority seems to be in favor of the proposition that an abutting owner of property on a public highway has an easement of reasonable view of his property from the highway. 90 A.L.R. 793, 794, and cases cited; 29 C.J.S., Eminent Domain, p. 912, § 105. The right of reasonable view in addition to the right of ingress and egress is named as one of the easements possessed by the abutting owner in Williams v. Los Angeles R. Co., 150 Cal. 592, 595, 89 P. 330, 332. Here again it was for the trial court to determine whether the obstruction caused by the underpass would unreasonably cut off defendants' property from visibility by travelers on the main highway, and, the right being substantially impaired, the amount of damage was a question for the jury. The findings and conclusion of the trial court implicit in the verdict are supported by the evidence and may not now properly be disturbed.

[19] No just criticism can be made of the severance damages awarded in the light of the record in this case. The entire property was valued at as much as $68,000 and the severance damage was estimated as high as $41,779. In view of this evidence an award of $15,000 on the latter item cannot be set aside on appeal.

[20] The plaintiff complains of certain instructions given and of the refusal to give others. Instruction No. 22 as given is assigned as error because by it the court advised the jury that the question whether the defendants had suffered an infringement of their rights in the property not sought to be condemned was a "question of fact for the jury" to determine. The giving of that instruction was error, but no prejudice resulted from it, because the record shows beyond question that the defendants would suffer an infringement of their rights by the construction of the improvement in the manner proposed. Furthermore, the trial court had in effect already held that such impairment would be suffered and as above stated, its finding and conclusion in that respect are implied in the verdict.

Certain language in the opinion in McCandless v. City of Los Angeles, supra, 214 Cal. 67, at page 71, 4 P.2d 139, at page 141, is referred to by the defendants as justifying that instruction. It is there said: "Whether the infringement of her right is special and peculiar to the plaintiff's property and has resulted in a substantial impairment of her right, is a question of fact * * *." The purpose of the appeal in that case was to test the sufficiency of the complaint to state a cause of action for damages for an alleged infringement of a property right of the plaintiff. That was the only question involved on the appeal and in passing on it the following was said immediately after the language last above quoted: "and we think the complaint is sufficient in alleging not only the special and peculiar nature of the infringement as applied to said property, but also the substantial impairment of that right. At least it may not be said as a matter of law that the plaintiff under her allegations has suffered no damage."

When both quotations are considered together it is obvious that the discussion had to do solely with the sufficiency of the complaint to state a cause of action. The quoted language relied upon by the defendants as justification for the challenged instruction was not as full as it might have been, but it is a correct statement of the law so far as it goes. A more complete statement of the law on the subject would have been that the question whether there has been a substantial impairment of her property right is a question of law, or of fact, or a mixed question of law and fact, for the trial court to determine. In no case is it a "question of fact for the jury" to determine.

[21] No error appears because of the refusal to give the plaintiff's proposed instruction No. 22. It would have advised the jury that any element or depreciation in market value of the property not sought to be condemned by reason of the construction of the improvement in the manner proposed would be of a general nature and not special and peculiar to the defendants' property. The subject matter of this instruction was not for the consideration of the jury and was properly refused.

Other instructions given are criticized by the plaintiff but we find no error in any of them.

[22] No question of the exercise of the police power by the state is involved in this case. The case is simply a condemnation suit in which the only questions properly to be determined on appeal are whether the court erred in overruling objections interposed by the state to the introduction of certain evidence on the question of severance damages, whether the court erred prejudicially in the matter of instructions to the jury and whether the verdict is supported by the evidence.

There is no other contention of the plaintiff which is not effectively disposed of by the foregoing discussion and authorities.

The judgment is affirmed.

GIBSON, C. J., and CARTER and SCHAUER, JJ., concurred.

EDMONDS, Justice (dissenting).

I dissent.

I am unable to concur in an opinion which, unsupported by authority in this state or elsewhere, under the guise of "defining" existing property rights, extends the provisions of article I, section 14, of the California Constitution to a degree never before recognized, thereby establishing rules of decision which will, in large measure, make the construction of necessary highway improvements prohibitive in cost. More specifically, I dissent from the conclusions of my associates as stated by Mr. Justice SHENK for the following reasons:

(1) Despite the law uniformly to the contrary throughout the United States, the decision entitles an abutting property owner to compensation for the additional distance he must travel in the public street before he reaches the lanes of a highway carrying the through traffic.

(2) In allowing recovery for such "circuity of travel," the court is already ignoring the restrictions just prescribed by it in Bacich v. Board of Control, 144 P.2d 818, limiting recovery to the owners of property lying between an obstruction and the first intersecting street.

(3) For the first time in the judicial history of the state, recovery is allowed because the main flow of traffic, when passing through a subway constructed for the safe and convenient use of the highway, will no longer have a completely unobstructed view of the abutting landowner's premises.

(4) In stating the rule creating this right of view against the State, my associates fail to distinguish between the unlawful impairment or obstruction of view

in the public street by a private individual and a lawful interference with the view of abutting property occasioned by necessary and proper highway construction, ignoring the decisions which draw this distinction.

(5) Although recognizing the established rule in this state denying compensation for a diminution in value of land occasioned by a highway project diverting traffic from in front of his premises, the court inconsistently holds that the owner may recover damages because the diverted traffic no longer can view his property.

(6) The opinion studiously avoids passing upon one of the vital questions presented in this appeal. There is no determination as to whether a landowner is entitled to compensation for any reduction in the width of the street upon which his property abuts or whether his easement of access may be said to extend only to such portion and width of the street as is reasonably necessary for the purposes of ingress and egress of the abutting owner, considering the nature of his property and the particular uses to which it is adaptable.

(7) The procedure to be followed in the ascertainment of the new property rights and the determination of the amount of damages to be awarded for interference with them is left in complete uncertainty. The inconsistent pronouncements of my associates upon these issues will be a fruitful source of litigation. They say that whether the proposed improvement has resulted in a substantial impairment of a property right is a question of law or of fact, a contradictory statement impossible of application by the legal profession or the courts upon the trial of a condemnation suit or on an appeal. Adding to the confusion is the declaration that the landowner is entitled to the difference between the market value of the entire parcel of land before a portion of it is taken under the power of eminent domain and the market value of the land remaining after the severance, although it is declared that certain elements diminishing the value may not be considered. To me, such statements can only mean that those who have joined in the majority opinion are not themselves in agreement upon these questions and concur in ambiguity which hereafter may be said to support either of the variant positions.

(8) Although stating that a court, in defining rights claimed to be infringed in violation of the constitutional provision, must balance against the necessity of safeguarding private property the duty to see "that the cost of public improvements * * * be not unduly enhanced," the rule is not applied.

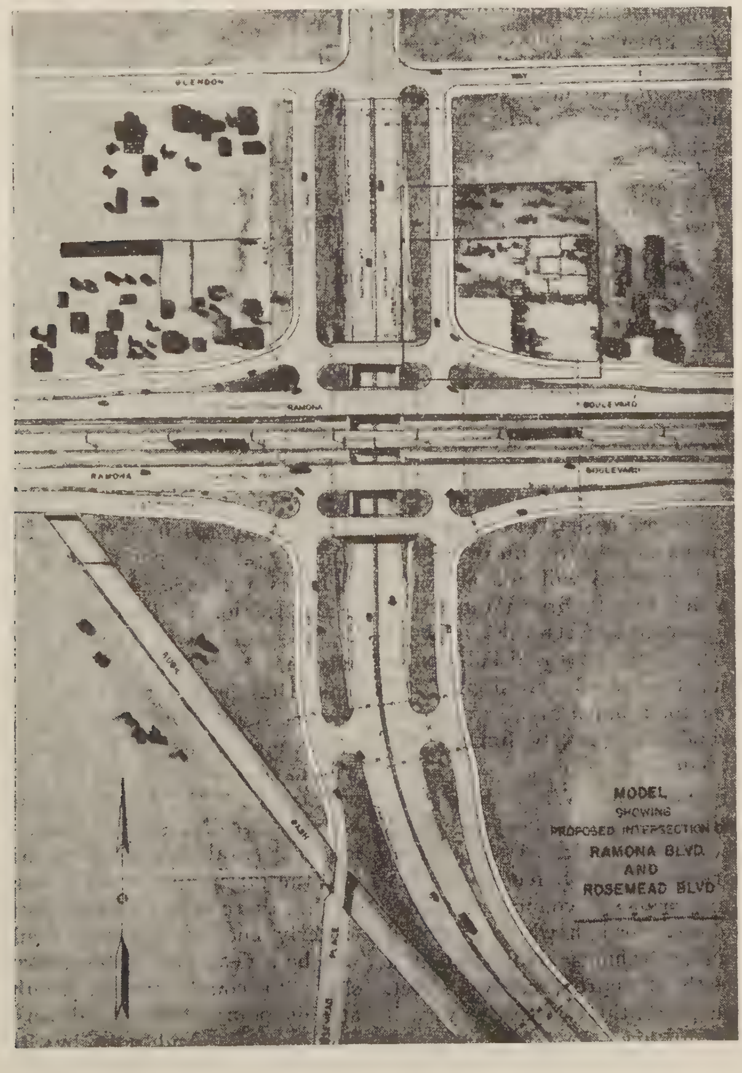
(9) Notwithstanding the admission that the trial judge erred in instructing the jurors that the question as to whether the respondents had suffered an infringement of their rights in the property not sought to be condemned was one for them to determine, my associates decide that the court had, by the admission of evidence, held that such impairment would be suffered and therefore no prejudice resulted. Yet the giving of this instruction completely negatives any prior ruling by the court upon that issue. Furthermore, if such a determination is a question of law, as stated in some parts of the opinion, no ruling upon it could be "implied in the verdict." And if it is a question of fact, one is confronted by the statement: "In no case is it a 'question of fact for the jury' to determine."

To fully understand the respective rights of the property owner and of the State requires, in my judgment, a more complete statement of the nature and extent of the proposed highway improvement than appears in the opinion of my associates and a summary of the testimony upon which the property owner was awarded damages. I shall therefore first present facts additional to those detailed by them and then, considering all of the evidence which to me is relevant to the questions for decision, state the reasons for my conclusion that the judgment appealed from should be reversed and a new trial ordered upon the issue of consequential damages.

As described by Mr. Justice SHENK, because of the construction of an underpass with service roads parallel to it and within the boundaries of the boulevard as widened, the State is "re-routing * * * the highway." Under any view of the testimony, this statement can apply only to Rosemead Boulevard. And as to that thoroughfare, as well as Ramona Boulevard, in my opinion the evidence shows only a widening of each of them with lanes and freeways designed in accordance with modern requirements for the protection and acceleration of motor vehicles and the separation of grades at a major traffic intersection.

The project for which part of the respondents' land is being condemned may be readily comprehended from the accompanying photograph of a relief map used at the trial. The boundaries of the two parcels of land owned by the respondents, as they existed at the time this action was commenced, are outlined on the map. It is comparable in design to many improvements now being planned for modernizing important highways to meet present day needs.

Rosemead Boulevard, a part of the state highway system designated as Route 168 (Streets and Highways Code, sec. 468, St. 1935, p. 286) is one of the main arteries of travel in a suburban district near Los Angeles. It is intersected by Route 26 of the state highway system (Streets and Highways Code, sec. 326) and, for some distance on either side of Route 168, bears the name of Ramona Boulevard. It is in two parts, divided by the tracks of the Pacific Electric Railway Company. In the vicinity of the property in controversy, the northerly travel lane, that is, the portion of the highway lying along the northerly boundary of the railroad right of way, commences at a dead end approximately two blocks west of Route 168 and continues across it to the east a distance of about a mile and a quarter, intersecting a number of streets. That part of Route 26 which lies to the south of the tracks is a paved road west of Route 168 for several miles. To the east of the intersection it is unpaved and, as described by one of the respondents' witnesses, "an ordinary lane."



In 1938, the Highway Commission adopted a resolution reciting that public interest and necessity require the acquisition and construction of a state highway upon certain real property. The Department of Public Works was directed to acquire the necessary land by condemnation. Thereafter, the present action was commenced.

The property mentioned in the resolution and in the complaint is described as two parcels, each of which fronts on Rosemead Boulevard. Together they may be roughly described as the westerly 90 feet and the southerly 32 feet of about three acres of land owned by the respondents.

Attached to the complaint is a map showing the boundaries of this land and the portions of it sought to be condemned, another giving the detailed plan for "Proposed Separation of Grades of Rosemead Blvd. & Ramona Blvd.," and a third depicting a cross section of the proposed improvement of Rosemead Boulevard. From these maps and the evidence offered upon trial, it appears that the State is acquiring the land described in the resolution and the complaint, all of which is owned by the respondents, for the purpose of reconstructing the two state highways and separating the grade of the center portion of Route 168 (Rosemead Boulevard) from Route 26 (Ramona Boulevard), and carrying it under that street in a subway. When the project is completed, for several hundred feet from the intersection of the two highways the width of Route 168 will be 280 feet and that of Route 26, including a center section carrying the railroad tracks, 255 feet.

Using the street names in further description of the grade separation project, north of Ramona Boulevard, the widening of Rosemead Boulevard will end at Glendon Way, which is the first intersecting street. The distance between them is about 525 feet. To the east of Rosemead Boulevard, Ramona Boulevard will occupy the increased area for a much greater distance and far beyond the easterly line of the respondents' land

South of Glendon Way, Rosemead Boulevard will have two roadways, each of which will be 35 feet wide. At a point in the neighborhood of 150 feet south of Glendon Way, they will commence to decline in a subway through which they will be carried under Ramona Boulevard at a maximum depth of approximately 18 feet. For safety purposes, the two roadways will be divided by an area four feet in width and curb high. Paralleling these traffic lanes the State will construct what it terms "service roads" at approximately the present grade of Rosemead Boulevard which will continue to Ramona Boulevard. They will afford direct access to the adjacent property.

The highway plans show that the portion of Ramona Boulevard to the north of the section used by the railroad is to have a 35 foot freeway for westbound fast travel and an outer lane 30 feet wide, also described as a service road, for local use. The portion of Rosemead Boulevard to continue at the present grade will intersect that part of Ramona Boulevard which is designed for local travel. When the two highways are reconstructed, the land of the respondents not taken by the State will have frontage on the "service roads" connecting with the center lanes reserved for traffic through the subway and also with Ramona Boulevard freeways.

Over the objections of the State, expert witnesses for the property owners explained that they had considered as an element of consequential damage the fact that the widening of the two boulevards and the construction of the underpass would block the respondents' land from access to the main traveled portions of the highways except through the circuitous routes afforded by the outer lanes. They further testified, over a similar objection, that another factor entering into their estimate of severance damages was what they termed "loss of visibility."

One of these witnesses pointed out that before the highways are reconstructed a person may reach or leave the Ricciardi property at any point along its frontage on the two streets. After the widening and reconstruction of Ramona Boulevard, said he, the land "will have a direct contact only on * * * a narrow lane or alley which has been termed by the State as a service road. On the west, the property which now abuts on Rosemead Boulevard will have no access [to it] * * * but will abut * * * on another alley or lane or so-called service road." The service road paralleling Ramona Boulevard, he told the jury, "apparently is not carried out so that there is any direct contact with the easterly end of Ramona Boulevard." It will be a dead end street, making it necessary "to come through another opening at this point * * * down to Ramona Boulevard." And only by following the service road along the westerly boundary of the respondents' property to Glendon Way may one reach Rosemead Boulevard. Moreover, by governmental regulation, in his opinion, a left-hand turn will be prohibited in the intersection of Glendon Way and Rosemead Boulevard.

On the subject of loss of visibility the witness stated that the difference in grade of the center travel lanes of Rosemead Boulevard and the construction of the subway will greatly impair efficient ingress to and egress from the property because one driving north through the underpass will not be able to see it before reaching the point where a turn can be made. As to travel in the opposite direction, he added, the visibility will be greatly impaired by the change of grade which begins at Glendon Way. Using Rosemead Boulevard as it will be reconstructed, in approaching the property "additional means of perception" must be used.

The same reason was given by another witness as the basis, in part, for his opinion concerning the amount of severance damages which the respondents will sustain on account of the loss of visibility. When the State's project is completed, he explained, a traveler proceeding north under Ramona Boulevard will not be able to see the Ricciardi property from the point at the south entrance of the underpass where the decline commences, to about the same relative place on the other side of the structure. He must then travel to Glendon Way and turn back. And, by the time one going in a southerly direction on Rosemead Boulevard arrives at the former southerly line of the Ricciardi property, he will then be 18 feet below the present grade of the highway. "It is my opinion," he concluded, "that the view will be sufficiently interfered with so that anyone desiring to reach Mr. Ricciardi's property will be inclined to lose his way on account of the circuitous route and fail to reach the property for that reason."

A third appraiser in stating the factors he considered in his estimate of the amount of severance damage which the property owners will sustain by reason of the reconstruction of the two highways included among them the following: "* * * Previous to the construction of the improvement Parcel No. 1 had free and easy access or ingress and egress both on Ramona Boulevard and on Rosemead Boulevard. * * * After the construction of the proposed improvement * * * the two center lanes of Rosemead Boulevard will be on a changing grade along the entire frontage of the Ricciardi property."

Continuing his testimony and speaking as of a time when the highways are rebuilt, he said that the Ricciardi property "hasn't any egress or ingress whatever directly on either Rosemead Boulevard or Ramona Boulevard. The only means of ingress and egress is by service roads * * * which run in a circuitous route from all directions, and in order to reach the Ricciardi property it is necessary to take one of those service roads from either Ramona Boulevard or Rosemead Boulevard. * * *"

Upon this and other evidence, the jury awarded the respondents $9,000 as the value of Parcel No. 1, and $15,000 as damages for its severance from the remainder of the property. The value of Parcel No. 2 was placed at $350, with no severance damages. No complaint is made concerning the amount determined to be the value of the land taken from the respondents in connection with a street widening and grade separation project, but it is charged that the evidence does not support the award of $15,000 made for severance damages.

Where a portion only of a landowner's property has been taken for a public improvement, the question necessarily arises as to the amount of compensation to which he is entitled for the reduction in value of the remaining parcel. Three alternative formulas have been used. In a few jurisdictions consequential damages have been allowed as part of the value of the land taken by appraising the value of the part with reference to the diminution in value of the whole. Another group of courts has stated that just compensation in a partial-taking case should be measured by the difference between the market value of the whole before the taking and the market value of the remainder after the taking. The formula accepted in the majority of states, however, is the value of the part taken plus damages to the remainder. Orgel, Valuation Under the Law of Eminent Domain, 1936, p. 218. My associates properly recognize that every diminution in value of land caused by public improvement is not compensable under the eminent domain clause of the California Constitution. It is therefore apparent that the test to be used in this state is not the difference between the market value of the land before the taking and the market value of the remainder following the severance but that this jurisdiction is committed to what may be termed the majority rule.

The necessity for allowing recovery on a basis other than the difference in market value of the entire parcel before the taking and the market value of the land remaining after the severance is clear, for many acts of government resulting in a reduction in the value of private property may be performed with impunity by citizens acting in their own self-interest. A municipality, for example, may establish a public building seriously impairing the value of adjacent residential property. It need pay no compensation for this injury,[1] but neither would a private citizen be liable for a similar damage resulting from the construction of an equally undesirable office building. Obviously, the value of real estate may decrease very materially as the result of the use which an adjacent property owner may lawfully make of his land, and since the owner has no right of action against such an individual for the damages thus caused, by the same token it may not reasonably be said that compensation for similar damage caused by the lawful use of property owned by the public was intended to be guaranteed to private individuals under the eminent domain clause of the California Constitution. Archer v. City of Los Angeles, 19 Cal.2d 19, 24, 119 P.2d 1; O'Hara v. Los Angeles County Flood, etc., Dist., 19 Cal.2d 61, 63, 119 P.2d 23. Therefore, since such factors may necessarily have contributed to reduction in market value of land remaining after the severance of part of it by the state, it is apparent that the difference in market value before and after the taking is an improper formula for ascertaining recoverable compensation.

Moreover, any distinction predicated upon the allowance of compensation for a reduction in value of land attributable to a lawful use of state property because there has been an appropriation of part of it, when no compensation would be awarded for the same element of damage without such a severance, is unsound. For, obviously it would be unfair discrimination to reimburse a property owner for such damage to his property simply because a portion of it, however small, may have been condemned, while denying to one from whom no land is taken recovery for a comparative reduction in value of his land. To allow a recovery to one property owner but not to another under such circumstances would obviously be arbitrary and unsupportable under the provisions of article I, section 14, of the California Constitution requiring compensation for a "damaging" as well as a "taking" of private property. Any language in Colusa & Hamilton R. Co. v. Leonard, 176 Cal. 109, 113, 167 P. 878, indicating the possible propriety of the distinction, is unwarranted and should be disapproved. Although it may be difficult, it is nevertheless necessary to exclude evidence as to that diminution in value which an owner of land from which a part has been taken may have suffered along with adjacent property owners because of the use detrimental to the remainder of his property.

The present action concerns property to which the State has title, and is now using, for highway purposes. Because of this fact, "The inauguration of a new use of a highway under proper authority within the general purposes for which the highway was created, is generally held not to constitute a 'taking or damaging' of the property of the abutting owner within the constitutional provision. The public has the right, as against the owner of the fee, to prepare and reserve the whole or a part of a highway for special forms of travel." 18 Am.Jur., Eminent Domain, sec. 188, pp. 818, 819. One of the purposes, however, for which highways are created is to provide a means of access to property abutting upon it. Consequently, as stated by the majority opinion, the courts have declared and enforced the property owner's right of access to the highway on which his property abuts. But the easement of access, properly defined, may be said to extend only to such portion and width of the street as is reasonably necessary for the purposes of ingress and egress of the abutting owner, considering the nature of his property and the particular uses to which it is adaptable. See Rose v. State of California, 19 Cal.2d 713, 728, 123 P.2d 505; 1 Lewis, Eminent Domain, 3d Ed., 1909, p. 190. Accordingly, the owner of abutting land has no absolute right, as against the public, to insist that the adjacent street always remain available for use in the same manner and to the same extent as when it was constructed. Regulations such as the prescribing of one way traffic or the prohibiting of left-hand turns upon it may interfere to that extent with the right of access without subjecting the municipality to liability for the resulting impairment. See note, 100 A.L.R. 487, 491–493.

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[1] The government may condemn private property and erect upon it a jail or "pest house" without compensating adjacent property owners for the undeniable impairment of their property values as a result of such public use. See Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 617, 37 P. 750, 42 Am.St.Rep. 149; Rigney v. Chicago, 102 Ill. 64, 80; City of Winchester v. Ring, 312 Ill. 544, 550–552, 144 N.E. 333, 36 A.L.R. 520; City of Geary v. Moore, 181 Okl. 616, 75 P.2d 891, distinguishing Oklahoma City v. Vetter, 72 Okl. 196, 179 P. 473, 4 A.L.R. 1009.

The abutting owner's easement does not, therefore, as a matter of law, entitle him to the use of the full width of the street, nor does it include the right to a street wholly free of obstruction. Thus the mere narrowing of a street is not ipso facto an infringement of his right of access (Brown v. Board of Supervisors, 124 Cal. 274, 281, 57 P. 82; and see Bigley v. Nunan, 53 Cal. 403), but where there is evidence showing that the reduction in width has left a street insufficient in width to afford ingress and egress in a reasonable manner, an interference with his right is clearly established. Rose v. State of California, supra. Similarly, a change in the grade of a street or the construction of an improvement thereon does not per se constitute an interference with the right of access (Brown v. Rea, 150 Cal. 171, 174, 175, 88 P. 713; Montgomery v. Santa Ana, etc., Co., 104 Cal. 186, 190, 37 P. 786, 25 L.R.A. 654, 43 Am.St.Rep. 89; City of San Mateo v. Railroad Commission, 9 Cal.2d 1, 9, 10, 68 P.2d 713), but if the obstruction substantially interferes with ingress and egress to the property, considering its nature and the particular uses to which it is adaptable, the easement of access is impaired. Rose v. State of California, supra; Eachus v. City of Los Angeles, 130 Cal. 492, 62 P. 829, 80 Am.St.Rep. 147; Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330; Lane v. San Diego Elec. R. Co., 208 Cal. 29, 280 P. 109; McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139.

For example, in Eachus v. Los Angeles, etc., R. Co., supra, the defendant railway company made an excavation in the street in front of the plaintiff's property which varied in depth from 20 to 28 feet, leaving only a 10-foot strip in front of the premises for access. And in Williams v. Los Angeles R. Co., supra, the construction by the railway company of a switch and signal tower in the street in front of the plaintiff's business premises directly interfered with his right of ingress and egress. Because the railway company, in Lane v. San Diego Elec. R. Co., supra, constructed its track so close to the plaintiff's land that a vehicle could not be parked in front of it while a street car passed by, the court held that the landowners' right of access was substantially and seriously impaired. Likewise, the construction of a pedestrian subway terminal so that it extended in front of and adjacent to one-third of the plaintiff's premises, which were zoned for general business purposes, was held, in McCandless v. City of Los Angeles, supra, to be a substantial impairment of the owner's right of ingress and egress.

The street improvement which occasioned the controversy in Rose v. State of California, supra, was very similar to that shown in the present case. There, however, the elimination of the grade crossing and construction of the subway left land fronting upon a 14-foot lane for vehicular traffic, an insufficient space to afford reasonable means for ingress and egress, considering the possible use of the property for industrial purposes. According to the testimony, the lane was too narrow for two vehicles traveling in opposite directions to pass, and upon the ground that the record showed substantial evidence to support the finding of interference with the easement of access, a judgment for the plaintiff was affirmed. In the present case, however, after the project is completed, the respondents' property will abut, along the same two sides as before the improvement was begun, upon roadways 30 feet in width. No facts are testified to by the witnesses for the respondents showing that the 30-foot roadway provides an insufficient means of access for a full and reasonable use of the property, considering its nature and the particular uses to which it is adaptable. Certainly no interference with the easement of access for the use of the property as a slaughterhouse, with facilities for the operation of a wholesale and retail meat market, is established merely by the fact that the roadways are 30 feet wide.

It is true that the appraisers who testified on behalf of the respondents premised their opinions as to severance damages, at least in part, upon their conclusion that after the subway project is completed, the Ricciardi property will not have frontage on either Rosemead or Ramona, but on what one of them described as a "narrow lane or alley." That the roadways will not be narrow lanes or alleys is apparent from their width and relation to the project as a whole. Whether those upon which the property will front will still be called "Rosemead" and "Ramona" boulevard, respectively, is not disclosed by the evidence, although the conclusion that they will be a part of those highways is implicit in the testimony of one of the respondents' appraisers who spoke of the roadway passing through the subway as "the two *center* lanes of Rosemead Boulevard." (Italics added.) But, in any event, the solution of the problem of compensation depends upon much more fundamental considerations than the mere label or change in name of a particular street, and a property owner has no right to insist upon the retention of a highway name.

Of more importance is the fact that, by resolution, the California Highway Commission has authorized the condemnation of the Ricciardi property for Route 168 of the state highway system, declaring "that the taking of said lands in fee is necessary to and for such public use and that it is necessary that all of said lands be so taken"; also "that the said proposed State highway is planned and located in a manner which will be most compatible with the greatest public good and the least private injury." And according to the map and the exhibits, only one right of way for state highway Route 168 is shown, which is the full width of approximately 280 feet, the various separate construction details being all within the exterior boundaries of that right of way. In addition, the explanation made by the State's highway engineer, whose testimony is relied upon by both the respondents and the appellant, shows that Highway 168 in the vicinity of the subway project, with the service roads and the sloping walls, will be 280 feet in width, and that the 255-foot right of way directly south of the premises will be a part of Route 26. He also testified that the service roads "were a part of the major plan" and "appurtenant to the whole thing as a unit." Unquestionably, the entire 280 feet of the widened Highway 168 and the 255 feet which, with the exception of the railroad tracks in the center, is to be occupied by Highway 26, will be used for essential highway purposes, title to all of this land being in the State.

Obviously, the safety objectives of the subway would be to a serious degree defeated should traffic be allowed to enter or cross the main flow of passage through it at the entrances to the tunnel. Additional complications also would arise through the change in grade necessary for the vehicular traffic to pass beneath the railway tracks on Rosemead. Under such circumstances, the aptly designated service roads are necessary to the successful utilization of the subway, form an essential part of the project for separation of grades and will furnish the only reasonable means for the owners of land now abutting on Rosemead Boulevard as presently constructed, and those others of the public who presently approach Rosemead along the north side of the railroad tracks on Ramona safely to enter the through flow of traffic on Rosemead.

So far as the owners of or visitors to the Ricciardi property are concerned, upon the completion of the contemplated improvement, they will still have unobstructed access to the highway system. After the changes are completed, if they wish to travel west they may either immediately turn into the westbound freeway of Highway 26 through the opening in the curbing separating the Ramona service road from the freeway, which is located at the corner of their premises, or continue over the subway on the service road in a westerly direction until they choose to enter the freeway at some subsequent opening in the curbing. In going east, they may immediately go in an easterly direction along the Ramona service road until they come to the first intersection crossing the railroad tracks, where they may enter the eastbound freeway of Ramona located just south of the railway right of way. Similarly, in traveling north, they may immediately go north on the service road paralleling the through channels of Rosemead and enter those lanes at Glendon Way. The only direction in which they may not immediately travel is to the south on Rosemead. In order to go south, they must travel north on either of the service roads paralleling the subway structure and then turn into the southbound traffic on the lanes of Rosemead leading to the underpass. But the fact that the particular portion of the highway system upon which they will immediately travel does not directly enter into "the two center lanes of Rosemead Boulevard" is because such an entry would be unsafe, and also impracticable because of the change in grade necessitated for the underpass. And if they were allowed to cross the railway tracks, upon the same grade as the track, in order to enter the service roads paralleling Rosemead on the south side of the underpass, one of the essential objectives in constructing the subway would be lost. The additional distance which they must travel before entering the main flow of traffic on Rosemead is required by the public safety and the proper and reasonable construction of the subway. It is no different from the additional distances one must travel because of traffic regulations or the construction of divided highways. Under these circumstances, as the respondents will be afforded full and unobstructed access to streets bordering their premises on the same sides as their property presently abuts on the highways, and it will be sufficient for their needs of ingress and egress, no compensation is recoverable merely because of the additional distance they must travel in the public street before they will be able to turn into the lanes of traffic leading under the subway, so that they may travel south on Rosemead Boulevard.

But the respondents claim that the service roads will be constructed as a means of compensating the abutting owners in lieu of paying them in money for the damage resulting from the improvement. Those joining in the majority opinion have been misled by this specious argument, as shown by their statement: "In providing for the service roads the state must be deemed to have proceeded in frank recognition of the private right of access possessed by the defendants, that such right would be invaded, and intended by means of those service roads to minimize and entirely absorb the damages to which the defendants would otherwise be entitled." But, as is clearly apparent from the evidence, the vital purpose of the service roads is to provide a means for Highway 168 to connect with Highway 26 so that traffic can flow between them, and this fact is conclusively shown from the resolution of the Highway Commission. And since an earlier junction of the service road with the underpass highway would safely be impracticable at any more southerly point than Glendon Way, the means adopted are not unreasonably more drastic than necessary to achieve the ends essential to the construction and completion of the Rosemead and Ramona crossing at the separated grades required for the underpass.

The basic error of the majority opinion in allowing recovery for the additional distance travelers to and from the Ricciardi property must go in order to reach the through lanes of traffic upon Rosemead Boulevard, lies in its misconception of the right of access of an abutting owner upon the highway system. For the owner's right of access is only over whatever street or portion of the highway system exists upon a particular boundary of his property, provided that full and unobstructed ingress and egress to and from his property to an extent reasonably necessary for its full beneficial use is unimpaired. He has no vested right in any particular avenue of the highway carrying any particular flow of traffic, but only a right to have his land front upon a part of the highway system sufficient to afford reasonable access to his property.

The fallacy of the majority opinion in this regard is illustrated by its statement: "We recognize that the defendants have no property right in any particular flow of traffic over the highway adjacent to their property, but they do possess the right of direct access to the through traffic highway and an easement of reasonable view of their property from such highway. If traffic normally flowing over that highway were re-routed or if another highway were constructed which resulted in a substantial amount of traffic being diverted from that through highway the value of their property might be diminished, but in such event defendants would have no right to compensation by reason of such re-routing or diversion of traffic. The re-routing or diversion of traffic in such a case would be a mere police power regulation, or the incidental result of a lawful act, and not the taking or damaging of a property right. But here we do not have a mere re-routing or diversion of traffic from the highway; we have, instead, a substantial change in the highway itself in relation to the defendants' property; i.e., a re-routing of the highway in relation to defendants' property rather than a mere re-routing of traffic in relation to the highway. Defendants' private property rights in and to that highway are to be taken and damaged. It is only for such private property rights that compensation has been assessed. The court allowed no damages to be predicated on any diversion of traffic from the highway but it did properly allow damages to be based on diversion of the highway from direct access to defendants' property."

If this language means anything, it creates in an abutting owner a vested right in a specific traffic avenue carrying a particular burden of traffic. Carried out to its necessary implication, it will also entitle the property owner upon an undivided highway to damages whenever the street is reconstructed, in accordance with modern highway engineering practice for the safety and convenience of the traveling public, into highspeed separated freeways for through traffic divided by curbings from lanes constructed for purposes of local and intersecting traffic, with openings into the main freeways only at comparatively widely spaced intervals. For obviously, under such circumstances, the abutting owner no longer may go directly from his property to the lanes of the highway carrying the through traffic, upon which his land formerly abutted. More specifically, the majority opinion approves an award of damages based in part not only upon testimony that the respondents' land will be less valuable because of the additional distance one must travel from it in order to reach the through lanes upon Rosemead Boulevard, but also, although not expressly stated, for the additional distance one must travel on the lanes for local traffic which are a part of Ramona Boulevard before he may enter the freeways carrying the main flow of traffic along that highway.

The prohibitive effect which the allowance of recovery for such a factor will have upon the construction of increasingly necessary arterial freeways, without grade crossings, to serve centers of large population, is readily apparent when one considers such contemplated highway projects as the proposed Bayshore freeway to bear the traffic from San Francisco down the Peninsula as far as Palo Alto and, eventually, to San Jose, and the similar freeway being considered for traffic from San Fernando to San Pedro in Los Angeles County, both of which include numerous structures for grade separation similar to that shown by the plans in the present case. And it may also be assumed that, in accordance with standardized engineering practice, a substantial portion of these highways will be built at a grade much lower than adjoining streets.

But the majority opinion adopts a rule, creating a property right never before recognized, without the citation of a single authority in support of its unique position. As a matter of fact, the law throughout the United States is uniformly to the contrary. For example, in what is probably the most recent case involving the problem, it was held that the owner of property could not recover consequential damages because travelers to and from his premises would have to travel a distance of approximately 2,000 feet farther in order to reach the newly located highway. In re Board of Sup'rs of Chenango County, 1939, 257 App.Div. 1038, 13 N.Y.S.2d 730. Consequently, even if the majority opinion is accurate in stating that the proposed improvement will result in a "diversion of the highway from direct access to defendants' property," no recovery should be permitted.

Furthermore, it is apparent that, despite such juggling of words as "re-routing of traffic" as distinguished from "re-routing of the highway," the element of damage involved in either is the same. The diminution in value, if any, to an abutting landowner will arise from the fact that the traffic formerly passing adjacent to his property will no longer be able directly to reach his land without traveling an additional distance. And, as the majority opinion has recognized, the law is settled in this state that such an element of damage is noncompensable. Rose v. State of California, supra, 19 Cal.2d at page 737, 123 P.2d 505; City of Stockton v. Marengo, 137 Cal.App. 760, 762, 763, 31 P.2d 467; People v. Gianni, 130 Cal.App. 584, 20 P. 2d 87.

And although I am convinced that the service roads are an essential and integral part of Highway 168, even were the majority opinion's treatment of them as entirely separate and distinct highways correct, the allowance of recovery for the additional distance to be traveled in order to reach the main highway is squarely contrary to the limitations which these same members of the court have placed upon damage caused by circuity of travel in the cul-de-sac cases, by the decision in Bacich v. Board of Control, Cal.Sup., 144 P.2d 818. For since the Ricciardi property is located upon a corner which abuts upon roadways with an outlet at either and into connecting streets, it is not located in a cul-de-sac.

In estimating the severance damages suffered by the respondents, their appraisers testified to a loss of visibility which will occur by reason of the construction of the subway. However, as there will be no impairment of view from the Ricciardi property caused by the change in grade of the lanes passing through the underpass or by the subway structure, the problem is factually limited to whether an owner of land has an easement of view of his premises from the street or highway which entitles him to compensation because, by the change in grade necessitated for vehicles to travel through an underpass, his property cannot be seen at all times.

My associates' treatment of the question is summary. "The weight of authority seems to be in favor of the proposition that an abutting owner of property on a public highway has an easement of reasonable view of his property from the highway," states the opinion. "The right of reasonable view in addition to the right of ingress and egress is named as one of the easements possessed by the abutting owner in Williams v. Los Angeles R. Co., 150 Cal. 592, 595, 89 P. 330." The rule stated by the majority opinion is correct insofar as it goes, but it has no application to the facts of this case. For the doctrine of the decisions cited in the annotation relied upon by the majority opinion in support of its statement more accurately is that there is an easement or property right of view both to and from the street as against obstruction by an adjoining owner or other private individual. But no such right exists as against the state when the view of the premises by passersby is impaired by the erection of such structures as are reasonably necessary to secure the safety or promote the convenience of the traveling public. Perlmutter v. Greene, 259 N.Y. 327, 182 N.E. 5, 81 A.L.R. 1543; McCarthy v. City of Minneapolis, 203 Minn. 427, 281 N.W. 759; 1 Lewis on Eminent Domain, supra, sec. 124, pp. 191–193; 25 Am.Jur., Highways, sec. 155, pp. 451, 452, sec. 319, p. 613; and see Kelbro, Inc., v. Myrick, 1943, 113 Vt. 64, 30 A.2d 527, 530, 531; but see Liddick v. City of Council Bluffs, Iowa 1942, 5 N.W.2d 361, 374, 379; 4 McQuillin, op. cit., sec. 1488, p. 198; notes, 90 A.L.R. 793, 40 A.L.R. 1321.

Thus, in Lewis on Eminent Domain, although the author recognizes the right of the abutting owner to an unobstructed view to and from any part of the street, he declares: "This right is subject of course to all legitimate street uses, but it cannot be interfered with for private purposes with or without compensation nor by structures placed in the street for public purposes which are not legitimate street uses, unless compensation is made." 2 Lewis on Eminent Domain, 3d Ed.1909, sec. 124, pp. 192, 193. And American Jurisprudence states the rule as follows: "It is well established that an abutting owner has also an easement of view of his premises from every part of the street or highway, as well as from his premises into the way, of which he cannot be deprived by encroachments placed on the way by an adjacent proprietor, although there are some holdings to the contrary. * * * But such easement of view is likewise subject to the enjoyment of the public right in the highway, and the erection by the public authorities of such structures as are reasonably necessary to secure the safety or promote the convenience of travelers does not constitute an unlawful interference therewith." 25 Am.Jur., Highways, sec. 155, p. 452.

This principle is recognized in Williams v. Los Angeles R., supra, where the court indicated that the private railway company would not have been subject to liability for impairment of the right of view by the erection of a switch tower in front of the plaintiffs' premises had the construction of the tower been essential for the operation of the railway. The reason for such distinction is obvious. An adjoining landowner obviously has no right to place obstructions in the public highway to the detriment of the owner of abutting property. He is, however, free to erect whatever structures he sees fit within the boundaries of his property, even though such structures may interfere with the former view enjoyed by his neighbor and cause reduction in the value of the latter's land. A similar situation arises when the state for admittedly proper highway purposes erects necessary structures for the convenience or safety of traffic, and the state should no more be required to pay for the resulting damage to abutting owners than would the private person for lawful acts upon his land. Consequently since, in the present case, the portions of the highway from which no view of the Ricciardi premises will be possible must be lowered in order to carry the traffic beneath the railroad tracks in furtherance of an undeniably proper highway purpose, no compensation may be allowed the respondents for such interference with the passing traffic's view of his land.

In considering the function of the court and the jury in a condemnation action, the majority opinion states that whether there has been a substantial impairment of a property right, "is a question of law, or of fact, or a mixed question of law and fact, for the trial court to determine. In no case is it a 'question of fact for the jury' to determine." This statement is fundamentally unsound and confusing. An issue of fact determinable by the court may, under certain circumstances, be submitted to the jury. See cases collected in 10 Cal.Jur. Eminent Domain, sec. 107, p. 411. And upon an appeal from the judgment, if the issue is one of fact, the sole duty of the appellate court is to ascertain whether there is evidence, or inferences properly to be drawn from the evidence, in support of the determination. On the other hand, if the issue is one of law, the court must exercise its independent judgment upon the evidence presented by the record.

As I understand the authorities upon this subject, the nature and extent of a property right within the meaning of the eminent domain provision of the Constitution presents a question of law. Where, however, the right is so defined that its extent or impairment depends upon a factual element, such as, in the present case, the limitation of the easement of access to such portion and width of the street as is reasonably necessary for the purposes of ingress and egress of the abutting owner, considering the nature of his property and the particular uses to which it is adaptable, the determination of this variable factor clearly falls within the province of the trier of fact even though its decision upon that question necessarily includes a finding as to whether an impairment of the easement has occurred. Of course, the question as to the amount of injury sustained is one for the trier of fact to determine upon evidence confined to compensable items of damage.

In my opinion, for the reasons stated, the judgment should be affirmed insofar as it awards the respondents $9,350 for the land appropriated by the State; as to the amount awarded for consequential damages, the judgment should be reversed for a new trial upon that issue.

CURTIS, Justice (dissenting).

I concur in the conclusion reached in the dissenting opinion.

TRAYNOR, Justice (dissenting).

I dissent for reasons set forth in my dissenting opinion in Bacich v. Board of Control et al., Cal.Sup., 144 P.2d 818.

23 Cal.2d 343

BACICH v. BOARD OF CONTROL OF CALIFORNIA et al.

S. F. 16832.

Supreme Court of California.

Dec. 21, 1943.

Rehearing Denied Jan. 17, 1944.

1. Eminent domain 🔑121

The State Board of Control was not liable for decrease in market value of apartment house allegedly caused by construction of approaches to a bridge, where it was not charged that the board had anything to do with constructing the bridge, the board had nothing to do with damaging the house and was interested only as the recipient of plaintiff's claim for damages. Const. art. 1, § 14.

2. Eminent domain 🔑289, 293(1)

Where complaint in property owner's action in inverse condemnation against the California Toll Bridge Authority, the State Department of Public Works, and the State Board of Control stated a case against the state, failure to name the state as a party defendant did not render the complaint demurrable and refusal of plaintiff's request for leave to substitute the state as a party defendant in place of defendants was error. Const. art. 1, § 14.

3. Constitutional law 🔑32
Eminent domain 🔑70, 266
States 🔑191(1)

The constitutional provision that private property may not be taken or damaged for a public purpose without compensation is "self-executing", and hence neither consent to sue the state nor creation of a remedy by legislative enactment is necessary to obtain the relief thereunder. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Self-Executing".

4. Eminent domain 🔑277

Where claim for decrease in market value of an apartment house allegedly caused by construction of approaches to a bridge was based upon liability incurred when the state exercised its power of eminent domain without pursuing the customary procedure therefor, the cause of action was in inverse condemnation and was not founded upon "express contract" or "negligence" within statute requiring persons having claims against state on "express contracts" or for "negligence" to present the claim to the State Board of Control. Pol. Code, § 688; Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Express Contract" and "Negligence".

5. States 🔑174

The purpose of section requiring persons having a claim against the state, the settlement of which is not otherwise provided for to present claims to the State Board of Control at least four months before meeting of Legislature, was, in view of other sections in the same article of the Political Code, to establish an orderly procedure by which the Legislature would be informed of claims against the state where no provision had been made for their payment. Const. art. 1, § 14; Pol. Code, §§ 664, 665–667, 688.

6. States 🔑177

In order to obtain payment of a claim against the state from funds available therefor or, if not available, from an appropriation, the requirements of sections of the Political Code concerned with the mechanics of financial operations of the state with relation to the payment of claims must be met. Pol. Code, §§ 664, 665–667, 688.

7. States 🔑174

The statutory requirement that claims against the state be presented to State Board of Control at least four months before meeting of Legislature is to give the board an opportunity to investigate the claims, thus enabling the ensuing Legislature to give them more intelligent consideration. Pol. Code, § 667.

8. States 🔑174

The clear intent of statute requiring a person having a claim against the state the settlement of which is not otherwise provided for to present claim to the State Board of Control at least four months before meeting of Legislature is that, if a claim is to be considered at the next session of the legislature, it should be presented four months prior thereto and an investigation made. Pol. Code, § 667.

9. Eminent domain 🔑277
States 🔑201

The statute requiring a person having a claim against the state, the settlement of which is not otherwise provided for, to present claim to the State Board of Control at least four months before meeting of Legislature, does not require the filing of a claim in inverse condemnation with the Board of Control as a condition precedent to an action thereon nor does the statute act as a limitation upon the time within which an action must be commenced. Pol. Code, §§ 667, 688, 688.1; St.1941, p. 2619, § 2; Const. art. 1, § 14.

10. Eminent domain 🔑91

In determining whether plaintiff under constitutional provision that private property shall not be taken for public use without compensation was entitled to recover against the state for decrease in market value of an apartment house allegedly caused by construction of approaches to a bridge, test that one might recover if he has suffered a damage peculiar to himself and different in kind as differentiated from degree from that suffered by the public generally was inapplicable. Const. art. 1, § 14.

11. Municipal corporations 🔑669

A property owner has a right of access in the street upon which his property abuts and which is appurtenant to such abutting property.

12. Eminent domain 🔑85
Municipal corporations 🔑669

An owner of property abutting upon a public street has a property right in the nature of an easement in the street which is appurtenant to his abutting property and which is his private right as distinguished from his right as a member of the public, and compensation must be given for an impairment of the right. Const. art. 1, § 14.

13. Eminent domain 🔑70, 95

The policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by a public improvement, and addition to the eminent domain clause of "or damaged" to the word "taken" indicates an intent to extend the policy to embrace additional situations. Const. art. 1, § 14.

14. Eminent domain ⚷122

In spite of the so-called policy that compensation allowed too liberally will seriously impede if not stop beneficial public improvements, the courts cannot ignore sound and settled principles of law safeguarding the rights and property of individuals and, although the improvement may be of great convenience to the public generally, the properties of abutting owners cannot be sacrificed in order to secure it. Const. art. 1, § 14.

15. Eminent domain ⚷2(6)

The state under the "police power" was not relieved of liability for decrease in market value of an apartment house allegedly caused by construction of approaches to a bridge, where it did not appear that any compelling emergency or public necessity required the construction without payment of compensation for property damaged. Const. art. 1, § 14.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

16. Pleading ⚷214(3)

On demurrer to complaint in inverse condemnation, allegation that plaintiff's property had been damaged by the improvement was taken as true. Const. art. 1, § 14.

17. Eminent domain ⚷106

In property owner's action in inverse condemnation, no recovery may be had where an obstruction impairing the property owner's right of access is beyond the next intersecting street. Const. art. 1, § 14.

18. Municipal corporations ⚷669

The extent of the easement of access is that which is reasonably required, giving consideration to all the purposes to which the property is adapted and the reasonable modes of egress and ingress embrace access to the next intersecting streets in both directions and the right is more extensive than the mere opportunity to go on to the street immediately in front of the property.

19. Eminent domain ⚷106

In property owner's action in inverse condemnation, generally, creation of a cul-de-sac, that is, the blocking of access to the next intersecting street in one direction, is compensable, although access still exists in the opposite direction to an intersecting street, since the property owner's easement is of that extent. Const. art. 1, § 14.

20. Eminent domain ⚷106

Where construction of approaches to a bridge resulted in closing one end of street on which plaintiff's apartment house was located, thereby depriving plaintiff of access to the house from one direction, depreciation in value of the building caused by closing of end of the street was compensable. Const. art. 1, § 14.

21. Eminent domain ⚷105

In property owner's action in inverse condemnation to recover decrease in market value of an apartment house allegedly caused by construction of approaches to a bridge, claimed items of damages, in that all nearby residences had been eliminated and a street railway had been removed, were not compensable where elevated road did not impair property owner's easement, if any, to light, air, or view. Const. art. 1, § 14.

TRAYNOR and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, City and County of San Francisco; E. P. Shortall, Judge.

Action in inverse condemnation by George Bacich against Board of Control of the State of California and others. From a judgment for defendant entered after sustaining of demurrers to the original complaint without leave to amend, plaintiff appeals.

Reversed with direction.

Prior opinion, App., 128 P.2d 191.

Hubbard & Hubbard, John J. Batistich, and J. C. Miller, all of San Francisco, for appellant.

Earl Warren, Atty. Gen., John J. Dailey, Deputy Atty. Gen., C. C. Carleton, City Atty., and Robert E. Reed, both of Sacramento, F. M. McAuliffe, Albert M. Monaco, and Heller, Ehrman, White & McAuliffe, all of San Francisco, for respondents.

CARTER, Justice.

The demurrers of defendants Board of Control, California Toll-Bridge Authority and State Department of Public Works to plaintiff's complaint for damages in this action in inverse condemnation were sustained without leave to amend.

Plaintiff alleges that he is the owner of an improved lot situated on the west side of Sterling Street between the intersection of that street with Bryant Street and Harrison Street in the City and County of San Francisco, the two latter streets being parallel; that before the construction of the improvement hereinafter mentioned Harrison Street was level with Sterling Street and he had access from his lot to Harrison Street by footpaths and street railway; that a street railway extending along Sterling Street served his property; that the area around his property was formerly used for residential purposes; that the construction of the approaches to the San Francisco Bay Bridge by defendants resulted in the lowering of Harrison Street fifty feet, leaving as the only access thereto an almost perpendicular flight of steps, the destruction of the residence property in the area, the removal of the street railway, and the erection of an elevated highway between his lot and Bryant Street which he must pass under to reach the latter street; that by reason of the foregoing his property has been damaged in the sum of $14,000; and that he filed a claim for those damages with defendant Board of Control which was rejected.

[1] The demurrer of defendant State Board of Control was properly sustained inasmuch as it had nothing to do with the construction of the improvement or the alleged damaging of plaintiff's property. It is not charged that the Board of Control, a state agency, had anything to do with the construction of the improvement, it being interested only as the recipient of the claim for damages filed by plaintiff.

[2] The failure to name the State of California as a party defendant does not require an affirmance of the judgment. The complaint contains all the elements necessary to state a case against the State and has named the state agencies in their capacity as such which had charge of the construction of the improvement. The action is in effect one against the State. Plaintiff's request for leave to substitute the State as party defendant in place of the defendants Board of Control, California Toll-Bridge Authority, and Department of Public Works should have been granted. California Securities Co. v. State, 111 Cal.App. 258, 295 P. 583. Under those circumstances it is not necessary to consider whether the Toll-Bridge Authority under its statutory powers had authority to do anything with reference to the construction of the improvement which plaintiff alleges caused the damages.

[3] The instant action is predicated upon the constitutional provision that private property may not be taken or damaged for a public purpose without the payment of just compensation. Cal.Const. art. I, sec. 14. That clause of the Constitution is self-executing and hence neither consent to sue the State nor the creation of a remedy by legislative enactment is necessary to obtain relief thereunder. Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505.

[4] Sections 667 and 688 of the Political Code relating to claims against the State do not constitute an obstacle to recovery on the liability here involved. Section 688 by its terms applies only to claims based on "express contract or for negligence." The claim here involved is one based upon the liability incurred when the State exercises its power of eminent domain without pursuing the customary procedure therefor. In such a case the cause of action is in inverse condemnation and is not founded either upon express contract or negligence. Rose v. State of California, supra.

[5-8] Section 667 states in part that: "Any person having a claim against the state, *the settlement of which is not otherwise provided for by law,* must present the same to the board at least four months before the meeting of the legislature, accompanied by a statement showing the facts constituting the claim, verified in the same manner as complaints in civil actions. Before finally passing upon any such claim, notice of the time and place of hearing must be mailed to the claimant at least fifteen days prior to the date set for final action. At the time designated the board must proceed to examine and adjust such claims. It may hear evidence in support of or against them and, with the sanction of the governor, *report to the legislature such facts and recommendations concerning them as may be proper.*" (Emphasis added.)

From the italicized portions of that section it is indicated that its purpose was to establish an orderly procedure by which the Legislature would be advised of claims against the State in instances where no provision had been made for their payment. The Legislature would then be in a position to determine, in the light of the investigation and recommendation of the Board of Control whether or not it should make an appropriation to pay the claim. That purpose is also evidenced from other sections appearing in the same article of the Political Code. For illustration, section 664 embraces the presentation of claims to the State Controller where an appropriation has been made. Section 665 authorizes the Controller to draw a warrant for a claim he has approved, and if disapproved, to file it together with his report with the Board of Control. Section 666 involves claims where no appropriation has been made or no fund is available for their payment, the settlement of which is provided by law, or where the fund has been exhausted. Such claims if approved by the Board of Control shall be transmitted to the Legislature. Section 667 deals with the situation where no mode of settlement of the claim has been provided by the law. Essentially, those sections deal with the means and methods of payment of claims, the conditions under which funds in the state treasury may be allocated to pay claims, and the obtaining of an appropriation from the Legislature when no funds are available. They are concerned with the mechanics of the financial operations of the State with relation to the payment of claims. In order to obtain payment of a claim from funds available therefor, or if not available from an appropriation by the Legislature, the requirements of those sections must be met. The requirement that claims be presented at least four months before the meeting of the Legislature is to give the Board of Control an opportunity to investigate them, thus enabling the ensuing Legislature to give them more intelligent consideration. The clear intent of the statute is that if a claim is to be given consideration at the next session of the Legislature it should be presented four months prior thereto and an investigation made.

[9] Section 667 makes no provision for a flat rejection or approval of the claim by the Board. It merely states that the Board shall, with the sanction of the Governor report to the Legislature such facts and recommendations as may be proper. See Sullivan v. Gage, 145 Cal. 759, 765, 79 P. 537, considering similar requirements in the Political Code as then written. No provision is made for the next steps available to the claimant if the recommendation is unfavorable. The section does not specify what session of the Legislature the four months' period must precede; that is, whether it is the session next following the accrual of the claim or some subsequent session. If the claim accrued during the four months' period immediately preceding a session of the Legislature, certainly compliance could not be had with the section if the next ensuing session of the Legislature were meant. If the claim accrued four months and two days before the next session of the Legislature, the claimant would have only two days in which to present his claim. That would be clearly unreasonable when we consider that his right is created and protected by the Constitution. Also as bearing upon the intent of the Legislature it should be noted that, in 1941, the Legislature added section 688.1 to the Political Code (Stats.1941, ch. 982, p. 2618), where it for the first time expressly provided that claims must be filed with the board in cases of inverse condemnation and adopted section 688 for the requirements in relation thereto. The act adding that section expressly declared it inapplicable to pending actions. Section 2. At the time of its adoption the instant action was pending. All of the foregoing factors manifest the intent that in the case of a claim in inverse condemnation predicated on the Constitution (Cal.Const. art. I, sec. 14) section 667 does not require the filing of a claim with the Board of Control as a condition precedent to an action thereon, nor as a limitation upon the time within which an action must be commenced. Hence, the sufficiency and timeliness of the claim filed by plaintiff in the instant action is immaterial.

[10] The major issue presented in this case is whether or not plaintiff may recover compensation under the constitutional provision (Cal.Const. art. I, sec. 14) in the light of the facts stated by him. He is entitled thereto under the wording of that provision if his property has been taken or damaged for a public use. The solution of that question depends largely upon the character and extent of his property right. If he has a property right and it has been impaired or damaged, he may recover. The test frequently mentioned by the authorities, that he may recover if he has suffered a damage peculiar to himself and different in kind, as differentiated from degree, from that suffered by the public generally, is of

no assistance in the solution of the problem. If he has a property right and it has been impaired, the damage is necessarily peculiar to himself and is different in kind from that suffered by him as a member of the public or by the public generally, for his particular property right as a property owner and not as a member of the public has been damaged. See Rose v. State of California, supra.

[11] In the instant case we are concerned with a property right known as the right of access which an owner has in the street upon which his property abuts and which is appurtenant to such abutting property. The function of the court is to determine and define the character and extent of that right. The right of access, being by its terms general in nature, requires definition and clarification as to its extent and character. This is especially true where we are concerned with the constitutional provision which requires that compensation be paid where property is taken or damaged. The property right of access generally is firmly established.

[12-14] It has long been recognized in this state and elsewhere that an owner of property abutting upon a public street has a property right in the nature of an easement in the street which is appurtenant to his abutting property and which is his private right, as distinguished from his right as a member of the public. That right has been described as an easement of ingress and egress to and from his property or, generally, the right of access over the street to and from his property, and compensation must be given for an impairment thereof. We are not now inclined to question or disturb that rule. See Rose v. State of California, supra; Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 37 P. 750, 42 Am.St.Rep. 149; McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139; Lane v. San Diego Elec. R. Co., 208 Cal. 29, 280 P. 109; Wilcox v. Engebretsen, 160 Cal. 288, 116 P. 750; Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330; Brown v. Board of Sup'rs, 124 Cal. 274, 57 P. 82; Geurkink v. City of Petaluma, 112 Cal. 306, 44 P. 570; Bigelow v. Ballerino, 111 Cal. 559, 44 P. 307; 10 Cal.Jur. 333–335; 18 Am.Jur., Eminent Domain, secs. 181–185; In re Hull, 163 Minn. 439, 204 N.W. 534, 205 N.W. 613, 49 A.L.R. 330; New York, C. & St. L. R. Co. v. Bucsi, 128 Ohio St. 134, 190 N.E. 562, 93 A.L.R. 639. The precise origin of that property right is somewhat obscure but it may be said generally to have arisen by court decisions declaring that such right existed and recognizing it. See 18 Am.Jur., Eminent Domain, sec. 181; 41 Yale Law Journal 221. For that reason, in the determination of the extent and character of that right most of the cases rely, without discussion, upon precedents which fit or are analogous to the circumstances present in the case before the court. If the question is one of first impression its answer depends chiefly upon matters of policy, a factor the nature of which, although at times discussed by the courts, is usually left undisclosed. It may be suggested that on the one hand the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements. See 41 Yale Law Journal, 221–224; 52 Harv.L.Rev. 1176, 1177; 3 Harv.L.Rev. 189–205. Manifestly, the addition to the eminent domain clause in constitutions in most states, including California, of "or damaged" to the word "taken" indicates an intent to extend that policy to embrace additional situations. On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost. See Davis v. County Com'rs, 153 Mass. 218, 26 N.E. 848, 850, 11 L.R.A. 750; 13 Va.L.Rev. 334–337. However, it is said that in spite of that so-called policy "the courts cannot ignore sound and settled principles of law safeguarding the rights and property of individuals. This [improvement] may be of great convenience to the public generally, but the properties of abutting owners ought not be sacrificed in order to secure it"; and, quoting from Sedgwick on Constitutional Law: "The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes. * * *" Liddick v. City of Council Bluffs, Iowa, 5 N.W.2d 361, 372, 382.

[15] In some degree those opposed policies are manifested in the conflict between the constitutional mandate that compensation be paid when private property is taken or damaged for a public purpose and the exercise of police power where

compensation need not be paid. The line between those two concepts is far from clearly marked. It will be recalled that in the instant case it is alleged that by reason of the lowering of Harrison Street fifty feet below the level of Sterling Street the access that plaintiff formerly had to Harrison Street from Sterling Street has now been lost except for an almost perpendicular flight of stairs. The condition resulted from the construction of a public improvement, namely, approaches to a bridge spanning San Francisco Bay. It does not appear that any compelling emergency or public necessity required its construction without the payment of compensation for property damaged. Therefore, the State may not escape the payment of compensation under the police power.

[16] The ultimate effect of lowering Harrison Street was to place plaintiff's property in a cul-de-sac. Whereas, before he had access to Harrison Street, the next intersecting street from his property on Sterling Street, he now has access in one direction only, that is, to Bryant Street, the next intersecting street in the opposite direction. The existence of access in one direction to the general system of streets has been impaired to the extent that there is now left only the stairway. Plaintiff alleged that formerly Sterling Street was level with Harrison Street, which may be interpreted to mean that general access was available. He does state that formerly he had access by a streetcar line and footpaths. That being true his access by those modes has been lost except to the extent that the stairway is a substitute for pedestrian access. In that respect his property has been placed in a cul-de-sac. Moreover, his request for leave to amend may be construed to embrace a showing that formerly there was access to Harrison Street for vehicular traffic, or at least that there was a right of way or public street, improved or unimproved, joining Sterling Street with Harrison Street. Furthermore, it is apparently conceded by defendants that a cul-de-sac has been created. That plaintiff's property has been damaged by the impairment cannot be here questioned. The allegation in his complaint that it has been must be taken as true.

[17-20] Whether or not such impairment is compensable must depend upon the character and extent of his easement of access. Does it extend to a right to pass to the next intersecting streets? Nothing more need be decided in this case; we are not concerned with the correct rule in a case where the obstruction occurs beyond the next intersecting street nor with what the rule may be for rural property. Practically all authorities hold, and we believe correctly, that no recovery may be had where the obstruction is beyond the next intersecting street. See cases cited: 4 McQuillin, Municipal Corporations, 2d Ed., 279-280, sec. 1527; 1 Lewis on Eminent Domain, 3d Ed., 350, 383, secs. 191, 203; 25 Am.Jur., Highways, sec. 318; In re Hull, 163 Minn. 439, 204 N.W. 534, 205 N.W. 613, 49 A.L.R. 330; New York, C. & St. L. R. Co. v. Bucsi, 128 Ohio St. 134, 190 N.E. 562, 93 A.L.R. 639. The extent of the easement of access may be said to be that which is reasonably required giving consideration to all the purposes to which the property is adapted. It is obvious that in the instant case the damage suffered is greater and different than if the obstruction had been beyond the next intersecting street. Where formerly plaintiff had an outlet from his property at both ends of Sterling Street, he now has access at only one end, which definitely affects ingress to and egress from his property. It would seem clear that the reasonable modes of egress and ingress would embrace access to the next intersecting street in both directions. It should be noted that the right is more extensive than the mere opportunity to go on to the street immediately in front of the property. Rose v. State of California, supra. We are not confronted with the necessity of balancing the conflicting policies heretofore referred to without the aid of persuasive precedent. Many authorities and writers have either declared or intimated that the creation of a cul-de-sac, that is, the blocking of access to the next intersecting street in one direction is compensable, although the access still exists in the opposite direction to an intersecting street. In other words, the easement is of that extent. See Felton v. State Highway Board, 47 Ga.App. 615, 171 S.E. 198; City of Chicago v. Baker, 7 Cir., 98 F. 830, 39 C.C.A. 318; City of Chicago v. Burcky, 158 Ill. 103, 42 N.E. 178, 29 L.R.A. 568, 49 Am.St.Rep. 142; Davis v. City of Chicago, 290 Ill.App. 244, 8 N.E.2d 378; Falender v. Atkins, 186 Ind. 455, 114 N.E. 965; O'Brien v. Central Iron & Steel Co., 158 Ind. 218, 63 N.E. 302, 57 L.R.A. 508, 92 Am.St.Rep. 305; Magdefrau v. Washington County, 228 Iowa 853, 293 N.W. 574; Liddick v. City of Council

Bluffs, supra; Highbarger v. Milford, 71 Kan. 331, 80 P. 633; Burton v. Freund, 243 Mich. 679, 220 N.W. 672; Dean v. Ann Arbor R. Co., 137 Mich. 459, 100 N.W. 773; Vanderburgh v. City of Minneapolis, 98 Minn. 329, 108 N.W. 480, 6 L.R.A.,N.S., 741; Locascio v. Northern Pac. R. Co., 185 Minn. 281, 240 N.W. 661; In re Hull, 163 Minn. 439, 204 N.W. 534, 205 N.W. 613, 49 A.L.R. 320; Lowell v. Buffalo County, 123 Neb. 194, 242 N.W. 452; Id., 119 Neb. 776, 230 N.W. 842; Mandell v. Board of Com'rs of Bernalillo County, 44 N.M. 109, 99 P.2d 108; In re City of Buffalo, Grade Crossing Com'rs, 210 App.Div. 328, 206 N.Y.S. 103, affirmed 240 N.Y. 612, 148 N.E. 727; In re William and North William Streets, 103 Misc. 313, 171 N.Y.S. 116, affirmed 188 App.Div. 668, 177 N.Y.S. 318; Hiatt v. City of Greensboro, 201 N.C. 515, 160 S.E. 748; Coy v. City of Tulsa, D.C., 2 F.Supp. 411; Atchison, T. & S. F. R. Co. v. Terminal Oil Mill Co., 180 Okl. 496, 71 P.2d 617; Sandstrom v. Oregon-Washington R. & Nav. Co., 69 Or. 194, 136 P. 878, 49 L.R.A.,N.S., 889; Cooke v. City of Portland, 136 Or. 233, 298 P. 900; In re Vacation of Part of Melon Street, 182 Pa. 397, 38 A. 482, 38 L.R.A. 275; Spang & Co. v. Commonwealth, 281 Pa. 414, 126 A. 781; Hindes v. Allegheny County, 123 Pa.Super. 469, 187 A. 219; Johnsen v. Old Colony R. Co., 18 R.I. 642, 29 A. 594, 49 Am.St.Rep. 800; Illinois Cent. R. Co. v. Moriarity, 135 Tenn. 446, 186 S.W. 1053; City of Texarkana v. Lawson, Tex.Civ. App., 168 S.W. 867; McQuillin, Municipal Corporations, 2d Ed., vol. 4, 276–278; secs. 1526–1527; Lewis on Eminent Domain, 3d Ed., vol. 1, 350–351, sec. 191; 16 Harv.L. Rev. 372; 39 Yale L. Journal 128. There are cases to the contrary (see In re Hull, 163 Minn. 439, 204 N.W. 534, 205 N.W. 613, 49 A.L.R. 330, New York, C. & St. L. R. Co. v. Bucsi, 128 Ohio St. 134, 190 N.E. 562, 93 A.L.R. 639), but some of them are based upon a constitutional provision which allows compensation for taking alone, no mention being made of a damaging. Many of them advance no sound reason for not permitting recovery, and arrive at the result with unenlightening phrases which furnish no real test. We do not fear that permitting recovery in cases of cul-de-sacs created in a municipality will seriously impede the construction of improvements, assuming the fear of such an event is real rather than fancied. The damage to the property owner is immediate and direct. The value of the use of the property is directly affected. To be able to get onto the street immediately in front of the property is of little value if that is as far as he can go. If he has access to the next intersecting street in both directions and one way is cut off, his easement, if it has any value to him at all, has certainly been impaired. We conclude, therefore, that the right of access extends in both directions to the next intersecting street.

Defendants contend that there are cases in California contrary to the foregoing views. In Wolff v. City of Los Angeles, 49 Cal.App. 400, 193 P. 862, the portion of the street which was graded was a considerable distance from plaintiffs' property and beyond an intersecting street, as was pointed out by this court in denying a hearing. In City of San Mateo v. Railroad Commission, 9 Cal.2d 1, 68 P.2d 713, 718, it does not appear that the closing of the street placed the property owners on a cul-de-sac. Streets crossing the railroad right of way were closed, but it is said that as far as appears from the record the property abutted upon either a county road or state highway which paralleled the sides of the railroad. Moreover, it is pointed out that the property owners were not parties to a proceeding before the Railroad Commission and that the commission had "not attempted to adjudicate such rights." The case was referred to and distinguished in Rose v. State of California, supra, 19 Cal.2d at page 731, 123 P.2d at page 516. While that case may hold that grade crossings may be eliminated pursuant to the police power, we do not interpret it as holding that property may be placed in a cul-de-sac by the construction of a public improvement without the payment of compensation. Reference is made to Bigley v. Nunan, 53 Cal. 403, and Brown v. Board of Sup'rs, 124 Cal. 274, 57 P. 82. Neither of those cases involved a cul-de-sac. Both of them were concerned with a narrowing of the width of a street. See Hargro v. Hodgdon, 89 Cal. 623, 26 P. 1106. The Bigley case is based upon the theory that the right of access is not peculiar and private to an abutting owner, which is out of harmony with Rose v. State of California, supra, 19 Cal.2d at pages 727–728, 123 P.2d at page 514, and the authorities there cited. In the Brown case the only question before the court was whether the board of supervisors had the power to narrow the width of the street by virtue of its authority to close or vacate streets. The question of whether an action for damages under the Constitution would lie was not involved. The discussion apparently to the contrary of the views herein expressed was unnecessary. Indeed, the court, near the close of its opinion, quoted with approval from Symons v. City & County of San Francisco, 115 Cal. 555, 42 P. 913, 914, 47 P. 453, where is was said: "Whether the order will have the effect to diminish the value of the plaintiffs' land, or to cause them damage, is not a ground for annulling the act of the board of supervisors, and cannot be considered in this proceeding. If the board of supervisors had the authority to pass the order, and the plaintiffs have sustained any legal damage by reason thereof, *they must seek relief in a direct proceeding therefor.*" (Emphasis added.)

Defendants contend that the creation of the cul-de-sac causes nothing more than mere circuity of travel which is not compensable, citing Wolff v. City of Los Angeles, supra. The inapplicability of that case has heretofore been discussed. In any event, the phrase "circuity of travel" has varied meanings and is frequently misused by the courts.

There is more than merely a diversion of traffic when a cul-de-sac is created. The ability to travel to and from the property to the general system of streets in one direction is lost. One might imagine many circumstances, as has been shown by defendants, in which recovery should not be permitted or where the reasons for recovery in the cul-de-sac cases might not be logically applied, but we are here concerned with the particular facts of this case and do not purport to declare the law for all cases under all circumstances.

[21] The other items of damages claimed by plaintiff are not compensable. He asserts that all the residences, except his own, in a described area in which his property is situated were eliminated by defendants, and that a street railway formerly operating on Sterling Street has been removed. There is no property right appurtenant to plaintiff's property on Sterling Street which entitles him to the maintenance of the residences or the continuous operation of the existing street railway. The removal of the residences and leaving the property vacant did not constitute a nuisance. It does not appear that the elevated road between plaintiff's property and Bryant Street in any way interferes with his access to the latter street or impairs any easement, if one exists, to light, air or view.

The judgment is reversed, and the court below is directed to permit the plaintiff to amend his complaint if he be so advised in conformity with the views herein expressed.

GIBSON, C. J., and SHENK and SCHAUER, JJ., concurred.

EDMONDS, Justice (concurring).

I concur in the conclusion that the judgment against the property owner should be reversed, but for reasons different from those stated by my associates. And as the decision vitally affects the public interest in that it may largely determine whether highway improvements essential for modern transportation can be made without incurring liability for damages beyond the capacity of the state or a municipality reasonably to pay, I deem it appropriate to state the grounds upon which I believe the determination should rest.

When the government acts, either by way of legislation or by the exercise of any other legitimate means,[1] to promote the public health, safety, morals, and general welfare, a large area exists in which private interests may be restricted, impaired, or entirely destroyed by such action without compensation for the resulting loss or diminution in value of the property. Miller v. Schoene, 276 U.S. 272, 48 S.Ct. 246, 72 L.Ed. 568; Bowditch v. City of Boston, 101 U.S. 16, 25 L.Ed. 980; Omnia Commercial Co. v. United States, 261 U.S. 502, 43 S.Ct. 437, 67 L.Ed. 773; Ex parte Hadacheck, 165 Cal. 416, 132 P. 584, L.R.A.1916B, 1248, affirmed in Hadacheck v. Sebastian, 239 U.S. 394, 36 S.Ct. 143, 60 L.Ed. 348, Ann.Cas.1917B, 927; Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303, 54 A.L.R.1016; Northwestern Laundry v. City of Des Moines, 239 U.S. 486, 36 S.Ct. 206, 60 L.Ed. 396; Sligh v. Kirkwood, 237 U.S. 52, 35 S.Ct. 501, 59 L.Ed. 835; Reinman v. City of Little Rock, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900. This power of the government to act in furtherance of the public good without incurring liability for the resulting injury to private individuals is commonly known as the police power. It has been held many times that the Constitution supposes the pre-existence of the police power, and must be construed with reference to that fact. Chicago & N. W. R. Co. v. Illinois Commerce Comm., 326 Ill. 625, 158 N.E. 376, 55 A.L.R. 654; Borden v. Louisiana State Bd. of Education, 168 La. 1005, 123 So. 655, 67 A.L.R. 1183; Village of Carthage v. Frederick, 122 N.Y. 268, 25 N.E. 480, 10 L.R.A. 178, 19 Am.St.Rep. 490; In re Morgan, 26 Colo. 415, 58 P. 1071, 47 L.R.A. 52, 77 Am.St.Rep. 269; see 11 Am.Jur., Constitutional Law, sec. 245, p. 969.

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[1] "The expression 'police power' is sometimes used in a very broad sense, including all legislation and almost every function of civil government." 11 Am. Jur., Constitutional Law, sec. 257, pp. 971, 972.

So far as the construction of improvements is concerned, however, even though their purpose be to promote and insure the public safety and convenience, the right of the State to take "private property" without the payment of "just" compensation, has been expressly forbidden by both the eminent domain provision of the State Constitution and the due process clause of the Fourteenth Amendment to the Constitution of the United States. Cal.Const., art. I, sec. 14; Chicago, B. & Q. R. Co. v. City of Chicago, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979. Obviously, under these provisions, if the State appropriates the land itself for a public use, it is exercising its power of eminent domain with a corresponding liability to pay the owner the value of the land. And the amendment to the State Constitution entitling the owner to just compensation in cases where his property is "damaged," as well as when it is "taken," for the public use, indicates an intention to liberalize the policy of compensation in the area of consequential injury, as distinguished from an actual appropriation. Eachus v. Los Angeles Ry., supra, 103 Cal. page 616, 37 P. at page 751, 42 Am.St.Rep. 149; Reardon v. City and County of San Francisco, 66 Cal. 492, 501, 6 P. 317, 56 Am.Rep. 109; Rigney v. City of Chicago, supra. The term "consequential damage," is used as meaning a diminution in value of land not actually acquired by the State, occasioned by the public improvement.

It is uniformly recognized, however, that not all consequential damage to private interests was intended to be included within the scope of the eminent domain clause. In the words of Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 412, 43 S.Ct. 158, 159, 67 L.Ed. 322, 28 A.L.R. 1321: "Government hardly could go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law [as the Pennsylvania statute under consideration forbidding the mining of coal within 150 feet of the improved property of another]. * * * One fact for consideration in determining [the] limits [of the police power] is the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act. So the question depends upon the particular facts." The court recognized that the question as to when compensation is required to be made for a diminution in value of private property under the eminent domain clause cannot be disposed of by general propositions; the problem is one "of degree." (260 U.S. at page 416, 43 S.Ct. at page 160, 67 L.Ed. 322, 28 A.L.R. 1321.) Also this court, in Rose v. State of California, 19 Cal.2d 713, 737, 123 P.2d 505, held that the diminution in value of land occasioned by a public improvement diverting the main flow of traffic from in front of the premises is noncompensable. And the government may condemn private property and erect upon it a jail or "pest house" without compensating adjacent property owners for the undeniable impairment of their property values as a result of such public use. See Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 617, 37 P. 750, 42 Am.St.Rep. 149; Rigney v. City of Chicago, 102 Ill. 64, 80; City of Winchester v. Ring, 312 Ill. 544, 550-552, 144 N.E. 333, 36 A.L.R. 520; City of Geary v. Moore, 181 Okl. 616, 75 P.2d 891, distinguishing Oklahoma City v. Vetter, 72 Okl. 196, 179 P. 473, 4 A.L.R. 1009.

From these decisions it seems clear that a determination as to whether the diminution in value of land resulting from public improvement, as distinguished from a taking of the land itself for public use, falls within the scope of eminent domain necessitating the payment of compensation requires a consideration of the importance of the interest affected. State of California v. Marin Mun. W. Dist., 17 Cal.2d 699, 706, 111 P.2d 651. In considering this problem, the court must weigh the relative interests of the public and the individual, so as to arrive at a just balance in order that government will not be unduly restricted in the proper exercise of its function for the public good, while at the same time giving due effect to the policy in the eminent domain clause of insuring the individual against an unreasonable loss occasioned by the exercise of governmental power. In this connection, a distinction must be made between a diminution in value because of an act of a private individual and the decrease in value resulting from a public highway improvement. Obviously, the courts will be more ready to protect even the less important interests connected with the use of land against interference by private individuals whose acts have no public utility, than when the governmental power is exercised in behalf of a public improvement for the general welfare. Therefore, the fact that a particular interest has been protected against impairment by a private person does not necessarily mean that it is of sufficient importance, as against the state, to be included in the term "private property" within the meaning of the eminent domain clause of the Constitution. See, for example, the discussion of the distinction between impairment of view by a private individual and by a proper highway improvement, in my dissenting opinion in People v. Ricciardi, Cal.Sup., 144 P.2d 799. The factors to be considered are, on the one hand, the magnitude of the damage to the owner of the land, and, on the other, the desirability and necessity for the particular type of improvement and the danger that the granting of compensation will tend to retard or prevent it. Pennsylvania Coal Co. v. Mahon, supra; Town of Windsor v. Whitney, 95 Conn. 357, 366, 369, 111 A. 354, 12 A.L.R. 669; Davis v. County Com'rs, 153 Mass. 218, 26 N.E. 848, 11 L.R.A. 750; Cram v. City of Laconia, 71 N.H. 41, 51 A. 635, 57 L.R.A. 282; Richmond v. City of Hinton, 117 W.Va. 223, 185 S.E. 411; see 34 Columb.L.Rev. 938; 42 Columb.L.Rev. 596, 637; and see Archer v. City of Los Angeles, 19 Cal.2d 19, 23, 24, 119 P.2d 1; O'Hara v. Los Angeles County Flood, etc., Dist., 19 Cal.2d 61, 63, 119 P.2d 23. In addition, before compensation may be denied, the court must find that the particular improvement be not unreasonably more drastic or injurious than necessary to achieve the public objective. Williams v. Los Angeles R. Co., 150 Cal. 592, 595, 596, 89 P. 330; Lane v. San Diego Elec. R. Co., 208 Cal. 29, 35, 280 P. 109; Town of Windsor v. Whitney, supra, 95 Conn. at page 369, 111 A. at page 357, 12 A.L.R. 669; Maxwell v. City of Miami, 87 Fla. 107, 100 So. 147, 33 A.L.R. 682; and see note, 35 Columb.L.Rev. 938, 939; 11 Am. Jur., Constitutional Law, sec. 266, p. 1006. Thus, if, in balancing these factors, the court decides that the interest affected by the improvement which results in a diminution in the value of the land is of sufficient importance to require the payment of compensation under the eminent domain clause of the Constitution, it is not necessary to consider the improvement as a "damaging" of the land; since the interest is recognized as entitled to the protection of the law, it becomes a property right included in the term "private property" within the meaning of article I, section 14 of the State Constitution. In the event, however, that the interest is deemed of insufficient magnitude to warrant the payment of compensation under the eminent domain provision, it obviously is not "private property" within the scope of that clause, and the diminution in value of the land attributable to it, when affected by public improvement, falls within the area of uncompensated loss occasioned by the exercise of essential governmental power. Pennsylvania Coal Co. v. Mahon, supra, see Rose v. State of California, supra, 19 Cal. 2d at page 737, 123 A.2d at page 519.

And the Supreme Court of the United States has indicated that the recognition and definition of the interests in property included within the term "private property" are essentially matters which each state is permitted to determine for itself. Reichelderfer v. Quinn, 287 U.S. 315, 319, 53 S.Ct. 177, 77 L.Ed. 331, 83 A.L.R. 1429; Sauer v. City of New York, 206 U.S. 536, 548, 27 S.Ct. 686, 51 L.Ed. 1176.

In balancing the necessity for a public improvement against the extent of damage sustained by an individual in order to determine the right to compensation, there need be no fear that individual rights will be unduly subordinated to the rights of society, for each claimed exercise of governmental power is subject to judicial examination as to whether the means exercised are reasonable, both in nature and extent. Town of Windsor v. Whitney, supra, 95 Conn. at page 369, 111 A. at page 357, 12 A.L.R. 669. And although the rule may be difficult to apply, it is not an arbitrary one. An analogous doctrine underlies a determination of the reasonableness of conduct in the law of negligence, which requires a court to weigh the magnitude of the risk involved in a particular act against its utility or the particular manner in which it is done. 2 Rest., Torts, sec. 291. Obviously, as the judicial decisions on the subject increase in number, the result in a specific case may be predicated with increasing accuracy. Noble State Bank v. Haskell, 219 U.S. 104, 31 S.Ct. 186, 55 L.Ed. 112, 32 L.R.A.,N.S., 1062, Ann. Cas.1912A, 487. One rule recently announced by this court in approaching such a problem is that at least if the property owner would have no cause of action were a private person to inflict the damage, he can claim no compensation from the state. Archer v. City of Los Angeles, supra, 19 Cal.2d at page 24, 119 P.2d at page 4. But in the area of individual rights as yet uncharted by judicial decision, a court must weigh the interests affected in each case.

The question whether a property owner is entitled to compensation under the eminent domain clause of the California Constitution (art. I, sec. 14) when his property is placed in a cul-de-sac by the obstruction or vacation of one end of a street upon which the property abuts, but where the obstruction is not directly in front of the property, is one of first impression in California. Although an interference with the abutting owner's right of access in one direction only, but leaving a less convenient means of egress in another direction, has been held not to be a taking of private property within the prohibition of the due process clause of the Fourteenth Amendment to the federal Constitution (Meyer v. City of Richmond, 172 U.S. 82, 19 S.Ct. 106, 43 L.Ed. 374), a majority of the courts which have considered the right of a property owner to damages, under the eminent domain clause of the jurisdiction, for being placed in a cul-de-sac have allowed recovery to those in the block where the obstruction occurs, even though one entrance to the block is left open. Felton v. State Highway Board, 47 Ga.App. 615, 171 S.E. 198; City of Chicago v. Baker, 7 Cir., 98 F. 830, 39 C.C.A. 318; City of Chicago v. Burcky, 158 Ill. 103, 42 N.E. 178, 29 L.R.A. 568, 49 Am.St.Rep. 142; Davis v. City of Chicago, 290 Ill.App. 244, 8 N.E.2d 378; Falender v. Atkins, 186 Ind. 455, 114 N.E. 965, 967; Highbarger v. Milford, 71 Kan. 331, 80 P. 633; Burton v. Freund, 243 Mich. 679, 220 N.W. 672; Vanderburgh v. City of Minneapolis, 98 Minn. 329, 108 N.W. 480, 6 L.R.A.,N.S., 741; Lowell v. Buffalo County, 123 Neb. 194, 242 N.W. 452; Id., 119 Neb. 776, 230 N.W. 842; Coy v. City of Tulsa, D.C., 2 F.Supp. 411; Atchison, etc., R. Co. v. Terminal Oil Mill Co., 180 Okl. 496, 71 P.2d 617; Sandstrom v. Oregon-Wash. R. & Nav. Co., 69 Or. 194, 136 P. 878, 49 L.R.A.,N.S., 889; In re Melon Street, 182 Pa. 397, 38 A. 482, 38 L.R.A. 275; City of Texarkana v. Lawson, Tex. Civ.App., 168 S.W. 867. Contra: Kachele v. Bridgeport Hydraulic Co., 109 Conn. 151, 145 A. 756; Micone v. City of Middletown, 110 Conn. 664, 149 A. 408; Taylor v. Cooke, 113 Conn. 162, 154 A. 349, 351; Krebs v. Uhl, 160 Md. 584, 154 A. 131, distinguishing Johnson v. Mayor, 148 Md. 432, 129 A. 648; Smith v. City of Boston, 61 Mass. 254; Davis v. County Com'rs, 153 Mass. 218, 26 N.E. 848, 11 L.R.A. 750; Nichols v. Inhabitants of Richmond, 162 Mass. 170, 38 N.E. 501; Arcadia Realty Co. v. City of St. Louis, 326 Mo. 273, 30 S.W.2d 995, 997; Wilson v. Kansas City, Mo.Sup., 162 S.W. 2d 802; Cram v. City of Laconia, 71 N.H. 41, 51 A. 635, 57 L.R.A. 282; New York, etc., R. Co. v. Bucsi, 128 Ohio 134, 190 N.E. 562, 93 A.L.R. 632; City of Bellevue v. Stedman, 138 Ohio 281, 34 N.E.2d 769; City of Lynchburg v. Peters, 145 Va. 1, 133 S.E. 674; Richmond v. City of Hinton, 117 W. Va. 223, 185 S.E. 411. But by the great weight of authority, as a matter of law, no compensation may be obtained because of an obstruction to or the vacation of a street in another block, even though the value of the complainant's property is substantially reduced thereby, and this regardless of whether the particular state Constitution requires compensation solely for property "taken" or "taken or damaged." City of East St. Louis v. O'Flynn, 119 Ill. 200, 10 N.E. 395, 59 Am.Rep. 795; Buhl v. Fort St. Union Depot Co., 98 Mich. 596, 57 N.W. 829, 23 L.R.A. 392; Locascio v. Northern Pac. R. Co., 185 Minn. 281, 240 N.W. 661; In re Hull, 163 Minn. 439, 204 N.W. 534, 538–540, 205 N.W. 613, 49 A.L.R. 320; Chicago, etc., R. Co. v. Prigmore, 180 Okl. 124, 68 P.2d 90; Cooke v. City of Portland, 136 Or. 233, 298 P. 900; Spang & Co. v. Commonwealth, 281 Pa. 414, 126 A. 781; Hindes v. Allegheny County, 123 Pa.Super. 469, 187 A. 219; Hyde v. Minnesota, etc., R. Co., 29 S.D. 220, 136 N.W. 92, 99, 40 L.R.A.,N.S., 48; Lee v. City of Stratford [Tex.Com.App., adopted by Sup.Ct.], 125 Tex. 179, 81 S.W.2d 1003; City of El Paso v. Sandfelder, Tex.Civ. App., 118 S.W.2d 950; Jackson v. Birmingham, etc., Co., 154 Ala. 464, 45 So. 660;

Whitsett v. Union Depot & R. Co., 10 Colo. 243, 15 P. 339; Jarnagin v. Louisiana Highway Comm., La.App., 5 So.2d 660; Mandell v. Board of Com'rs of Bernalillo County, 44 N.M. 109, 99 P.2d 108; Sanders v. Town of Smithfield, 221 N.C. 166, 19 S.E.2d 630; Chicago & N. W. R. Co. v. Railroad Comm., 167 Wis. 185, 167 N.W. 266.

The question immediately arises as to the reason, if any, for such a distinction. What are the factors which have induced courts to recognize the damage of one owner as compensable and that of another as noncompensable when the diminution in value of the properties of both is occasioned by the same public act? So far as the mere inconvenience of traveling any additional distance necessitated by the inability longer to use the obstructed street is concerned, no compelling reason for such a distinction is warranted by logic, as it is difficult to justify the denial of compensation to one whose property is located directly across the first intersecting street while allowing recovery to the person owning the lot on the corner of the block in which the cul-de-sac exists. And because many of the courts have confined consideration of the damage caused by the obstruction to what they term the necessity for "circuity of travel," the conclusion that the allowance of recovery should not be extended to the whole neighborhood with a probable throttling of public improvements, has influenced a substantial number of them to deny compensation altogether. Dantzer v. Indianapolis Union Ry. Co., 141 Ind. 604, 39 N.E. 223, 34 L.R.A. 769, 50 Am.St.Rep. 343; Nichols v. Inhabitants of Richmond, (Mass.) supra; Cram v. City of Laconia, (N.H.) supra; Henry L. Doherty & Co. v. Joachim, 146 Fla. 50, 200 So. 238. Also some decisions which follow the majority view have treated recovery in a cul-de-sac case as an exception to the rule generally announced that circuity of travel occasioned by a proper highway improvement, or regulation, is a noncompensable item of damage.

But the traveling of additional distances occasioned by modern traffic engineering to make travel more safe and to adapt the highway system to the adequate disposal of the increasingly heavy burden of automobile traffic—as, for example, by the construction of divided highways for various types of traffic, or the re-routing of traffic by one-way regulations or the prohibition of left-hand turns—is an element of damage for which the property owner may not complain in the absence of arbitrary action. City of San Mateo v. Railroad Comm., 9 Cal.2d 1, 9, 10, 68 P.2d 713; see note 100 A.L.R. 487, 491–493. It is therefore not surprising that so many courts have refused compensation in cul-de-sac cases because of the similarity in problems so far as the question of circuity is concerned. And therefore, in testing the merits of the majority rule, mere "circuity of travel," in the sense that it refers to the additional distance required to be traversed because of a proper highway construction, should not be used to justify the allowance of compensation to the owner abutting upon the street in the block where the obstruction exists.

There is a material difference, however, between the situation of the property owner in the block where one end of the street is obstructed and that of the persons whose lots abut on the same street beyond the first intersection. Whereas formerly he had an outlet at both ends of the street on which his lot fronts, after the obstruction, he has but one. This is obviously not true of the landowners beyond the first intersection, for they still have access in either direction.

But, it may be asked, of what practical significance is this distinction, so far as damage to the property owner is concerned? If, for example, the land is used for business or industrial purposes, the fact that it is in a block where the street terminates may seriously affect the easement of access, in considering the full and beneficial use of the property. All vehicles entering the block must either turn around or back out in order to leave it, to this extent impairing the right of egress. In the case of trucks or other large vehicles, such a requirement may substantially interfere with the highest and best use of the property. See Cartmell v. City of Marysville, 231 Ky. 666, 22 S.W.2d 102, 104. And the owner of a lot so located is more adversely affected than is one whose property abuts upon a street restricted to one-way traffic, for in the latter case free ingress and egress is possible.

Yet, even though the interference with the use of the land within the block where the cul-de-sac is created is materially greater than that of the property beyond the first intersection upon the same street, the question remains whether the owner's access to his property is so materially affected as to warrant the payment of compensation under the eminent domain provision of the California Constitution.

The necessity for arterial freeways, uninterrupted by numerous intersections, in order to safely and efficiently dispose of vehicular traffic is a matter of growing public concern. Allowance of damages to the property owners on each street formerly crossing a highway which is to be rebuilt for the requirements of fast moving or interurban traffic for a distance of a few or many miles, even if confined to one block on each side of the freeway, might prove so burdensome as to stop or substantially decrease needed improvements. See Davis v. County Com'rs, supra, 153 Mass. 218, 26 N.E. at page 850; Cram v. City of Laconia (N. H.), supra; Richmond v. City of Hinton (W. Va.), supra; 13 Va. L. Rev. 334-337. It must be remembered also that to the amount of damages awarded must be added the probable expense of defending hundreds of suits. At the same time, however, in view of the policy underlying the eminent domain provision of the Constitution, the court must give adequate recognition to the hardship to the individual in a block ending in a dead end, materially affecting, as the objection does, the right of egress from his property. In addition, the possibility of locating and constructing the improvement in such a way as to leave the property owner with a way out in each direction along the street upon which he abuts has a direct connection with the limitation that, in order to avoid liability for compensation, the placement of the improvement and its manner of construction must not be unreasonably more drastic or injurious than is reasonably required to achieve the necessary end. For example, ordinarily, in constructing an arterial freeway the objectives of the project may be served and a method of egress provided for property owners by the construction of local service roads, paralleling the main freeway, into which the traffic from the side streets may pass and enter or cross the freeway at locations consistent with safety. See People v. Ricciardi, supra. Were the construction of such service roads to be approved as a proper use of the land owned by the state for highway purposes without subjecting the state to liability to abutting property owners for such improvements, the cost of such service roads would constitute a definitely ascertainable item, thus obviating the uncertainty in estimating in advance the damages to the property owners, were the streets to be terminated so as to create cul-de-sacs. Under such circumstances, where governing authorities fail or refuse to include such service roads as a part of the project, or in the relatively few situations where their construction is not possible, the damage sustained by the individual should be borne by the public. But the majority opinion in the Ricciardi case, by creating a cause of action in every property owner abutting upon the lane constructed for local traffic along the route of an arterial highway, certainly offers no inducement to the state to include such features in highway improvements, and makes the balancing of the respective interests of the public and the landowner a close question. However, because I can readily visualize circumstances where, after a block is closed at one end, the owner's access to his property from the street may be as effectively blocked as though an obstruction were placed directly in front of his premises,[2] I feel that the question of compensable impairment of ingress and egress should be left for the trier of fact to determine.

But in ascertaining the amount of damage arising from the impairment of the easement of access, the jury may consider only compensable elements of injury, relating to the interference with the ingress to and egress from the property insofar as it affects the uses to which the property is adaptable. Such elements as the additional distance which one is required to travel upon the public street in order to reach the property and the divergence of travel occasioned by the highway improvements should be excluded from the testimony of the witnesses and the consideration of the jury. People v. Ricciardi, supra; Rose v. State of California, supra, 19 Cal.2d at page 737, 123 P.2d at page 519; Dantzer v. Indianapolis Union Ry. Co., supra; Grigg Hanna Lumber, etc., Co., v. Wagoner, 294 Mich. 346, 293 N.W. 675, 678, 679; Tomaszewski v. Palmer

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[2] For example, a truck which formerly entered the street, stopped in front of the landowner's industrial premises, and then, in leaving, continued along the street in the same direction, may, because of the width of the street, be unable to turn around in it after one end is blocked, and for that reason, be unable to use the street for access to the land.

Bee Co., 223 Mich. 565, 194 N.W. 571; Atchison, etc., R. Co. v. Terminal Oil Mill Co., supra, 180 Okl. 496, 71 P.2d at page 619; Chicago, etc., R. Co. v. Prigmore, supra, 180 Okl. 124, 68 P.2d at pages 91, 92; Henry L. Doherty & Co. v. Joachim (Fla.), supra; Canady v. Cœur d'Alene Lumber Co., 21 Idaho 77, 120 P. 830; Jarnagin v. Louisiana Highway Comm. (La.App.), supra; Sanders v. Town of Smithfield, supra, 221 N.C. 166, 19 S.E.2d at page 634; Chicago & N. W. R. Co. v. Railway Comm. (Wis.), supra.

CURTIS, Justice (concurring).

I agree with the conclusion reached in the majority opinion on the ground expressed in the concurring opinion.

TRAYNOR, Justice (dissenting).

I dissent.

The majority opinion declares that the allowance of recovery to the owner in this case "depends largely upon the character and extent of his property right." It seeks such a right in the right of ingress and egress which, it declares, "being by its terms general in nature requires definition and clarification as to its extent and character." What follows is a definition amplifying that right to make it a basis for recovery in the present case in terms of the invasion of property rights. As there is no invasion of traditional rights, a new right is created by the simple process of redefinition. The frontiers of the right of ingress and egress are thus freely advanced to make the very recovery in question a foregone conclusion.

The real basis of the decision must be found in the considerations that moved the majority to grant recovery. The key to those considerations lies in the statement in the majority opinion that "If the question is one of first impression its answer depends chiefly upon matters of policy, a factor the nature of which, although at times discussed by the courts, is usually left undisclosed." By way of revelation in the present case, the opinion goes on to declare that "on the one hand the policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements * * *. On the other hand, fears have been expressed that compensation allowed too liberally will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost * * *. In some degree those opposed policies are manifested in the conflict between the constitutional mandate that compensation would be paid when private property is taken or damaged for a public purpose and the exercise of the police power where compensation need not be paid."

One is led to expect that the solution of the problem will lie in the weighing of these two policies, but it is not clear that the majority arrives at its solution in this manner. A review of the facts is summarily followed by the rule for which the case now stands: "It would seem clear that the reasonable modes of egress and ingress embrace access to the next intersecting street in both directions. It should be noted that the right is more extensive than the mere opportunity to go on to the street immediately in front of the property." Having thus reached its conclusion without stating why one policy outweighed the other, the opinion suggests that it balanced policies with the aid of precedents. "We are not confronted with the necessity of balancing the conflicting policies heretofore referred to without the aid of persuasive precedent." It is thus left in doubt whether the weighing of policies or the persuasive precedents served as the basis of the opinion. There is an intimation that it was the latter in the statement: "Many authorities and writers have either declared or intimated that the creation of a cul-de-sac, that is, the blocking of access to the next intersecting street in one direction is compensable, although the access still exists in the opposite direction to an intersecting street. In other words, the easement is to that extent." A list of cases from other states, together with citations to texts and law reviews is appended to support this statement.[1] The conclusion is first reached and then justified in a manner that suggests a weighing of policies: "We do not fear that permitting recovery in cases of cul-de-sacs created in a municipality will seriously impede the construction of improvements, assuming the fear of such an event is real rather than fancied. The damage to the property owner is immediate and direct. The value of the use of the property is directly affected. To be able to get onto the street immediately in front of the property is of little value if that is as far as he can go. If his access to the next intersecting street in both directions and one way is cut off, his easement, if it has any value to him at all, has certainly been impaired. We conclude, therefore, that the right of access extends in both directions to the next intersecting street." Being more concerned with the reduction in value of plaintiff's property than with the fear that the allowance of recovery will impede improvements, the majority allows recovery and thus creates the property right.

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[1] There are also persuasive precedents against this conclusion: Meyer v. City of Richmond, 172 U.S. 82, 19 S.Ct. 106, 43 L.Ed. 374; New York, C. & S. L. R. Co. v. Bucsi, 128 Ohio St. 134, 190 N.E. 562, 93 A.L.R. 632; City of Bellevue ex rel. Vickery v. Stedman, 138 Ohio St. 281, 34 N.E.2d 769; Davis v. County Com'rs, 153 Mass. 218, 26 N.E. 848, 11 L.R.A. 750; Nichols v. Inhabitants of Richmond, 162 Mass. 170, 38 N.E. 501; Warner v. New York, N. H. & H. R. Co., 86 Conn. 561, 86 A. 23; Cram v. City of Laconia, 71 N.H. 41, 51 A. 635,

It is implicit in the majority opinion, however, that such a property right was already inherent in the right, admittedly of obscure origin, of ingress and egress. The opinion states that in spite of the policy not to impede beneficial improvements "the courts cannot ignore sound and settled principles of law safeguarding the rights and property of individuals." It also states, after describing the cul-de-sac in the present case, "that plaintiff's property has been damaged by the impairment cannot be here questioned." The statement that "If he has access to the next intersecting street in both directions and one way is cut off, his easement, if it has any value to him at all, has certainly been impaired" assumes that plaintiff's easement embraces the right in question.

Whether the majority opinion allows recovery on the ground that there has been an impairment of a property right inhering in the right of ingress and egress or on the ground that such a right should now be judicially created, I cannot subscribe to it.

The basic question in this appeal is whether the property that plaintiff alleged was taken or damaged existed at all. If the abutting owner has an easement in the street longitudinally to the next intersection in each direction, compensation must be paid for the impairment of that easement. See United States v. Welch, 217 U. S. 333, 339, 30 S.Ct. 527, 54 L.Ed. 787, 28 L.R.A.,N.S., 385, 19 Ann.Cas. 680. If he does not have such an easement he can have no recovery even though the value of the abutting property may be diminished as a result of the improvement. Reichelderfer v. Quinn, 287 U.S. 315, 319, 53 S. Ct. 177, 77 L.Ed. 331, 83 A.L.R. 1429; Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 617, 37 P. 750, 42 Am.St.Rep. 149; Rose v. State of California, 19 Cal. 2d 713, 737, 744, 123 P.2d 505; Rigney v. City of Chicago, 102 Ill. 64, 80; City of Winchester v. Ring, 312 Ill. 544, 550, 552, 144 N.E. 333, 36 A.L.R. 520; Nelson v. State Highway Bd., 110 Vt. 44, 1 A.2d 689, 118 A.L.R. 921.

There is nothing in the history of the right of ingress and egress to indicate that it embraces any such easement. The right of ingress and egress is a creation of judicial decision.[2] See Crane v. Hahlo, 258

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57 L.R.A. 282; Kachele v. Bridgeport Hydraulic Co., 109 Conn. 151, 145 A. 756; Micone v. City of Middletown, 110 Conn. 664, 149 A. 408; Taylor v. Cooke, 113 Conn. 162, 154 A. 349; Krebs v. Uhl, 160 Md. 584, 154 A. 131; Chicago & N. W. R. Co. v. Railroad Comm., 167 Wis. 185, 167 N.W. 266; Arcadia Realty Co. v. City of St. Louis, 326 Mo. 273, 30 S.W.2d 995; Wilson v. Kansas City, Mo. Sup., 162 S.W.2d 802; City of Lynchburg v. Peters, 145 Va. 1, 133 S.E. 674; Jarnagin v. Louisiana Highway Comm., La.App., 5 So.2d 660; Powell v. McKelvey, 56 Idaho 291, 53 P.2d 626; Kemp v. City of Seattle, 149 Wash. 197, 270 P. 431; Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 P. 316; City of Fort Smith v. Van Zandt, 197 Ark. 91, 122 S.W.2d 187; Ralph v. Hazen, 68 App. D.C. 55, 93 F.2d 68; Freeman v. City of Centralia, 67 Wash. 142, 120 P. 886, Ann.Cas.1913D, 786; Richmond v. City of Hinton, 117 W.Va. 223, 185 S.E. 411; Olsen v. Jacobs, 193 Wash. 506, 76 P.2d 607; DeRossette v. Jefferson County, 288 Ky. 407, 156 S.W.2d 165.

[2] The origin of the whole doctrine of abutters' rights is graphically described in the dissenting opinion of Mr. Justice Holmes in Muhlker v. New York & H. R. Co., 197 U.S. 544, 572, 25 S.Ct. 522, 528, 49 L.Ed. 872: "The plaintiff's rights, whether expressed in terms of property or of contract, are all a construction of the courts, deduced by way of consequence from dedication to and trusts for the purposes of a public street. They never were granted to him or his predecessors in express words, or, probably,

U.S. 142, 42 S.Ct. 214, 66 L.Ed. 514. Its operation as a limitation on street improvements by municipalities and public utilities originated in the New York elevated railway cases. In the leading case of Story v. New York El. R. Co., 90 N.Y. 122, 43 Am.Rep. 146, an injunction was sought to restrain the erection of an elevated railway in the street on which plaintiff's property abutted. The court held that the use of the street for elevated railway purposes was inconsistent with the use of the right of way for street purposes. The city had subdivided the land originally, laid out the streets and lots, and conveyed the land by deeds containing a covenant that the streets shown on the maps should forever remain open as public streets and ways. The court cited the ordinary rule that a grantor making a conveyance that refers to a map showing streets cannot divert the lands to any use inconsistent with the normal uses of the street. The court held that this rule applied to the city in its role as subdivider. In Lahr v. Metropolitan E. Ry. Co., 104 N. Y. 268, 10 N.E. 528, however, the court held that even where the abutters did not derive their title from the city and had no express covenant, such as existed in the Story case, they nevertheless had an easement of access to the street. The basis of the decision was that under the New York statutes whereby streets were opened a trust was created for the benefit of the public at large and also for the benefit of abutting owners. The court held that an easement of access was implicit in the trust. Later, however, it took care to hold that the abutting owner's rights are subordinate to any reasonable use of the street made by public authorities to facilitate general travel. Reining v. New York, L. & W. R. Co., 128 N.Y. 157, 28 N.E. 640, 14 L.R.A. 133; Rigney v. New York C. & H. R. Co., 217 N.Y. 31, 111 N.E. 226. Presumably the public right to use the street was reserved if the city subdivided and sold the lots in the street; conversely compensation for the normal uses of the street was paid if the street or highway was condemned or conveyed. See Davis v. County Com'rs, 153 Mass. 218, 26 N.E. 848, 850, 11 L.R.A. 750; 13 Va.L.Rev. 334. While the normal uses of the street are bound to change with the times, the streets are invariably characterized as public rights of way.

In Eachus v. Los Angeles Consolidated Electric Ry. Co., 103 Cal. 614, 37 P. 750, 42 Am.St.Rep. 149, upon which plaintiff relies heavily, the city had likewise subdivided and sold the property owned by the plaintiffs. California, like New York, later extended abutters' easements to cases where title was not derived from the city.

The trust that arises from the appropriation of land for public thoroughfares is for the benefit of the public at large and only incidentally for the benefit of abutting owners. The extension of the abutting owner's rights in the present case makes the primary consideration the benefit of abutting owners rather than the benefit of the public. Hitherto no California case has ever defined the right of ingress or egress as inclusive of an easement to the next intersecting street. The rule has been that the right of ingress and egress is limited to adequate and reasonable access to the property from the street, that it does not extend to the full width of the street, or to the full length thereof, or even to all points upon the street in front of the abutting property. It is sufficient if there is access to a street that in turn connects with the general street system. Any improvement that does not materially interfere with such access does no compensable damage. The California Vehicle Code, St.1935, p. 93, and city traffic ordinances abound with regulations that limit a property owner's freedom of movement upon the street on which his property abuts.

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by any conscious implication. If at the outset the New York courts had decided that, apart from statute or express grant, the abutters on a street had only the rights of the public and no private easement of any kind, it would have been in no way amazing. It would have been very possible to distinguish between the practical commercial advantages of the expectation that a street would remain open and a right in rem that it would remain so. * * * But again, if the plaintiff had an easement over the whole street he got it as a tacit incident of an appropriation of the street to the uses of the public. * * * it was possible for the New York courts to hold, as they seem to have held, that the easement which they had declared to exist is subject to the fullest exercise of the primary right out of which it sprang, and that any change in the street for the benefit of public travel is a matter of public right, as against what I have called the parasitic right which the plaintiff claims."

Thus "U" turns or the making of left turns upon emerging from a building or private driveway are frequently prohibited, and the diversion of traffic into one-way streets is common. Frequently traffic moving in opposite directions is separated by some physical barrier such as a raised curbing. These restrictions have the same effect whether they ensue from traffic regulations or physical obstructions and there is no more reason to allow compensation because of the resulting diminution in property values or the inconvenience of circuity of travel in the one case than in the other.

The newly created property right in this case is inconsistent not only with the trust from which the right of ingress and egress is derived, but with the established rule in this state and others that street improvements give rise to no compensable damage if there is no injury to the abutting owner different in kind from that suffered by other property owners and the general public. This rule is repudiated in the majority opinion: "If he has a property right and it has been impaired, the damage is necessarily peculiar to himself and is different in kind than that suffered by him as a member of the public generally for his particular right as a property owner and not as a member of the public has been damaged." This statement draws its conclusion from an assumption of the very thing to be proved. The question is whether or not the owner has a property right that has been impaired, and it cannot be assumed that he has without drawing a line between his property and all the other property in the community. When the majority opinion draws the line at the next intersection it arbitrarily attaches a right to abutting property in one block on the street, but not to abutting property on the same street in the next block or to property abutting on neighboring streets, even though they may likewise be diminished in value as a result of the improvement and the owners may be similarly inconvenienced by circuity of travel. Recovery therefore depends upon the accident of location.[3]

Whatever difficulties may arise in applying the rule requiring proof of special damage to the facts of a particular case (see Cram v. City of Laconia, 71 N.H. 41, 51 A. 635, 636, 57 L.R.A. 282), it is an objective standard that has become a rule of property over the years. It should not be abandoned merely to be replaced by the subjective judgment of a majority of this court that singles out particular owners for compensation because of the diminution in the value of their property and the inconvenience of circuity of travel.

It has long been established that an injury is not peculiar to the abutting property merely because the improvement causes a diminution in the value of property. Eachus v. Los Angeles Consolidated Electric Ry. Co., 103 Cal. 614, 617, 37 P. 750, 42 Am.St.Rep. 149. The rule is forcefully stated by Mr. Chief Justice Stone in Reichelderfer v. Quinn, 287 U.S. 315, 319, 53 S.Ct. 177, 178, 77 L.Ed. 331, 83 A.L.R. 1429: "But the existence of value alone does not generate interests protected by the Constitution against diminution by the government, however unreasonable its action may be. The beneficial use and hence the value of abutting property is decreased when a public street or canal is closed or obstructed by public authority, Meyer v. [City of] Richmond, 172 U.S. 82, 95, 19 S.Ct. 106, 43 L.Ed. 374; cf. Whitney v. [State of] New York, 96 N.Y. 240; Fox v. [City of] Cincinnati, 104 U.S. 783, 26 L.Ed. 928; Kirk v. Maumee Valley E. Co., 279 U.S. 797, 802, 803, 49 S.Ct. 507, 73 L.Ed. 963; Smith v. [City of] Boston, 7 Cush., (Mass.), 254; Stanwood v. [City of] Malden, 157 Mass. 17, 31 N.E. 702, 16 L.R.A.

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[3] The concurring opinion attempts to draw a distinction between abutting owners in the block on which the obstruction exists and other owners, on the ground that "All vehicles entering the block must either turn around or back out in order to leave it." This inconvenience is not essentially different from the inconvenience of circuity of travel, and it is not compensable for the very reasons advanced in the concurring opinion with regard to circuity of travel. See also Jones Beach Boulevard Estates v. Moses, 268 N.Y. 362, 197 N.E. 313, 100 A.L.R. 487; Ralph v. Hazen, 68 App.D.C. 55, 93 F.2d 68, 71; City of Fort Smith v. Van Zandt, 197 Ark. 91, 122 S.W.2d 187. It is commonplace in the operation of motor vehicles to turn around on streets or back out therefrom just as it is to back out from property where there is no space for turning the vehicles. The right of ingress and egress is no more impaired in such situations than on a one-way street or divided highway where one cannot turn around or back out.

591; or a street grade is raised, Smith [to Use of Cushing] v. Washington, 20 How., U.S., 135, 15 L.Ed. 858; see Mead v. [City of] Portland, 200 U.S. 148, 162, 26 S.Ct. 171, 50 L.Ed. 413 or the location of a county seat, Newton v. [Mahoning County] Commissioners, supra [100 U.S. 548, 25 L. Ed. 710], or of a railroad is changed. Bryan v. Louisville & N. R. Co., 8 Cir., 244 F. 650, 659, 157 C.C.A. 98. But in such cases no private right is infringed.

"Beyond the traditional boundaries of the common law, only some imperative justification in policy will lead the courts to recognize in old values new property rights. * * * The case is clear where the question is not of private rights alone, but the value was both created and diminished as an incident of the operations of the government. For, if the enjoyment of a benefit thus derived from the public acts of government were a source of legal rights to have it perpetuated, the powers of government would be exhausted by their exercise." In holding that owners of land adjacent to a public park had no easement in the park and therefore no claim to recovery because of the erection of a fire-engine house in the park that reduced the value of neighboring property, Mr. Chief Justice Stone declared: "The abutting owner cannot complain; the damage suffered by him 'though greater in degree than that of the rest of the public, is the same in kind.'" See, also, Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 617, 37 P. 750, 42 Am.St.Rep. 149; Rose v. State of California, 19 Cal.2d 713, 737, 744, 123 P.2d 505; People v. Gianni, 130 Cal.App. 584, 586, 20 P.2d 87; City of Stockton v. Marengo, 137 Cal.App. 760, 31 P.2d 467; Levee Dist. No. 9 v. Farmer, 101 Cal. 178, 35 P. 569, 23 L.R.A. 388.

The application in numerous cases in this state of the rule requiring a showing of special damages has established the law that if an obstruction cuts off the owner's access from his premises to the street, he has suffered a special injury. See Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505; Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 37 P. 750, 42 Am.St.Rep. 149; McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139; Lane v. San Diego Elec. R. Co., 208 Cal. 29, 280 P. 109; Wilcox v. Engebretsen, 160 Cal. 288, 116 P. 750; Williams v. Los Angeles R. Co., 150 Cal. 592, 89 P. 330; Geurkink v. City of Petaluma, 112 Cal. 306, 44 P. 570; Bigelow v. Ballerino, 111 Cal. 559, 44 P. 307. It has also established the law that the inconvenience of circuity of travel does not call for compensation (see 49 A.L.R. 333; New York, C. & St. L. R. Co. v. Bucsi, 128 Ohio St. 134, 190 N.E. 562, 93 A.L.R. 639), and that any inconvenience to the owner after he is on the street and wishes to travel over the system of public streets is a damage suffered in common with the general public and does not constitute an impairment of his easement. Thus, in Bigley v. Nunan, 53 Cal. 403, 404, the defendant, by the construction of a fence, occupied one-half of the public street immediately in front of plaintiff's property but on the opposite side of the street therefrom. The fence shut off completely one-half of the street width in front of plaintiff's property. The plaintiff sued the defendant to abate the nuisance, and for damages. The court held that if there was a nuisance it was a public one, and that a private person could not bring an action to abate a public nuisance unless he could show damage to himself or his property that was peculiar to him as distinguished from damage to the public. The court held that the plaintiff could not make such a showing under the alleged facts, declaring: "The access from plaintiff's lot to the street has not been cut off or impeded, and if plaintiff and his immediate neighbors have more occasion to pass through the street than the public at large, this is an inconvenience in degree only, and is not an injury in kind different from that sustained by the public." The narrowing of a street by one-half immediately opposite a lot, is in principle no different from the closing of the street in one direction with access left unimpeded in the other.

In Reynolds v. Presidio, etc., R. Co., 1 Cal.App. 229, 81 P. 1118, the complaint alleged that the laying of streetcar tracks near the boundary of plaintiff's property has "obstructed ingress to and from said property." In denying damages the court said: "There is no allegation that the obstruction prevents the plaintiff from having access to and from her property * * *. Such obstruction clearly would not prevent the plaintiff from getting on or off her lot to the public street."

Where, however, the obstruction cuts off access to the street an injury results that is peculiar to the property and different in kind from that suffered by the general public. The distinction is forcefully brought out in Hargro v. Hodgdon, 89 Cal. 623, 628, 26 P. 1106, 1107. In that case the defendant constructed on a public alleyway a building that occupied the whole alley along the plaintiff's property line. The court affirmed an order enjoining the maintenance of the building. After approving the doctrine that the obstruction of a public highway of itself does not constitute a special injury to an abutting property owner, the court stated: "But it has never been held that an individual cannot maintain an action to abate an obstruction which, while obstructing the public highway, also cuts off access from his premises to the public highway. So far as it does this it becomes a private nuisance. His complaint is not that it obstructs the street or road, but that it prevents him from reaching it." See, also, Schaufele v. Doyle, 86 Cal. 107, 24 P. 834; Strong v. Sullivan, 180 Cal. 331, 181 P. 59, 4 A.L.R. 343; Williams v. Los Angeles R. Co., 150 Cal. 592, 594, 89 P. 330.

In Hitch v. Scholle, 180 Cal. 467, 181 P. 657, the complaint alleged that the plaintiff owned certain land subject to an easement of way in the public and that the defendant obstructed this public highway by building and maintaining a fence across it and threatened to plow up the highway. The court denied an injunction, declaring: "It is well settled that, if an obstruction which is wrongfully erected and maintained in a public highway constitutes a nuisance which injuriously affects a private person equally in common with the public at large, a private action may not be maintained to abate the nuisance. Blanc v. Klumpke, 29 Cal. 156. It is only where the free use of the property of a private person is interfered with by such an obstruction that he may have his private action to abate the nuisance resulting therefrom. * * * There is no ground for an action by a private person to abate a public nuisance resulting from the obstruction of a public highway where it merely appears that the person would be subjected to personal inconvenience by the obstruction or placed under the necessity of traveling by a much more circuitous route to reach his destination." 180 Cal. 467, 468, 470, 181 P. 657; see, also, 2 Wood on Nuisances, 853, sec. 645; 42 Columb.L.Rev. 596, 613; 4 Rest., Torts, 216 et seq.

While these are nuisance cases they are directly in point, for an action to enjoin a public nuisance cannot be maintained unless it constitutes an injury to a private right. It is established that a property right must be invaded before compensation is allowed under article I, section 14 of the California Constitution. The constitutional provision creates no property rights; it protects those that already exist. That which was damnum absque injuria before the adoption of the "or damaged" clause is still damnum absque injuria. "The provision (art. I, sec. 14) permits an action against the state, which cannot be sued without its consent. It is designed, not to create new causes of action, but to give a remedy for a cause of action that would otherwise exist. The state is therefore not liable under this provision for an injury that is damnum absque injuria. If the property owner would have no cause of action were a private person to inflict the damage, he can have no claim for compensation from the state." Archer v. City of Los Angeles, 19 Cal.2d 19, 24, 119 P.2d 1, 4.

The rule, however, is not derived solely from the nuisance cases. Thus in Brown v. Board of Sup'rs, 124 Cal. 274, 57 P. 82, 84, the San Francisco Board of Supervisors passed an order providing for the reduction in the width of Turk Street from 100 feet to 68 feet 7 inches. The abutting owners claimed that the improvement could not be made without providing compensation for the damage the improvement would cause their property. In sustaining a demurrer to their petition for certiorari the court declared: "The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation. This right is peculiar and individual to the abutting owner, differing from the right of passing to and fro upon the street, which he enjoys in common with the public, and any infringement thereof gives him a right of action. * * * The appellants herein do not, however, claim that the reduction in the width of the street will in any respect interfere with their enjoyment of light and air, or that access to their lots is in any degree impaired. Indeed, in view of the fact that by the proposed reduction of the street it will have the same width as the majority of streets in the city, such contention could not be made. * * * The damage which the appellants may sustain by reason of a diminution in value of their lands is not damage for which they are entitled to compensation. * * * 'The right of abutting owners in the streets is not of that absolute character that they can resist or prevent any and all interference with the street to their detriment, or which can be asserted to stay the hand of the municipality in the control, regulation, or improvement of the streets in the public interest, although it may be made to appear that the privileges which they had theretofore enjoyed, and the benefits they derived from the street in its existing condition, would be curtailed or impaired to their injury by the changes proposed.' Reining v. New York, etc., R. Co., 128 N. Y. 157, 28 N.E. 640 [14 L.R.A. 133]. It has been held in other states that even the entire closing of a street upon which property abuts does not give to the owner a right of compensation, so long as there are other public streets by which he has access to his land. The mere inconvenience thereby experienced is not a damage for which he is entitled to compensation." 124 Cal. 274, 280, 57 P. 82.

In McCandless v. City of Los Angeles, 214 Cal. 67, 4 P.2d 139, involving a claim for damages under article I, section 14, recovery was allowed because the injury was regarded as peculiar to the abutting property. The court declared: "Cases illustrating the rule that an abutting property owner may suffer special damages peculiar to himself and independent of such damage as he sustains in common with other property owners and the public by reason of the construction of railroad tracks in the street adjacent to his property are these: O'Connor v. Southern Pac. R. Co., 122 Cal. 681, 55 P. 688; Smith v. Southern Pac. R. Co., 146 Cal. 164, 79 P. 868, 106 Am.St.Rep. 17; Fairchild v. Oakland & Bay Shore R. Co., 176 Cal. 629, 169 P. 388; Lane v. San Diego Elec. R. Co., 208 Cal. 29, 280 P. 109." 214 Cal. 67, 70, 71, 4 P.2d 139, 140. In holding that the subway, approach and railings as constructed greatly "interfere[d] with the free use by the plaintiff of the street in front of her property for the purposes of ingress and egress" the court quoted from Brown v. Board of Sup'rs, supra, as follows: "The property which an abutting owner has in the street in front of his land is the right of access and of light and air, and for an infringement of these rights he is entitled to compensation. This right is peculiar and individual to the abutting owner, differing from the right of passing to and fro upon the street, which he enjoys in common with the public, and any infringement thereof gives him a right of action." See, also, Eachus v. Los Angeles, etc., Ry. Co., 103 Cal. 614, 37 P. 750, 42 Am.St.Rep. 149; Lane v. San Diego Electric R. Co., 208 Cal. 29, 280 P. 109; Williams v. Los Angeles, etc., R. Co., 150 Cal. 592, 594, 89 P. 330; Hargro v. Hodgdon, 89 Cal. 623, 26 P. 1106; Geurkink v. City of Petaluma, 112 Cal. 306, 44 P. 570; Rose v. State of California, 19 Cal.2d 713, 123 P.2d 505.

The identity of the tests in the nuisance cases and actions for damages under article I, section 14, is forcefully brought out in Brown v. Rea, 150 Cal. 171, 88 P. 713, 714, in which the plaintiff sought to enjoin the construction of a railroad in a street. In sustaining a demurrer to the complaint the court declared: "Generally speaking a public nuisance does not furnish ground for action by a private person, but such public nuisance may inflict upon an individual such peculiar injury as to entitle him to maintain a separate action for its abatement, or to recover damages therefor. * * The injury to the individual must, however, be different in kind and not merely in degree from that suffered by the general public. Aram v. Schallenberger, 41 Cal. 449; Bigley v. Nunan, 53 Cal. 403; Hogan v. Central Pac. R. Co., 71 Cal. 83, 11 P. 876. Ordinarily an obstruction to a highway, if unauthorized and illegal, is a public nuisance. The injury is to the right to travel upon the highway, which right resides in the public generally. Such obstruction may, however, constitute a private nuisance as well. Every owner of land abutting upon a highway has a right of access from his land to the highway and from the highway to his land. This right of access is an easement, and an obstruction to the highway which at the same time obstructs this easement is a peculiar injury to the abutting landowner and gives him a cause of action." Holding that the complaint was insufficient because it did not allege that the "right of passage between the street and his premises" was impaired, the court declared: "These facts alone do not make it appear to the court that the plaintiff's right of passage between the street and his premises will be in any degree affected." The court later stated: "We do not overlook the consideration that, under the constitutional provision that 'private property shall not be taken or damaged for public use without just compensation having first been made' * * * damages may be recovered by an abutting owner for any public use of a street which damages his adjoining property, or his easement of access to and from the street. * * * But the complaint, whether seeking damages after the construction, or an injunction before, must show some actual or threatened injury to a private property right of the plaintiff, and this the present complaint fails to do." 150 Cal. 171, 174, 175, 88 P. 713, 714; see, also, Wolff v. City of Los Angeles, 49 Cal.App. 400, 193 P. 862; City of San Mateo v. Railroad Commission, 9 Cal.2d 1, 68 P.2d 713.

Under the majority opinion new private property rights representing millions of dollars have been carved out of public streets and highways, at the expense not alone of the public treasury but of the public safety. Of recent years the growth of traffic has necessitated the construction of highways with fewer intersecting streets to expedite the flow of traffic and reduce the rate of motor vehicle accidents. Such highways have been constructed through the City of San Rafael, and the Arroyo Seco Parkway from Los Angeles to Pasadena, and the construction of many more is contemplated. In such cases it will be necessary either to close the cross streets or to carry them under or over the freeway, both costly projects. The plans contemplate overhead or subway crossings every few blocks over the freeway, necessarily creating cul-de-sacs of the remaining streets. Similar improvements are involved in the separation of grades of railroads and highways, for it is usually necessary to make a dead end of one or more streets as a highway is raised or lowered to cross the railroad tracks. In the present case the cul-de-sac on Sterling Street was an integral part of the rearrangement of the streets of the City of San Francisco made necessary by the construction of the San Francisco-Oakland Bay Bridge.

The cost of making such improvements may be prohibitive now that new rights are created for owners of property abutting on streets that would be at right angles to the improvements, for these rights must be condemned or ways constructed over or under the improvements. The construction of improvements is bound to be discouraged by the multitude of claims that would arise, the costs of negotiation with claimants or of litigation, and the amounts that claimants might recover. Such claims could only be met by public revenues that would otherwise be expended on the further development and improvement of streets and highways.

It must be remembered that the question is not whether existing easements should be taken without compensation, but whether private rights should be created for an arbitrarily chosen group of private persons, necessitating tribute from the public if it exercises public rights of long standing in the interest of safe and expeditious travel on public thoroughfares.

Rehearing denied; EDMONDS and TRAYNOR, JJ., dissenting.

23 Cal.2d 381

BEALS v. CITY OF LOS ANGELES et al.

L. A. 17363.

Supreme Court of California.
Dec. 21, 1943.

Rehearing Denied Jan. 17, 1944.

1. Municipal corporations 🔑669

Owner of property abutting upon a public street has a property right or easement of ingress and egress extending in both directions to next intersecting street.

2. Highways 🔑155
Municipal corporations 🔑657(4)

Owner of corner lot abutting upon an alley had sufficient property interest to maintain action to enjoin partial vacation of alley which would cut off access to lot over alley from next intersecting street, though owner still had access to lot upon the two adjoining streets in addition to portion of alley not vacated.

3. Municipal corporations 🔑657(6)

Act of city council in ordering vacation of a street is legislative in character and is conclusive both as to the necessity or convenience of improvement and as to extent of district to be benefited thereby, except where finding of public convenience and necessity results from fraud or collusion between city council and private landowners. St.1889, p. 70 et seq.; St.1941. p. 765 et seq., § 3200 et seq.

4. Municipal corporations ⚷657(4)

That partial vacation of alley would benefit city department of water and power which owned land abutting upon portion of alley to be closed did not show fraud or collusion resulting in city council's finding of public convenience and necessity of the improvement so as to entitle objecting landowner to judicial determination of question of public convenience and necessity. St. 1889, p. 70 et seq.; St.1941, p. 765 et seq., § 3200 et seq.

5. Municipal corporations ⚷657(5)

The ascertainment and payment of damages is not a jurisdictional prerequisite to city council's authority to order work done under Street Opening Act, and hence failure to appoint commissioners to ascertain damages to abutting landowner did not affect validity of ordinances authorizing partial vacation of a public alley. St.1889, p. 70 et seq.; St.1941, p. 765 et seq., § 3200 et seq.; Const. art. 1, § 14.

6. Eminent domain ⚷293(1)

Complaint, alleging that city council had authorized partial vacation of a public alley without providing for ascertainment and payment of damages to abutting landowner, stated a cause of action for injunctive relief. Const. art. 1, § 14.

7. Eminent domain ⚷69

The ascertainment and payment of damages is a condition precedent to right of a city to do public work which will destroy or damage private property. Const. art. 1, § 14.

8. Eminent domain ⚷274(4)

Where a taking of private property for public use is attempted under the power of eminent domain without any provision being made for compensation, an injunction will lie. Const. art. 1, § 14.

9. Eminent domain ⚷279(2)

Where private property has been taken for a public use without any provision being made for compensation, an unqualified injunction may be refused if public use has intervened. Const. art. 1, § 14.

10. Eminent domain ⚷106

City council, by determining and providing in ordinance ordering partial vacation of a public alley that no damages would result from such work, could not deprive abutting property owner of constitutional right to compensation and prepayment of damages. St. 1889, p. 70 et seq.; St. 1941, p. 765 et seq., § 3200 et seq.; Const. art. 1, § 14.

TRAYNOR and EDMONDS, JJ., dissenting.

In Bank.

Appeal from Superior Court, Los Angeles County; John Beardsley, Judge.

Action by Addie Lillian Beals against the City of Los Angeles, a municipal corporation, and others, to restrain defendants from closing a public alley pursuant to ordinances enacted by the city and to have such ordinances declared void. The trial court sustained a general demurrer without leave to amend, and, from a judgment dismissing her action, plaintiff appeals.

Judgment reversed.

Prior opinion 116 P.2d 489.

Chas. Lloyd Clearman, of Tujunga, and E. H. Delorey, of Los Angeles, for appellant.

Ray L. Chesebro, City Atty., Frederick von Schrader, Asst. City Atty., S. B. Robinson, Chief Asst. Atty., for Department of Water and Power, Francis H. Lindley, Asst. City Atty., and G. Ellsworth Meyer and Alfred H. Driscoll, Deputy City Attys., all of Los Angeles, for respondents.

C. C. Carleton, Frank B. Durkee, C. R. Montgomery, and Robert E. Reed, all of Sacramento, amici curiae for respondent Department of Public Works.

GIBSON, Chief Justice.

In this action plaintiff seeks to restrain defendants from closing a public alley pursuant to ordinances enacted by the City of Los Angeles and to have such ordinances declared void. The trial court sustained a general demurrer without leave to amend.

The ordinances were adopted under the Street Opening Act of 1889, p. 70 et seq., and provide for the partial vacation of an alley running in an easterly and westerly direction between Boylston and Corto Streets, which run north and south. Plaintiff's property is located on the corner of First and Corto Streets and abuts upon that portion of the alley which remains open. The closing of the alley shuts off plaintiff's access to Boylston Street by way of the alley but leaves access to Corto Street. Defendants own all of the remaining property within the block adjoining and contiguous to the alley. The Department of Water and Power instituted the proceedings for vacation by petitioning the city council which passed and published an ordinance declaring its intention to vacate a portion of the alley. Plaintiff filed a protest on the grounds that public interest and convenience did not require such vacation. The city council after hearing overruled her objections, and passed a second ordinance ordering the alley closed. This ordinance provided that "as it appears * * there are no damages, costs or expenses arising out of said work, and that no assessment is necessary * * * no commissioners are appointed to assess benefits and damages."

It is alleged that "defendants, without authority of law and without regard to the rights of this plaintiff, have entered in and upon the said alley and caused an excavation to be made therein of approximately 54 feet length, 10 feet width and 14 feet depth, rendering passage along the same impossible, and plaintiff is informed and believes and therefore alleges the fact to be that the defendants intend to allow said excavation to remain until the defendants begin the erection of a building in the near future upon the said alley. * * * Plaintiff further alleges that ingress and egress to her property over and on that part of the alley appropriated by the defendants has been destroyed; that the existence of the excavation and the fence around it renders the same impassable; that the contemplated building of the defendants will forever close the said alley; * * *"

In contending that the complaint states a cause of action, plaintiff argues: (1) That she has a sufficient property interest to challenge the vacation of the alley, (2) that the ordinances are void because public interest and convenience did not require the vacation, and that the council's determination with regard thereto was fraudulent, (3) that the ordinances are void because commissioners were not appointed to assess damages, and (4) that since no provision is made for the ascertainment and payment of damages, her property is being taken for a public use without compensation in violation of article I, section 14 of the California Constitution.

[1, 2] Although plaintiff's property does not abut upon the vacated portion of the alley, she is deprived of all access by means of the alley to the next intersecting street to the west, thus leaving the property in a cul-de-sac. This brings plaintiff within the rule announced in Bacich v. Board of Control, Cal.Sup., 144 P.2d 818. It was there held that the owner of property abutting upon a public street has a property right or easement of ingress and egress extending in both directions to the next intersecting street. Defendants urge that an action will not lie for the closing of a street unless access to the abutting owner's property is *entirely* cut off, whereas here the property is a corner lot, abutting upon two streets in addition to the alley. The possibility of access over these adjoining streets, however, is not ground for holding that plaintiff has no property right or easement in the alley, or that it may be taken or damaged without payment of compensation. Illinois Central R. Co. v. Moriarity, 135 Tenn. 446, 186 S.W. 1053; Kaje v. Chicago, St. P., M. & O. Ry. Co., 57 Minn. 422, 59 N.W. 493, 47 Am.St.Rep. 627; Burton v. Freund, 243 Mich. 679, 220 N.W. 672; cf. Hargro v. Hodgdon, 89 Cal. 623, 26 P. 1106. The Illinois Central case, which involved a corner lot, held that the owner's "easement of access extends along any street or alley upon which his property abuts, in either direction, to the next intersecting street." 186 S.W. at page 1055. In the Kaje case, supra, the court noted that an alley is generally used for purposes different from a front entrance. Symons v. City & County of San Francisco, 115 Cal. 555, 42 P. 913, 47 P. 453, and Wolff v. City of Los Angeles, 49 Cal. App. 400, 193 P. 862, cited by defendants, do not support their position, because in those cases intersecting streets intervened between the property involved and the obstructions. Defendants rely upon a statement in Brown v. Board of Supervisors, 124 Cal. 274, at page 281, 57 P. 82, at page 84, to the effect that: "It has been held in other states that even the entire closing of a street upon which property abuts does not give to the owner a right of compensation, so long as there are other public streets by which he has access to his land. The mere inconvenience thereby experienced is not a damage for which he is entitled to compensation." As pointed out in the Bacich case, supra, 144 P.2d 818, this discussion was unnecessary to the decision in the Brown case. Hitch v. Scholle, 180 Cal. 467, 469, 181 P. 657, 658, held that a complaint in an action to enjoin the obstruction of a public highway was "vitally defective for the reason that it fails to allege that the highway in ques-

tion constitutes the only mode of ingress and egress to and from the lands of the plaintiff." Insofar as this language is inconsistent with our decision here it is disapproved. We conclude, therefore, that plaintiff has a sufficient property interest to maintain this action.

Plaintiff next contends that the ordinances are invalid. The Street Opening Act of 1889, under which the proceedings were taken, contemplates the exercise of the powers of eminent domain. Stats.1889, p. 70, now Streets and Highways Code, § 3200, et seq., St.1941, p. 765 et seq. It authorizes the city council to order the opening or closing of any street whenever public interest or convenience so require. Provision is made therein for publication of notice of intention to vacate, for filing of protests and hearing thereon, and for the appointment of commissioners to assess benefits and damages. If the owner of property to be taken or damaged refuses to accept the award made by the commissioners, proceedings may be taken for condemnation under the right of eminent domain.

[3, 4] The act of the council in ordering the vacation of a street is legislative in character and is conclusive both as to the necessity or convenience of the improvement and as to the extent of the district to be benefited thereby. Brown v. Board of Supervisors, 124 Cal. 274, 57 P. 82; Cohen v. City of Alameda, 183 Cal. 519, 191 P. 1110; see, also, People v. City of Los Angeles, 62 Cal.App. 781, 786, 218 P. 63; 4 McQuillin, Municipal Corporations, 2d Ed. 1928, p. 285, Id., 1941 supp., 608; 25 Am. Jur. 418. The finality of such a legislative determination is subject to an exception, however, where the finding of public convenience and necessity results from fraud or collusion between the city council and private landowners. People v. City of Los Angeles, 62 Cal.App. 781, 786, 218 P. 63; Erro v. City of Santa Barbara, 123 Cal. App. 508, 11 P.2d 890; cf. People v. City of Oakland, 96 Cal.App. 488, 492, 274 P. 438; Brydon v. City of Hermosa Beach, 93 Cal.App. 615, 624, 270 P. 255. Plaintiff contends that the complaint alleges facts showing fraud and collusion and that she is therefore entitled to a judicial determination of the question of public convenience and necessity. The allegations on this point may be summarized as follows: That the defendant Department of Water and Power operates its business in a proprietary capacity and is to be considered a private corporation; that the vacation of the alley was sought solely by the Department which petitioned therefor on the grounds, among others, that a valuable property right of the defendant might be utilized thereby and particularly that permanent buildings might be erected on the land; that the Department is the owner of all land abutting the portion of the alley to be closed with the result that it will acquire title to the land abandoned; that the proposed vacation is solely for the benefit of the Department; and that public necessity and convenience do not require the closing of the alley, but, on the contrary, require that it remain open. These allegations are not sufficient to show fraud or collusion. The fact that the Department of Water and Power requested the closing and that it was benefited by the vacation does not establish fraud or collusion. Brown v. Board of Supervisors, 124 Cal. 274, 282, 57 P. 82; People v. City of Oakland, 96 Cal.App. 488, 274 P. 438; People v. City of San Rafael, 95 Cal.App. 733, 739, 273 P. 138. As the court said in People v. City of Oakland, supra, 96 Cal.App. at page 497, 274 P. at page 442: "The face of the record does not show the purpose to be one of private gain—at most all that can be said is that the private benefit * * * was incidental to public welfare. This does not constitute legal fraud." See, also, Poneschil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 P. 316; Phelps v. Stott Realty Co., 233 Mich. 486, 207 N.W. 2. The allegations in this complaint amount to no more than a statement of plaintiff's conclusion that the council erroneously determined that the vacation was required in the interest of the public.

[5] Plaintiff's contention that the ordinances are invalid because of the failure of the city council to appoint commissioners to ascertain her damages cannot be sustained. The ascertainment and payment of damages under the act is not a jurisdictional prerequisite to the authority of the city council to order work done thereunder and the failure to appoint commissioners could not affect the validity of the ordinances. Brown v. Board of Supervisors, 124 Cal. 274, 57 P. 82; cf. Bigelow v. Ballerino, 111 Cal. 559, 565, 44 P. 307; Curran v. Shattuck, 24 Cal. 427, 434.

[6-8] We agree, however, with plaintiff's contention that the complaint states a

cause of action. Closing of the alley results in the taking or damaging of private property for a public use. It is settled that the ascertainment and payment of damages is a condition precedent to the right of a city to do public work which will destroy or damage private property. Wilcox v. Engebretsen, 160 Cal. 288, 116 P. 750; Geurkink v. City of Petaluma, 112 Cal. 306, 44 P. 570; Bigelow v. Ballerino, 111 Cal. 559, 44 P. 307; Grigsby v. Burtnett, 31 Cal. 406; see Duncan v. Ramish, 142 Cal. 686, 694, 76 P. 661. The obligation to make compensation arises from the constitutional provision that "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *." Cal.Const., art. I, sec. 14. In Bigelow v. Ballerino, 111 Cal. 559, 564, 44 P. 307, 309 which also involved the vacation of an alley, it is stated that, "The constitutional rights of an owner of private property which is sought to be taken or damaged for public use are two: First, the right to compensation; and second, the right to have that compensation made or paid into court before his property is taken or injuriously affected. * * * the property owner may rest secure in the protection which the constitution affords him that his property shall not be taken or damaged without compensation first made. It is not incumbent upon him to demand that the authorities shall respect his rights; the duty is theirs to work no unlawful invasion of them." Accordingly, where a taking is attempted under the power of eminent domain without any provision being made for compensation an injunction will lie. Wilcox v. Engebretsen, supra; O'Connor v. Southern Pac. R. Co., 122 Cal. 681, 55 P. 688; Rudel v. Los Angeles County, 118 Cal. 281, 50 P. 400; Geurkink v. City of Petaluma, supra; Scott v. Dyer, 54 Cal. 430; Grigsby v. Burtnett, supra; Curran v. Shattuck, 24 Cal. 427; McCann v. Sierra County, 7 Cal. 121; Felton Water Co. v. Superior Court, 82 Cal.App. 382, 256 P. 255; Stone v. Cordua Irr. Dist., 72 Cal. App. 331, 237 P. 554; Marblehead L. Co. v. Superior Court, 60 Cal.App. 644, 213 P. 718; Schaufele v. Doyle, 86 Cal. 107, 24 P. 834; see Duncan v. Ramish, supra.

[9] The courts may refuse to issue an unqualified injunction where public use has intervened. Hillside Water Co. v. Los Angeles, 10 Cal.2d 677, 76 P.2d 681; Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486; Collier v. Merced Irr. Dist., 213 Cal. 554, 2 P.2d 790; Newport v. Temescal Water Co., 149 Cal. 531, 87 P. 372, 6 L.R.A., N.S., 1098; Felton Water Co. v. Superior Court, 82 Cal.App. 382, 256 P. 255. It is not contended by defendants, however, that the complaint in this case shows on its face that a public use has attached in such a manner as to prevent injunctive relief.

[10] In ordering the closing of the alley, the city council concluded "it appears * * * there are no damages * * * arising out of said work." A property owner cannot, however, be deprived of the constitutional guarantee of compensation and prepayment by the decision of a city council that he is not damaged. Wilcox v. Engebretsen, 160 Cal. 288, 116 P. 750. In the Wilcox case, under a statute similar to the act of 1889, the city council ordered a change of grade of a street upon which plaintiff's property fronted. The council confirmed a report by commissioners that plaintiff would not be damaged by the improvement. In an action brought to restrain the city from proceeding, the court expressly rejected the contention that plaintiff was bound by the report declaring he was not damaged, and concluded that plaintiff was entitled to enjoin the proposed work until his damages had been lawfully ascertained and paid in the manner prescribed by the Constitution. In Bigelow v. Ballerino, 111 Cal. 559, 44 P. 307, the city council passed an ordinance vacating an alley upon which defendant's property abutted and made no provision for the ascertainment and payment of damages. It was there held that defendant retained the easement of a right of way over all of the land formerly within the alley for the necessary and convenient use of his property and that the vacation or closing was without effect as to the owner until prepayment of compensation. Cf. Geurkink v. City of Petaluma, supra, 112 Cal. at pages 309, 310, 44 P. 570; Schaufele v. Doyle, supra, 86 Cal. at page 109, 24 P. 834.

The judgment is reversed.

SHENK and CARTER, JJ., concurred.

SCHAUER, Justice.

I concur in the judgment, and in the opinion except as to the holding that the allegations of the complaint are insufficient as a basis for proof of fraud and collusion.

EDMONDS, Justice.

I concur in the judgment for the reasons stated in my concurring opinion in Bacich v. Board of Control, 144 P.2d 818.

TRAYNOR, Justice.

I dissent for the reasons set forth in my dissenting opinion in Bacich v. Board of Control et al., 144 P.2d 818.

Rehearing denied: EDMONDS and TRAYNOR, JJ., dissenting.

62 Cal.App.2d 429

STEWART v. ABERNATHY et al.

Civ. 14025.

District Court of Appeal, Second District, Division 3, California.

Jan. 21, 1944.

Hearing Denied March 20, 1944.

1. Partition 🔑114(2)

Purpose of statute pertaining to costs and attorney fees in partition actions was to place burden of expense for services of counsel upon those parties sharing in benefits from such services, who are, ordinarily, the owners. Code Civ.Proc. § 796.

2. Partition 🔑56

The statute requiring a defendant in an action for partition to controvert such allegations as he does not wish to be taken as admitted and, if he claims a lien, to state date and character of lien, amount remaining due, and whether he has any additional security is mandatory. Code Civ.Proc. § 758.

3. Partition 🔑114(5)

In partition action, services of attorneys for defendant lien claimant in establishing that date of maturity of lien was such that obligation was not barred by limitations was not for "common benefit" of owners within the statute so as to authorize award of attorney fees to lien claimant Code Civ.Proc. § 796.

See Words and Phrases, Permanent Edition, for all other definitions of "Common Benefit".

4. Appeal and error 🔑843(2)

Where trial court, after appeal was taken, made nunc pro tunc order correcting final decree reducing award of costs to defendants from $40 to $4, which amount conformed with findings, issue that judgment for costs was not supported by finding became "moot".

See Words and Phrases, Permanent Edition, for all other definitions of "Moot Issue".

5. Judgment 🔑326

A nunc pro tunc order is proper method of correcting a clerical error in a judgment.

6. Partition 🔑114(1)

The statutory provision pertaining to costs in partition action is exclusive. Code Civ.Proc. § 796.

7. Partition 🔑114(5)

In partition action, where costs of lien claimant were incurred in establishing that lien, which was set out in complaint, was not barred by limitation, costs were not incurred for "common benefit" of owners within the statute and were not allowable to lien claimant. Code Civ.Proc. § 796.

Appeal from Superior Court, Los Angeles County; Benjamin J. Scheinman, Judge.

Action by Arthur T. Stewart against David P. Abernathy and others for partition, wherein defendants Ida M. Maire and Frank J. Maire appeared and defended. From that portion of decree which allowed defendants costs and attorney's fees, plaintiff appeals.

Reversed.

Paul Stewart, of Los Angeles, for appellant.

Eugene C. Campbell, of Long Beach, for respondent.

PARKER WOOD, Justice.

Plaintiff appeals from "that portion of the final decree in partition" wherein it was ordered that the referee "pay to defendant Ida A. Maire $40.00 for her costs and $75.00 for fee for her attorney."

Plaintiff and Rachael J. Abernathy, deceased, each owned an undivided one-half interest in two parcels of real estate, one improved and one unimproved. The improved property was encumbered with a deed of trust under which Ida A. Maire was the beneficiary, and the Title Insurance and Trust Company was trustee. Plaintiff commenced this action for partition of both parcels on December 12, 1941, naming as defendants the administrator of decedent Abernathy's estate, the Title Insurance and Trust Company, Ida A. Maire and her husband Frank J. Maire. Ida A. Maire, hereinafter called defendant, and her husband were the only defendants who answered the complaint. The complaint alleged that there was an unpaid balance on the deed of trust of approximately $385.26 which became due, together with interest thereon at the rate of 7 per cent per annum, on November 23, 1935, and prayed for costs, reasonable attorney's fees, and that amounts and priorities of liens and owners be determined and paid accordingly. Defendant's answer denied that the balance of $385.26 became due November 23, 1935; alleged that the parties to the transaction had extended the time of payment of the note for a period of 3 years from November 23, 1935, by a duly executed written agreement which was recorded July 15, 1935; alleged further that that balance, together with the interest thereon, had been due and unpaid since November 23, 1941; and prayed for such balance, interest at the rate of 7 per cent per annum from November 23, 1941, costs, disbursements, and reasonable attorney fees. The court found that the deed of trust appeared of record; that there was due and owing $385.26 thereon, together with interest at the rate of 7 per cent per annum from November 23, 1941, to the time of payment; and also found the property incapable of physical division and named a referee to sell same. The referee sold the unimproved property (for $25) and the improved property (for $1000) to plaintiff, the highest bidder. Defendant's lien was paid. The final decree ordered that the balance remaining in the referee's hands be distributed equally between plaintiff and the administrator of the Abernathy estate after certain payments had been made which included $150 attorney fees and $12.50 costs for plaintiff, and $75 attorney fees and $40 costs for defendant.

Plaintiff contends that the decree is against law in that the services of defendant's attorney were not for the "common benefit" as required by law and, therefore, not chargeable against the owners of the property partitioned.

[1-3] The only provision in the law under which a plaintiff or defendant in an action for partition is entitled to an allowance for counsel fees is in section 796 of the Code of Civil Procedure, wherein it provides: "The costs of partition, including *reasonable counsel fees,* expended by the plaintiff or either of the defendants, *for the common benefit* * * * must be paid by the parties respectively entitled to share in the lands divided * * *." (Italics added.) The statute does not expressly state for whose common benefit the fees must be expended. It is apparently defendant's position that section 796 does not contemplate the owners of the land exclusively in requiring that the services must be for the "common benefit." The purpose of that section was to place the burden of the expense for services of counsel upon those parties sharing in the benefits realized from such services, and that burden is specifically placed upon the parties "entitled to share in the lands divided," that is, the owners. It remains then to be determined whether the services of defendant's attorney contributed anything of benefit to the cotenants herein. Defendant asserts that plaintiff chose to make her a party defendant and she was required to employ an attorney to file an answer to controvert such allegations of the complaint as she did not wish to admit; and that in setting up her lien she assisted in the successful completion of the partition proceedings, and delivery of an unemcumbered title to the purchaser, thereby performing services for the common benefit. Plaintiff had knowledge of defendant's lien on the property, and was under a statutory duty to set it forth in his complaint. Section 753 of the Code of Civil Procedure requires that a complaint for partition *must* set forth the interests of all persons in the property as far as known to plaintiff. Likewise, defendant was under a statutory duty to answer and deny any allegations in the complaint which she did not wish to be deemed admitted. Section 758 of the Code of Civil Procedure requires that a defendant to an action for partition must controvert such allegations of the complaint as he does not wish to be taken as admitted and, if he claims a lien, that he state the date and character of the lien, the amount remaining due, and whether he has any additional security therefor. This section is mandatory. Ritzman v. Ritzman, 1923, 190 Cal. 505, 506, 213 P. 493. The allegations in the complaint and in the answer were not in conflict as to the balance due on the trust

deed, but were in conflict as to the date of maturity—the complaint showing a date which might indicate that the obligation was barred by the statute of limitations. Although the court found that the allegation in defendant's answer in this regard was correct, the establishment of that fact was not for the common benefit of the parties who shared in the partition of the property, but rather for the benefit of defendant. In the case of Capuccio v. Caire, 1929, 207 Cal. 200, at page 208, 277 P. 475, at page 478, 73 A.L.R. 8, the court said in dividing the plaintiff's expenses among the cotenants in a partition action: "It was doubtless for the purpose of making a just and equitable provision for the division of the expenses entailed either by the plaintiff or by any one or more of the defendants in pursuing the required courses for the partition of the property involved in said action whenever such expenditures could be shown to have been made for the common benefit that section 796 of the Code of Civil Procedure was formulated and embraced in said title thereof. * * * It is not to be understood that in so holding we are deciding that the cost of litigating purely controversial issues arising in such actions between parties thereto who have their own counsel and are incurring their own costs in the effort to sustain their adverse claims shall be chargeable or recoverable against the losing party or parties to such controversy. It is evident that such was not the intent of the framers of section 796 [of the] Code of Civil Procedure, since it is expressly provided therein that it is only when the costs, including counsel fees entailed in said action, shall be found to have been expended for the common benefit, that they shall be chargeable or recoverable by whichever of the parties, plaintiff or defendant, shall have so expended the same." See also Capuccio v. Caire, 1932, 215 Cal. 518, 525, 11 P.2d 1097. The law requires certain procedural steps in an action for partition, and makes certain persons necessary parties, and it is to be noted that the only instance in which any party is entitled to attorney fees is where, and to the extent, the services of the attorney for such party are determined to be for the "common benefit." Whether the services are for the common benefit must be decided upon the facts and circumstances in each particular case. The lien herein had aready been set forth by plaintiff in his complaint. Counsel for defendant was protecting defendant's interests in establishing that the statute of limitations had not run and the lien was still legally effective, but he performed no services which were for the common benefit of the parties interested as owners in the property to be partitioned. As stated above, the purpose of the statute is to divide the cost of the legal services among the parties benefitted by the result of the proceeding. The record does not show that the determination of the partition proceeding herein was in any way more advantageous to the owners of the property as a result of services performed by defendant's counsel.

[4, 5] The issue presented by appellant's further contention, that the judgment awarding defendant $40 costs is not supported by the findings, has become moot. Since this appeal was taken, the trial court made a nunc pro tunc order correcting the final decree so that it read $4, which amount conforms with the findings of the court. A certified copy of said order has been filed in this court. Such an order is a proper method of correcting a clerical error in a judgment. In the case of Lauchere v. Lambert, 1930, 210 Cal. 274, at page 278, 291 P. 412, at page 414, the court stated: "'Nor is the right of the lower court to amend suspended or impeded by an appeal where an amendment does not affect any substantial rights of the appellant, and consists of the correction of a clerical mistake appearing upon the face of the record. It is true that the court by the appeal loses jurisdiction of the cause for the purpose of appeal, but it does not lose jurisdiction of its records.'" In the present proceedings the record fully supports the conclusion that the error was a clerical one.

[6, 7] Plaintiff contends further that the $4 allowed as costs was not for the common benefit, and therefore should not have been allowed. It is indicated in Harrington v. Goldsmith, 1902, 136 Cal. 168, 68 P. 594, and Harvey v. Stafford, 1930, 106 Cal.App. 307, 288 P. 1085, that the provision in section 796 of the Code of Civil Procedure as to costs of partition is exclusive. As above shown, said section provides in part that: "The costs of partition * * * expended * * * for the common benefit * * * must be paid by the parties respectively entitled to share in the lands divided * * *." The costs and counsel fees of defendant herein were incurred under the same circumstances. The statements herein that counsel fees were not

for the common benefit are applicable to the matter of costs. The costs were not for the common benefit and should not have been allowed.

No counsel fees for services on this appeal are allowed to plaintiff.

The portion of the judgment granting costs and counsel fees to defendant Maire is reversed.

SHINN, Acting P. J., and SHAW, Justice Pro tem., concur.

Hearing denied; CURTIS and CARTER, JJ., dissenting.

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62 Cal.App.2d 542

BUHL et al. v. WOOD TRUCKING LINES, Inc., et al.

Civ. 12559.

District Court of Appeal, First District, Division 1, California.

Jan. 26, 1944.

Rehearing Denied Feb. 25, 1944.

Hearing Denied March 23, 1944.

1. Trial 🔑315

A verdict pursuant to an agreement to vote for an amount calculated by averaging sums favored by individual jurors is improper as a "verdict arrived at by chance".

See Words and Phrases, Permanent Edition, for all other definitions of "Verdict Arrived at by Chance".

2. Appeal and error 🔑1015(5)

Conflict in affidavits as to whether a verdict was arrived at by quotient process, or whether a different sum was arrived at after discussion and subsequent vote was for trial court on motion for new trial, whose decision could not be disturbed by appellate court.

Appeal from Superior Court, Alameda County; Leon E. Gray, Judge.

Action by Mary A. Buhl and Arthur Buhl against the Wood Trucking Lines, Inc., and others. From an order granting motion of defendants Wood Truck Lines and Jack Cole for new trial after verdict of jury for plaintiffs, plaintiffs appeal.

Affirmed.

Myron Harris, William H. Older, Daniel Rygel, and John Jewett Earle, all of Oakland, for appellants.

Appelbaum & Mitchell, of Oakland, for respondents.

WARD, Justice.

This is an appeal by plaintiffs from an order granting a new trial to defendants Wood Truck Lines, Inc. (sued herein as The Wood Trucking Lines, Inc., a corporation), and Jack Cole after verdict of a jury in plaintiffs' favor.

The parties to the appeal have stipulated and agreed that the order granting a new trial was based solely upon the ground of misconduct of the jury, in that it reached its verdict by resort to chance, and further stipulated that the respondents do not attempt to justify the order upon any other ground.

The defendants in support of their motion for a new trial presented affidavits of five members of the jury "that all of the jurors who joined in the verdict in the said cause voted for the verdict in favor of the plaintiffs in an amount to be calculated by an average of the sums which were voted by all the jurors in said cause; that before arriving at the sum to be allowed the said plaintiffs, the jurors agreed that the amount so written down on said piece of paper by each juror would be added together and would then be divided by twelve and that the average was to be the amount of the verdict; that in determining the amount of said verdict in favor of plaintiffs Mary A. Buhl and Arthur Buhl, each of the jurors who joined in the verdict in said cause wrote on a piece of paper the amount which he or she desired to award the said plaintiffs and the total of said sums was then divided by twelve, and it was by this method that the amount of the verdict was reached; * * *"

In opposition to the motion plaintiffs presented the affidavits of eight members of the jury, including those of two who made the foregoing affidavit. Each deposed and said that "it was suggested by one of the jurors, as a basis for reaching an agreement if possible, that each juror write down the amount that he favored and that these sums be added together and divided by the number participating; this was done; the affiant cannot now remember the exact amount thus resulting, but affiant recalls that it was forty-four odd hundred dollars; that thereafter affiant proposed the sum of

$4000.00 as fair and equitable; that a vote was taken on the sum of $4000.00 and the vote of the jury was eleven affirming and one dissenting. This was the method by which the verdicts were arrived at in the Buhl cases."

There was also presented in opposition to the motion the affidavit of W. H. Older, one of the attorneys for plaintiffs setting forth a conversation had by him with one of the jurors, who related to him the circumstances under which the verdict was reached and which are substantially the same as those contained in the other affidavits filed on behalf of plaintiffs.

The affidavits thus set forth constitute the whole of the evidence upon which the motion for a new trial was submitted and decided. It is the contention of the appellants that these affidavits taken in their entirety present no real conflict; that those used by the defendants are in such general language as to amount but to conclusions, and that the facts and details upon which such conclusions are based are disclosed in affidavits presented by appellants, in which behalf they point out that two of the jurors who subscribed to the account of the proceedings as given in the affidavits offered by the respondents also endorse unreservedly the detailed account contained in those presented by the appellants, and this without retracting anything contained in the affidavits already signed. They further contend that the verdict rendered was not the sum of the amounts suggested by the individual jurors divided by the number of jurors participating, but a figure thereafter proposed and voted upon.

The position of the respondents on the appeal is that the affidavits in fact create a conflict, and that this court, therefore, may not disturb the order made by the trial court.

[1] An agreement to vote for an amount calculated by averaging the sums favored by the individual jurors is a verdict arrived at by chance. In Will v. Southern Pacific Co., 18 Cal.2d 468, 478, 116 P.2d 44, 49, the court said: "* * * it is not improper for jurors to calculate an average amount as a basis for discussion if there is a later consideration of the amount and a vote upon it, even if they agree upon that amount. Griffith v. Oak Ridge Oil Co., 190 Cal. 389, 212 P. 913; McDonnell v. Pescadero Stage Co., supra [120 Cal. 476, 52 P. 725]; Ham v. County of Los Angeles, 46 Cal.App. 148, 189 P. 462." See Balkwill v. City of Stockton, 50 Cal.App.2d 661, 123 P.2d 596. It is upon the rule thus announced that plaintiffs base their appeal. Their statement that there was no conflict in the facts does not bear scrutiny. Their affidavits, while not denying that the amount of the judgment was reached by averaging the different sums, aver additional facts in conflict with those in the affidavits submitted by defendants.

[2] The trial court was called upon to determine whether the amount of the verdict was fixed by averaging the different amounts or whether, after discussion and subsequent vote, a different sum was arrived at. A similar factual background appears in Ham v. County of Los Angeles, 46 Cal.App. 148, 154, 189 P. 462, 464, where the court said: "It is true, in the case before us, that plaintiffs presented to the court, on the motion, counter affidavits of these same jurors, in which they modify their former statements, and allege that certain averments therein contained were inadvertently made; but these counter affidavits contain no denial that there was a previous agreement to abide by the average sum arrived at, or that they were influenced in adopting such amount as their verdict by such an agreement. They do state, however, that there was deliberation and discussion after taking this average, before they finally voted to adopt it. But it is not the province of this court to determine whether the facts as related in the counter affidavits are true; nor is it necessary to determine whether, if true, the amended affidavits avoid the attack on the verdict."

If on the same facts the trial court herein had denied a new trial, this court could have affirmed that order on the ground the evidence showed that the amount of the judgment, although arrived at substantially by the quotient process, was discussed, voted upon and represented the individual and collective views of at least three-fourths of the jurors. Appellants have failed to convince us that as a matter of law there was not such a conflict in the affidavits presented on the motion that but one conclusion could be reached. Spadoni v. Maggenti, 121 Cal.App. 147, 8 P.2d 874; Balkwill v. City of Stockton, supra.

The order appealed from is affirmed.

PETERS, P. J., and DOOLING, Justice pro tem., concur.

62 Cal.App.2d 418

In re DEAN'S ESTATE.

LINDSAY et al. v. DEAN.

Civ. 14068.

District Court of Appeal, Second District, Division 1, California.

Jan. 19, 1944.

1. Wills ⚷293(4)

In proceeding by testatrix' husband contesting probate of alleged lost will and codicil, evidence that married life of testatrix and husband had not been congenial was material.

2. Wills ⚷302(8)

Evidence supported finding that alleged lost will and codicil were in existence at time of testatrix' death, so as to authorize their being probated upon petition of testatrix' niece, which petition was opposed by testatrix' husband.

◆

Appeal from Superior Court, Los Angeles County; H. C. Shepherd, Judge pro tem.

Proceeding in the matter of the estate of Martha Dean, also known as Martha Metzger Dean, deceased. Frances Lindsay filed a petition for the probate of an alleged lost or destroyed will and codicils thereto, and a contest and objection thereto was filed by Dr. Lloyd E. Dean. From a decree admitting alleged lost or destroyed will to probate, the contestant appeals.

Affirmed.

Sherman & Sherman and Glenn M. Still, all of Los Angeles, for appellant.

Lane & Lane, of Glendale, for respondents.

DORAN, Justice.

This is an appeal by contestant from a decree admitting an alleged lost or destroyed will to probate.

Martha Metzger Dean died on or about January 30, 1942. A will dated January 27, 1942, was admitted to probate. Virginia Lindsay, deceased's sister, and Dr. Lloyd E. Dean, deceased's husband, qualified as executors. July 8, 1942, Frances Lindsay, daughter of Virginia Lindsay, filed a petition for the probate of an alleged lost or destroyed will and codicil thereto. A contest and objection was filed by Dr. Lloyd E. Dean. The issues raised by the answers to the contest and objections were duly tried and the court found as follows.

"I. The Court finds that the said Martha Metzger Dean did on or about the 6th day of October, 1932, make and execute her Last Will and Testament, a copy of which is on file in this proceedings and is made a part of Proponent's Petition for Probate marked 'Exhibit A'; that at the time said Will was executed the said Martha Metzger Dean was over the age of eighteen years, and was of sound and disposing mind, and was not acting under menace, duress, fraud or undue influence; that said will was in writing signed by the Testatrix, and attested by two subscribing witnesses who signed at the request of testatrix, and in her presence and in the presence of each other after she declared the same to be her last will and testament;

"II. That decedent kept the original of her said will of October 6, 1932, in her safe deposit box in the Bank of America, Glendale Branch; that for more than ten years prior to the death of decedent Virginia H. Lindsay, sister of decedent, who resided in Burt, New York, was the record holder of said safe deposit box as a joint tenant with decedent, but that at no time did she have personal access thereto; that Eleven (11) days prior to the death of decedent, to-wit, on January 19, 1942, while decedent was in the hospital, she permitted her husband, contestant herein, Lloyd E. Dean, to have access to said safe deposit box; that on or about January 20, 1942, said Lloyd E. Dean transferred said safe deposit box and the contents thereof to his own name exclusively; that on four or more occasions between the 19th day of January, 1942, and the date of death of decedent, January 30, 1942, and on numerous occasions thereafter, Contestant, Lloyd E. Dean, entered the said safe deposit box; that the last entry of decedent in said safe deposit box was on January 13, 1942, before she went to the Hospital; that decedent thereafter had no access to said safe deposit box;

"III. That on two or more occasions between the 20th day of January, 1942, and the date of death of decedent on January 30, 1942, decedent stated she had a will and that the same was in her safe deposit box in the Bank of America; that between January 20, 1942, and January 30, 1942, decedent had in her possession a copy of said Last Will and Testament of October 6, 1932, and referred to the same as a copy of her will, and stated she wanted to make some changes therein;

"IV. The Court further finds that at the death of decedent on January 30, 1942, the said Will of October 6, 1942 (sic), was in existence, and that the same had not been revoked or cancelled; that said original Will of October 6, 1932, was lost, or fraudulently destroyed by contestant, Lloyd E. Dean, sometime subsequent to the death of decedent; that after decedent's death demand was made on contestant, Lloyd E. Dean, to produce said original will of October 6, 1932, but that he failed and refused to produce the same;

"V. That the provisions of said original Will of October 6, 1932 were clearly and distinctly proven by two creditable witnesses, to-wit, C. H. Hasbrouck, an attorney at law, who drew said will, Helen Burland, the typist who wrote the said original and duplicate carbon copy of said will;

"VI. That at the date of death of decedent she left a condicil to aforesaid Will of October 6, 1932, dated the 3rd day of July, 1941, which codicil is wholly written, dated and signed in the handwriting of deceased; that the said codicil was in existence at the date of death of decedent, and has heretofore been filed with the Clerk of this Court;

"VII. That at the date of death of decedent she left a Will dated the 27th day of January, 1942, which was heretofore admitted to probate on March 13, 1942, and Letters Testamentary thereon were issued to Virginia H. Lindsay and Lloyd E. Dean;

"VIII. The Court further finds that all of the allegations of Proponent's Petition for Probate on file herein are true; that all of the allegations contained in Contestant's First, Second and Third Affirmative grounds of contest and Objections are untrue."

The findings correspond substantially to the allegations of the petition.

Appellant submits, under the heading "Preliminary Statement" that: "This appeal raises the question of the sufficiency in law and fact of the evidence upon which the decree was based admitting said alleged Will to probate and also questions relating to the insufficiency of the pleadings and the evidence." Under the heading "Argument Upon the Issues Upon this Appeal", appellant divides the argument into four "issues". Without reciting them, it is sufficient to note that they together present but two questions, viz: 1. Does the evidence sustain the findings? 2. Do the findings support the judgment? And there is no other question presented by the appeal.

In that connection, it should be emphasized at the outset that the court found the will in question to be in existence at the time of the testator's death and that the same had not been revoked or cancelled. The record reveals that decedent evidently had in mind, during the last few days preceding her death, making some changes in her will. During that time she had in her possession a carbon copy of said will which by interlineation and deletion warranted a conclusion by the trial court that, although a few changes in bequests of comparatively minor importance were contemplated, nevertheless such changes indicated no intention to change the general scheme of distribution. Moreover, the fact remains, which the court was bound to accept, that no such changes were effected in another will and only valid evidence could be considered for the purpose of carrying out the testator's intention.

The testimony of Dr. Dean raised a conflict in the evidence, but that there is sufficient evidence to support the findings, there can be no question. Briefly, it is as follows: The deceased declared several times before her death that her will was in the bank, in the safety deposit box; that the Bank of America had her will. Evidence of this declaration is to be found in the testimony of several witnesses. In connection with the copy of the will hereinbefore mentioned, decedent referred to it as the copy of her will. Decedent asked her husband, Dr. Dean, several times before her death to have a lawyer come to her room for the purpose of making some changes in her will. In part, Dr. Dean's testimony in that regard is as follows:

"Q. * * * When did you first learn that the Bank of America was designated as the executor in the 1932 document? A. I think it was—Well, it was sometime up there while Mrs. Dean was ill at the sanitarium. I can't say just what time or when it was precisely.

"Q. Didn't you have some discussion with Mr. Kihorny about that? A. Yes, when she wanted to have a new will made out.

"Q. When did you have this talk with Mr. Kihorny in which he— A. It must have been about the 26th or 27th of January, 1942.

"Q. And how did Mr. Kihorny know that the Bank of America was executor? A. I think he said Martha told him.

"Q. And he informed you? A. Well, I don't recall that.

"Q. Well, when was the first knowledge you had, who informed you? A. It was right around there, I think. Martha stated herself the Bank of America was executor.

"Q. You had a talk with Martha with reference to this will? A. Not specifically.

"Q. What did she say? A. She spoke incidentally.

"Q. When did she so speak? A. Well, in the few days preceding the making of this will on January 27th, was when she was wanting to make a will. She wanted to make out an entirely new will.

"Q. Just what did she say to you, doctor? A. She said she would like to have an attorney up when she got strong enough some day to have a new will made.

"Q. Was that all she said? A. I think so. It is about all I recall aside from some indirect statement that the Bank of America was made executor by the terms of the old will.

"Q. Did she call it 'the old will'? A. No, she called it 'her will'.

"Q. She told you that a few days before the 27th of January, 1942? A. Yes, right around in there.

"Q. And she intended to have a lawyer come and make some changes? A. Yes, she wanted him to call when she was stronger.

"Q. Did she ever have a lawyer up? A. She never got strong enough to.

"Q. Isn't it a fact doctor, she did ask you to have an attorney come and you said the attorney was out of town and you couldn't get him? A. I don't recall that.

"Q. Do you recall there was at least three different times when the question of having an attorney come up was discussed in your presence? A. I suppose there were as many as that.

"Q. What was your response? A. My response was I would get him as soon as she was able.

"Q. She wanted him too? A. As soon as she was able.

"Q. Didn't she ask to have him come? A. When she was able. She never told me she was able. Whenever it was mentioned she said, 'Wait, maybe I will be stronger tomorrow.'

"Q. She never made the statement she was not able until the evening of the 28th of January, when she was reading the copy of the will and she said to, 'Take it away and see if I am stronger in the morning?' A. That is what she said. She said, 'Perhaps I will be stronger in the morning and we can have the attorney come over and make a new will.'

"Q. Had she asked you before? A. She intimated she wanted to have an attorney come as soon as she could.

"Q. Didn't she ask you why you didn't have the attorney come? A. No, because that was her own doing. She was the one that was preventing the attorney coming. I was willing and wanted to have him come."

The evidence further reveals that on January 27th Dr. Dean himself prepared a will for decedent which, he testified, was done at her request. It is as follows.

"Glendale Sanitarium
"Glendale, Calif.
"January 27, 1942.

"To Whom It May Concern:

"This is to certify that I, Mrs. Martha Dean, being in my right mind and in possession of my mental faculties, do wish, appoint and ordain my husband—Dr. Lloyd E. Dean, and my sister—Mrs. Virginia Lindsay, to administer all my affairs from now on, and in accordance with their combined best and honest judgment and in accordance with my directions and their knowledge of my wishes as already expressed or as may yet be expressed, to distribute all my remaining worldly goods.

"They will thus constitute my agent and the executors of my estate without bond.

"This is my last will and testament.

"Signed Mrs. Martha Dean

"Witnesses—
"Joseph I. Kihorny
"Pauline Plamondon
"Agnes A. Drake
"Marion E. Lane, R. N."

It is noteworthy, which the trial court in all probability regarded as a material circumstance, that the difference in the two wills redounded to the benefit of Dr. Dean materially. By the original will of 1932 Dr. Dean received only his office furniture and equipment. The estate which consisted of a residence and stocks and bonds was appraised at $15,275.89. There was evidence also that Dr. Dean had years before executed a promissory note in the sum of $6,050 in favor of his wife. Dr. Dean testified with regard to this note as follows:

"Q. By Mr. A. W. Lane: What became of the note? A. I destroyed it at her order.

"Q. When? A. I think about January 27th.

"Q. Where did you find the note? A. In the safety box that she had turned over to me.

"Q. You may state under what circumstances you procured the note from her safety deposit box.

"Mr. Chase: Now—well, I withdraw it. A. Why in looking over the things in the safety deposit box I noticed this note and subsequently when I was up to her room I mentioned it to her. I said, 'Martha, I see you have that note there of $5,800 or $6,000.' I said, 'What do you want done with that?' She said, 'Destroy it,' just two words.

"Q. By Mr. A. W. Lane: Was anyone present? A. I don't recall.

"Q. Isn't a fact, doctor, she asked you to go down to the safety deposit box and get some papers and jewelry and bring up to the hospital room? A. That is right, some jewelry.

"Q. Did you get anything else? A. I don't recall I did.

"Q. Didn't you bring up this note on which her sister was one of the signers? A. I don't think I did at that same time.

"Q. You did bring it up at her request? A. Yes, after I had asked her. I said, 'I suppose you would want Virginia to have the $800.00 note?'

"Q. Did you say that before or after you had destroyed the $6000 note? A. I think it was before; I couldn't say definitely.

"Q. What did she say about that note, you say $800 note? A. She said yes, she would like to have Virginia have it.

"Q. And what did she do? A. She didn't do anything until I got the note. I went and got the note from the safety deposit box and brought it up to her and wrote on the back of it transferring it to Virginia, and she signed it and handed it over to Virginia.

"Q. Virginia was on the note, you affixed the assignment to Virginia and Mrs. Dean signed it and handed to Virginia? A. That is right.

"Q. Did she do that with your $6000 note? A. No.

"Q. She didn't put her name on the $6000 note you had signed? A. No, she told me to destroy it."

[1] The evidence justified the inference that the married life of Dr. Dean and decedent over a period of years had not been altogether peaceful and congenial. Evidence of such a circumstance was material and manifestly taken into account. In that connection Dr. Dean himself testified on cross examination: "Martha and I were very different temperaments, I will say. Her being dead and gone I didn't like to bring these things up at all, but it is true that we had many differences, but at the time of her death we were agreed. We had asked each other's forgiveness for any past differences or unpleasantnesses and I was glad that she could pass away under those conditions."

There was evidence also that the deceased's safe deposit box at the bank had always been in her name. Dr. Dean at no time had access thereto until about ten days before the death of deceased. The circumstances surrounding Dr. Dean's visit to the safety deposit box and the ultimate transfer thereof from Mrs. Dean to Dr. Dean justified the inference on the part of the trial court that Dr. Dean's interest in the box and its contents was not unselfish.

[2] The foregoing account of the evidence includes what may be regarded as the most important phases of the trial. The fact of the due and lawful execution of the alleged lost or destroyed will and its provisions is not disputed. It is clear from the record that the only disputed question presented for the trial court's determination was whether said will was in existence at the time of the testator's death. This the court determined was the fact and the duty to admit such will to probate followed. As a matter of law, the pleadings

were adequate, the evidence supports the findings and the findings support the judgment. Appellant's argument with regard to presumptions are not applicable. See In re Estate of Bristol, 23 Cal.2d —, 143 P.2d 689, and the dissenting opinion of Mr. Justice Traynor therein as well.

For the foregoing reasons the judgment is affirmed.

YORK, P.J., and WHITE, J., concur.

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62 Cal.App.2d 416

PEOPLE v. THOMAS.

Cr. 3758.

District Court of Appeal, Second District, Division 3, California.

Jan. 18, 1944.

1. Infants 🔑20

Testimony of accused and his mother tending to contradict evidence that accused committed lewd and lascivious acts on boys under 14 years of age presented questions for the trier of facts. Pen.Code, § 288.

2. Infants 🔑20

The rule that a charge of committing lewd and lascivious acts on a child under 14 years of age is easily made and difficult to disprove, and therefore the testimony of prosecuting witness should be examined with caution, is intended primarily for guidance of the trier of facts. Pen.Code, § 288.

3. Criminal law 🔑260(11)

Where prosecution for committing lewd and lascivious acts upon a child under 14 years of age was tried by the court sitting without a jury, District Court of Appeal must presume that trial judge applied the rule that such a charge is easily made and difficult to disprove and therefore testimony of prosecuting witness should be examined with caution. Pen.Code, § 288.

4. Infants 🔑20

Police officer's testimony that accused admitted having committed lewd and lascivious acts on some boys, though he did not identify victims, would have considerable effect as corroborative of testimony given by prosecuting witnesses. Pen.Code, § 288.

5. Infants 🔑20

Trial court's finding that accused was guilty of committing lewd and lascivious acts upon boys under 14 years of age was supported by sufficient evidence. Pen.Code, § 288.

Appeal from Superior Court, Los Angeles County; Clement D. Nye, Judge.

Fay Chester Thomas was convicted of committing lewd and lascivious acts upon three boys under the age of 14 years, in violation of Penal Code, § 288, and he appeals.

Judgments affirmed.

Fay Chester Thomas, in pro. per., for appellant.

Robert W. Kenny, Atty. Gen., and T. G. Negrich, Deputy Atty. Gen., for respondent.

SHAW, Justice pro tem.

Defendant was tried on an information charging him in three counts with committing lewd and lascivious acts upon three boys under the age of fourteen years, in violation of section 288 of the Penal Code. After trial by the court sitting without a jury, the defendant was found guilty on all three counts, and he appeals from the judgments.

[1] The only point made by him in support of his appeal is that "the judgment of the Court is contrary to the evidence." The three boys named in the information, whose respective ages were nine, twelve, and thirteen years were called as witnesses. Each of them gave testimony showing clearly and unequivocally, if accepted as true, that the offense against him had been committed as charged. Since defendant makes no claim that the acts so narrated were not sufficient to constitute the offenses charged, we do not set forth the testimony here. Defendant's contention appears to be that this testimony should not have been believed. He took the stand and denied the commission of all the acts to which the boys testified. His mother, with whom he lived, gave testimony tending to

show that one of the offenses, said by the boy to have been committed at defendant's residence, could not have been committed at the time and place stated by the boy. But these contradictions were matters for the consideration of the trier of facts. They do not afford ground for a reversal of the judgment on appeal. (People v. Beatty (1942) 55 Cal.App.2d 258, 260, 130 P.2d 433; People v. Tedesco (1934) 1 Cal. 2d 211, 219, 34 P.2d 467).

[2-5] The only authority cited by defendant is People v. Putnam (1942) 20 Cal. 2d 885, 889, 891, 129 P.2d 367, where the Supreme Court, dealing with a charge like those we have here, stated, by quotation from another case, that "to the mind of the average citizen or juror, the mere fact that a person has been accused of the commission of such an offense seems to constitute sufficient evidence to warrant a verdict of 'guilty'." But the court there was not considering the sufficiency of the evidence; its holding was that where such a charge is tried by a jury, a cautionary instruction should be given warning the jury "that such a charge is easily made and difficult to disprove for which reason the testimony of the prosecuting witness should be examined with caution." The present case was not tried by a jury and no question regarding instructions arises. The trial judge was no doubt familiar with the rule stated in the case cited and in other similar cases. It is a rule intended primarily for the guidance of the trier of facts, and we must presume that he applied it to this case. The evidence of the boys above mentioned bears no indicia of coaching by others and has no marks of inherent improbability upon it. There was also testimony by the Chief of Police before whom defendant was brought soon after his arrest, that defendant admitted to him that defendant had committed offenses on "some boys," which were the same as those to which the boys named in the information testified. Defendant's statement did not name or definitely identify the boys he referred to, but it would nevertheless have considerable effect as corroborative of the testimony given by the boys. The trial court's finding of guilt is supported by sufficient evidence and is conclusive on appeal.

The judgments are affirmed.

DESMOND, P. J., and PARKER WOOD, J., concur.

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62 Cal.App.2d 315

GUTKNECHT v. JOHNSON et al.

Civ. 14005.

District Court of Appeal, Second District, Division 3, California.
Jan. 14, 1944.

1. Automobiles ⚷239(2)

In action by pedestrian for injuries sustained when struck by automobile, defendants having failed to set up contributory negligence of plaintiff as a defense could not rely thereon.

2. Automobiles ⚷192(8)

Where dealer delivered possession of recently purchased automobile still licensed in Texas to conditional buyer without notifying vehicle department of transfer and received payment therefor by discounting conditional sales contract, dealer was liable as "owner" for negligent operation of automobile by conditional buyer before application was made for registration of automobile in California. Vehicle Code, § 73, St. 1937, p. 1980; § 146, St.1939, p. 1393; § 147, St.1935, p. 110; §§ 177, 178, St.1935, p. 115; § 402 (a, f), St.1937, pp. 2353, 2354.

See Words and Phrases, Permanent Edition, for all other definitions of "Owner".

3. Automobiles ⚷192(8)

The conditional seller is liable, within the amounts stated in section 402 for negligent operation of automobile with his consent by conditional buyer, where conditional seller delivers possession of automobile to conditional buyer but fails to comply with section 177 with reference to giving notice of transfer prior to occurrence of accident. Vehicle Code, § 177, St.1935, p. 115; § 402, St.1937, p. 2353.

◆

Appeal from Superior Court, Los Angeles County; Thurmond Clarke, Judge.

Action by Bertha Gutknecht against Samuel Johnson and J. H. Norman for personal injuries sustained when struck by an automobile driven by Johnson which he had undertaken to buy from Norman under a conditional sale contract. Judgment for plaintiff, and J. H. Norman appeals.

Judgment affirmed.

Paul S. Crouch, of Los Angeles, for appellant.

Harry E. Templeton, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

[1] In this case plaintiff in the court below, respondent here, recovered damages from defendants Johnson and Norman for injuries sustained on February 21, 1941, when she, as a pedestrian, was struck by a Packard coupe driven by Johnson. He had undertaken to buy the coupe from Norman under a conditional sale contract. The latter appeals from the judgment claiming that the trial court erred in disregarding the uncontradicted testimony that he was not the legal or registered owner of the car at the time of the accident. He also claims that error arose when the trial court denied his motion for a new trial, but, reviewing the evidence as reported in the bill of exceptions, we find no merit in that claim. His present contention that plaintiff was guilty of contributory negligence was not set up as a defense and that is required when reliance is placed upon it (Crabbe v. Mammoth Channel G. Min. Co., 1914, 168 Cal. 500, 505, 143 P. 714); nor did the trial court find that the facts warranted any such conclusion. We direct our attention, therefore, to the conditions surrounding ownership of the Packard automobile, and the fixing of liability for the damage done.

The court found that on February 21, 1941, the date of the accident, another named defendant, C. O. Eisele, who apparently was not served, was the registered and legal owner of the Packard car which was at that time licensed by the State of Texas; that it had been sold on or about February 15, 1941 to defendant Norman, a dealer, as such word is defined in the Vehicle Code of California, St.1935, p. 93; that Norman sold the automobile to defendant Johnson under conditional sales contract on or about February 17, 1941; that at the time of the accident, February 21, 1941, the Packard coupe was owned by defendant Johnson; that neither Eisele, Norman or Johnson had at that time "complied with the provisions of the California Vehicle Code in that registration slip for said Packard coupe was not turned in to the Department of Motor Vehicles for transfer, nor was a notice given by the defendant C. O. Eisele to said department of the sale of said Packard coupe to the defendant J. H. Norman, a dealer in used automobiles, nor was a notice given by the defendant J. H. Norman to said department of the sale of said Packard coupe to the defendant Samuel Johnson." Another finding was as follows: "That it is true that the defendant Samuel Johnson was at the time and place of said accident, driving, operating and controlling said Packard automobile hereinbefore referred to *with the consent of his codefendants.*" (Italics ours.)

Certain provisions of the California Vehicle Code, in effect at the time of the accident, read as follows, so far as pertinent to this discussion:

Section 73, St.1937, p. 1980. "'Dealer' is a person engaged in the business of buying, selling or exchanging vehicles of a type required to be registered hereunder who has an established place of business for such purpose in this State."

Section 177, St.1935, p. 115. "(a) Whenever the owner of a vehicle registered hereunder sells or transfers his title or interest in, and delivers the possession of, said vehicle to another, said owner shall immediately notify the department of such sale or transfer giving the date thereof, the name and address of such owner and of the transferee and such description of the vehicle as may be required in the appropriate form provided for such purpose by the department.

"(b) Every dealer upon transferring by sale, lease or otherwise any vehicle, whether new or used, of a type subject to registration hereunder, shall immediately give written notice of such transfer to the department upon the appropriate form provided by it but a dealer need not give such notice when selling or transferring a vehicle to another dealer."

Section 178, St.1935, p. 115. "Whether notice of a transfer be given or not as hereinbefore required an owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser and has made proper endorsement and delivery of the certificate of ownership as provided in this code shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another."

Section 402, St.1937, p. 2353. "(a) Every owner of a motor vehicle is liable and responsible for the death of or injury to person or property resulting from negligence in the operation of such motor vehicle, in the business of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner, and the negligence of such person shall be imputed to the owner for all purposes of civil damages. * * *"

Subdivision (f) of section 402 is important in the consideration of this case and will be quoted hereinafter at the appropriate point.

Section 146, St.1939, p. 1393, specifies the procedure to be followed in applying for registration in California of a vehicle previously registered outside this state, and Section 147, St.1935, p. 110, provides that "The department in its discretion may grant a temporary permit to operate a vehicle for which application for registration has been made, where such application is accompanied by the proper fee pending action upon said application by the department."

According to the record, when Norman purchased the automobile and took delivery thereof, he paid for it by means of a sight draft on a finance company, payable only on presentation of California certificates of registration and ownership properly endorsed to him. Shortly thereafter, on February 17, 1941, he sold the car to Johnson, retaining title under conditions set out in the contract and next day received full payment from the same finance company, presumably by discounting Johnson's contract. It was not until February 25, 1941, four days after respondent was injured, that application for registration of the car to Eisele in California was presented to the Division of Motor Vehicles at Los Angeles. The certificates did not clear through the Division for approximately a month thereafter or just prior to March 31, 1941, on which date Eisele endorsed them and presented them with the sight draft to the finance company for payment. These certificates Norman presented to the Motor Vehicle Division on the same day, which was forty-two days after he made his conditional sale to Johnson.

[2, 3] To relieve his client of liability, counsel for appellant invokes subdivision (f) of section 402, California Vehicle Code, hereinbefore mentioned. That section reads as follows: "(f) If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee, or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of such motor vehicle. * * *" This provision was not sufficient, under the conditions stated and under the findings made by the court, to free appellant from legal responsibility in case of accident. Similar contentions under somewhat similar conditions have failed to impress the courts in several recent cases. This appears from the opinion in Ferroni v. Pacific Finance Corp., 1943, 21 Cal.2d 773, 135 P.2d 569. In that case, at page 776 of 21 Cal.2d, at page 571 of 135 P.2d, the court says: "In approaching the problem presented by this appeal it should first be observed that sections 402 and 177 of the Vehicle Code have been construed as providing that the conditional vendor of an automobile is liable within the amounts stated in the former section for the operation of such automobile with his consent by his conditional vendee in a negligent manner, where he delivers possession of the car to the vendee and fails to comply with section 177 * * * with reference to giving notice of the transfer prior to the occurrence of the accident. Guillot v. Hagman, 30 Cal.App.2d 582, 86 P.2d 865; Bunch v. Kin, 2 Cal.App.2d 81, 37 P.2d 744; Helmuth v. Frame, 46 Cal.App.2d 372, 115 P.2d 846. Appellant questions the soundness of those cases, but a hearing by this court was denied in all of them and we are not inclined to disapprove them. In the instant action there is no question but that the car was sold on conditional sale contract and that McConnville was the conditional vendee, and as such he was in possession of the car and using it with the consent of the owner at the time of the accident. Nor can it be doubted that there was not an immediate notification to the Motor Vehicle Department by the conditional vendor of the transfer. See Guillot v. Hagman, supra. The accident occurred the day following the execution of the conditional sale contract; the circumstance with relation to the transfer had not changed since the transfer, and the department was not notified until six days thereafter. Therefore, the conditional vendor, whoever he was, would be liable to plaintiffs because he was the owner within the meaning of section 402 of the Vehicle Code, and was not exempted from its terms by subdivision (f) thereof." In applying the foregoing to the instant case, we have in

mind particularly the fact that appellant, even before the accident, had received the proceeds of the sale to Johnson, his conditional vendee, and certainly had consented to his use of the Packard automobile.

Appellant cites to us Helmuth v. Frame, 1941, 46 Cal.App.2d 372, 115 P.2d 846, and Schmidt v. C. I. T. Corp., 1936, 14 Cal.App.2d 92, 57 P.2d 1016, but we find nothing in either of those cases contrary to the view expressed by the court in the Ferroni case, from which we have just quoted.

Judgment affirmed.

SHINN, J., and BISHOP, J., pro tem., concur.

62 Cal.App.2d 378

IRVINE et al. v. CITRUS PEST DIST. NO. 2 OF SAN BERNARDINO COUNTY et al.

Civ. 3259.

District Court of Appeal, Fourth District, California.

Jan. 17, 1944.

Rehearing Denied Feb. 15, 1944.

Hearing Denied March 16, 1944.

1. Agriculture 🔑1
Constitutional law 🔑254

The provisions of Citrus Pest District Control Act that proceeding to organize district shall be instituted on petition signed by owners of 51 per cent. of land in district and filed with county board of supervisors, which must fix time and place for hearing and give notice thereof, that protests may be filed and must be considered with petition at hearing, and that board must act on evidence presented, satisfy requirements of "due process of law". St.1939, p. 1055 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Due Process of Law".

2. Constitutional law 🔑251

To satisfy constitutional requirement of "due process of law", judicial hearing and trial before courts is unnecessary, but it is satisfied by statutory provision for hearing, after notice, before a board or officer empowered to hear and determine issues presented.

3. Evidence 🔑20(1)

The District Court of Appeal may take judicial notice of conditions of California citrus industry, including facts that scale and other pests propagate and prey on citrus trees and that value of such trees will be destroyed unless such pests are controlled.

4. Agriculture 🔑1
Constitutional law 🔑284(2)

The provisions of Citrus Pest District Control Act for notice of hearing on annual budget proposed by district board of directors, right to protest against it, and hearing on amount thereof, satisfy constitutional requirement of "due process of law", though act does not provide for notice to property owners of proposed assessments and affords them no opportunity to protest against such assessments after budget is fixed, as performance of idle act need not be required. St.1939, p. 1059, § 45; p. 1061, § 65.

5. Agriculture 🔑1
Constitutional law 🔑284(1)

The section of Citrus Pest District Control Act as to assessments of property in district is not invalid as violating constitutional guaranty of "due process of law" by giving county assessor right to determine conclusively amounts of various assessments. St.1939, p. 1061, § 65.

6. Evidence 🔑83(1)

It is presumed that officer charged with duty will perform it in accordance with requirements of constitution and law.

7. Constitutional law 🔑42

Owners of property in citrus pest control district cannot complain that they have been deprived of "equal protection of law" by making of assessments under act, in absence of fraud or oppression and unjust inequality in assessments. St.1939, p. 1061, § 65.

See Words and Phrases, Permanent Edition, for all other definitions of "Equal Protection of Law".

8. Evidence 🔑13, 20(1)

It is common knowledge that citrus pests infest small as well as large trees and that treatment of small tree to control such pests requires less materials and labor than treatment of mature tree.

9. Agriculture 🔑1
Constitutional law 🔑229(3)

The Citrus Pest District Control Act is not unconstitutional as depriving owners of property in such districts of "equal protection of law" by placing same burden of assessment on owners of small young citrus trees as on owners of large full-bearing trees. St.1939, p. 1061, § 65.

10. Agriculture 🔑1

The Citrus Pest District Control Act is not unconstitutional as permitting unlawful invasion of property rights of owners of lands in control districts by authorizing others to trespass on their properties to inspect and treat trees thereon against such owners' will, since powers exercised under Act are "police powers." St.1939, p. 1055 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Police Power".

11. Eminent domain 🔑2(1)

The state, in exercise of its "police power", may take or destroy private property without compensation when it is dangerous to life, health, or property.

12. Agriculture 🔑1
Constitutional law 🔑63(1)

The Citrus Pest District Control Act is not unconstitutional as attempting to delegate legislative powers to local boards of directors of districts organized thereunder. St.1939, p. 1059, § 45.

13. Agriculture 🔑1
Constitutional law 🔑80(2)

The Citrus Pest District Control Act is not unconstitutional as vesting judicial powers in district boards of trustees. St. 1939, p. 1059, § 45.

14. Agriculture 🔑2

Local boards of limited territorial jurisdiction without statewide authority, such as citrus pest control district boards of directors, may act in judicial capacity as quasi judicial bodies. St.1939, p. 1059, § 45.

15. Taxation 🔑47(1)

The Citrus Pest District Control Act is not unconstitutional as permitting double taxation for same purpose as other acts permitting removal of citrus pests by public authority at property owners' expense, in absence of any intimation that any other authority than citrus pest control district has been organized or is attempting to abate such pests in same locality or that provisions of act are intended to be exclusive. St.1939, p. 1061, § 65.

16. Constitutional law 🔑38

The fact that Legislature has enacted two statutes to abate same evil or afford same remedy is not sufficient reason to hold either statute unconstitutional.

17. Agriculture 🔑1

The Citrus Pest District Control Act is proper exercise of state's "police powers" as promoting general welfare by protecting an industry which provides a livelihood for many people of state. St.1939, p. 1055 et seq.

18. Evidence 🔑20(1)

It is common knowledge that acreage devoted to culture of oranges in state and quantity of production and number of growers thereof greatly exceed acreage devoted to culture of lemons and production and number of growers thereof.

19. Agriculture 🔑1

The Citrus Pest District Control Act is not unconstitutional as permitting confiscatory assessments and deprivation of property of owners of land in control districts because of failure to limit expressly amount of money districts may spend or amount of indebtedness they may incur. St.1939, p. 1061, § 65.

◆

Appeal from Superior Court, San Bernardino County; Charles L. Allison, Judge.

Action by Hugh Irvine and another against the Citrus Pest District No. 2 of San Bernardino County and others, to test the constitutionality of the Citrus Pest District Control Act. Judgment for defendants, and plaintiffs appeal.

Affirmed.

Harry H. Parsons, of San Bernardino, for appellants.

Donald S. Gillespie, Co. Counsel, and R. J. Farrell, Deputy Co. Counsel, both of San Bernardino, for respondents.

MARKS, Justice.

This is an action to test the constitutionality of the "Citrous Pest District Control Act", Statutes 1939, Ch. 89, Deering's Gen.Laws, 1939 Supp., Act 130, which we will refer to as "The Act". The cause was heard on an agreed statement of facts. Judgment went for defendants and this appeal followed.

It was agreed that the Citrus Pest Control District Number Two of San Bernardino County (hereinafter referred to as the Disrtict) and the individual defendants had functioned in exact accordance with the provisions of and powers granted in The Act and had acted fairly and honestly in administering the affairs of the District. This stipulation eliminates from consideration several of the issues tendered by the pleadings. It was also stipulated that plaintiffs each owned citrus groves in the District which were subject to assessments levied by the District to pay for citrus pest control and expenses of operation; that part of their properties had "irregular or border planting" as referred to in section 65 of The Act.

The only question seriously presented for our consideration is the constitutionality of the Act. Plaintiffs direct their principal attack against it on the ground that its provisions violate the constitutional mandates directing that no person shall be deprived of his property without due process of law and guaranteeing to each the equal protection of the law. Subsidiary questions are argued as follows: That the Act contains a delegation of legislative power to a local board; (2) that judicial powers are vested in a local board; (3) that the Act permits double taxation for the same purposes; (4) that it is not a valid exercise of the police power; (5) that there is no limitation on the amount of indebtedness the District may incur nor upon expenditures that can be made so the assessments may become confiscatory.

It seems to be the theory of plaintiffs that the Act permits the assessment and taxation of property without any right of protest and review on the part of the owners, and permits the assessment and taxation of some properties within the District with valuations made on a basis different from that of other properties; that the valuations are to be fixed by the assessor which are declared conclusive with no right of review.

[1] No question is raised, except incidently under another heading, of the lawful organization of the District so that subject requires no notice except to say that such proceedings are instituted on petition of the owners of fifty-one per cent of the area of land in the proposed district; that the petition is filed with the board of supervisors of the county which must fix a time and place for hearing; that notice thereof must be given; that protests may be filed and must be considered with the petition at the hearing; that the board of supervisors must act on such evidence as is presented and may exclude lands included within the proposed boundaries or may include other lands on petition of the owners and may allow or disallow the petition for formation of the District. These provisions of the Act fully satisfy the requirements of due process. This conclusion is supported by the cases next cited.

The Act provides that when a pest control district is organized a board of directors shall be appointed for it. The powers of the District are defined in section 45 of the Act. The board of directors is required to adopt a plan for the control of citrus pests, to annually estimate its cost and submit a budget of expenditure for each fiscal year, fix a time and place for hearing on the proposed budget and give notice of such hearing which shall include a statement "that it is the intention to raise the amount of money required to meet the proposed budget by levying a tax upon the assessed value of the citrous trees within the district in accordance with the provisions of this act". The hearing must be held and all protests considered and passed upon, and the budget, or modified budget, is then to be adopted.

Section 65 of the Act provides as follows: "The county assessor in making the annual assessment of property in each and every year after the organization of the district, shall assess and enter as a separate item on the assessment roll for each parcel of real property included in the district, the value, as improvements thereon, of all citrous trees growing thereon. Such assessment shall be upon an acreage basis and the number of acres in the case of irregular or border planting, shall be determined conclusively by the assessor by counting such trees and dividing the total number by the number per acre of average planting as certified by the county agricultural commissioner. Upon completing the assessment roll of the county in each year, the assessor shall separately compute and certify to the board of supervisors, the total assessed value, as shown by said assessment roll, of all such citrous trees in the district."

It is argued that this section empowers the assessor to place an arbitrary and unjust assessment on property without any right of protest, hearing of objections, or appeal.

[2] It is not necessary to satisfy the constitutional requirements of due process that there be a judicial hearing and trial before the courts. It is satisfied by providing for a hearing, after notice, before a board or officer empowered to hear and determine the issues presented. City of Seattle v. Kelleher, 195 U.S. 351, 25 S.Ct. 44, 49 L.Ed. 232; United States v. Ju Toy, 198 U.S. 253, 25 S.Ct. 644, 49 L.Ed. 1040; Fallbrook Irrigation District v. Bradley, 164 U.S. 112, 17 S.Ct. 56, 41 L.Ed. 369; In re Orosi Public Utility Dist., 196 Cal. 43, 235 P. 1004; Sherer v. City of Laguna Beach, 13 Cal.App.2d 396, 57 P. 2d 157; In re Estate of Stobie, 30 Cal.App. 2d 525, 86 P.2d 883.

[3] We are permitted to take judicial notice of the conditions of the citrus industry in California. Agricultural Prorate Commission v. Superior Court, 5 Cal. 2d 550, 55 P.2d 495; Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307. We can thus draw on our knowledge of the industry to the effect that scale and other such pests propagate and prey upon the citrus trees; that unless these pests are controlled the value of the trees will be destroyed.

[4] It is evident from the provisions of the Act that the basis of the assessment is the number of citrus trees growing on a given tract. The amount of the assessment is evidently determined by a mathematical calculation involving the acreage of regular or rectangular tracts and the average number of trees per acre on irregular or border plantings. It is there evident that the important factor in determining the assessment is the amount of the budget as the acreage or number of trees per acre will remain a fairly constant figure.

While the Act does not provide for notice to the property owners of the making of the proposed assessment and affords them no opportunity to protest, it does provide for notice, opportunity to protest, and hearing on the question of the adoption of the proposed budget. As the amount of the budget is the variable figure involved in fixing the amount of the assessment, notice, the right to protest, and a hearing on the amount of the budget should satisfy the requirements of due process for after the budget is fixed the computation of the assessments is a simple matter of division and amounts to no more than the performance of a ministerial act. The right to protest an assessment after the budget is fixed would be an idle act and could accomplish nothing. The performance of an idle act need not be required.

[5] Plaintiffs argue that section 65 of The Act gives the right to the assessor to *conclusively* determine the amount of the various assessments to be levied. We do not so construe the section. The assessor merely determines the acreage in the irregular or border plantings for the purpose of the assessment. Where this duty is performed fairly and impartially, and when there is no abuse of this authority, the property owners have no cause for complaint and the constitutional guaranty of due process is not violated. United States v. Ju Toy, supra.

[6, 7] It is presumed that an officer charged with a duty will perform it in accordance with the requirements of the Constitution and the law. People v. Globe Grain & Milling Co., 211 Cal. 121, 294 P. 3; In re Estate of Stobie, supra. Further, the stipulation "that no wrong or fraud whatever, in any way, is charged against any of the defendants in this case" and that they "have performed their functions and alleged duties under the terms and conditions of the act" precludes plaintiffs from making any argument that there has been any fraud or oppression practiced in making the assessments. Until there has been something amounting to such fraud or oppression and unjust inequality in the assessments levied the property owners cannot complain that they have been deprived of the equal protection of the law.

[8, 9] Counsel argues that the Act is unjust and discriminatory in placing the same burden of assessment on the owner of small young trees as is placed on large full bearing trees. Of course it is common knowledge that citrus pests infest small as well as large trees. If not controlled they spread from tree to tree and from orchard to orchard with disastrous results. It is also common knowledge that the treatment of a small tree requires less materials and less labor than that of

a mature tree. To this extent the burden is not equally distributed on all owners alike. However, small young trees grow to be large old ones, and large old trees outlive their usefulness and have to be replaced with small young ones. Thus with the passing of time the burdens may be equalized. Further, there is nothing in the record to indicate that there is any variance in the size and age of the trees in the District nor that any of the trees on plaintiffs' properties are small or young. To this extent the argument is academic. Under the facts we cannot hold that this method of assessment deprives plaintiffs of the equal protection of the law. The scale from the small trees will spread to the large ones and, if not controlled, will destroy them.

[10, 11] Plaintiffs urge that the Act permits an unlawful invasion of their property rights by authorizing others to trespass upon their properties to inspect and treat their trees against their will and without their consent. If the powers exercised under the Act come within the classification of police powers, this argument is without merit. It is universally held that in the exercise of its police powers the State may take or destroy private property without compensation when it is dangerous to life, health or property. Coelho v. Truckell, 9 Cal.App.2d 47, and cases cited at page 54, 48 P.2d 697, at page 701.

[12] The Act is attacked on the ground that it attempts to delegate legislative powers to a local board. This argument is sufficiently answered in Agricultural Prorate Commission v. Superior Court, supra.

[13, 14] It is next urged that the Act is unconstitutional because it vests judicial powers in the board of trustees of the District, citing Laisne v. State Board of Optometry, 19 Cal.2d 831, 123 P.2d 457. That case is not controlling here as it had to do with a State board with statewide jurisdiction, while here we have a local board with limited territorial jurisdiction. It is settled in California that local boards of limited territorial jurisdiction not possessing statewide authority may act in a judicial capacity as a quasi-judicial body. Wulzen v. Board of Supervisors, 101 Cal. 15, 35 P. 353, 40 Am.St. Rep. 17; Croly v. City of Sacramento, 119 Cal. 229, 51 P. 323; Imperial Water Co. v. Board of Supervisors, 162 Cal. 14, 120 P. 780; Rigdon v. Common Council, 30 Cal.App. 107, 157 P. 513; Norman v. Cogswell, 82 Cal.App. 159, 255 P. 251; Bayside Land Co. v. Dolley, 103 Cal.App. 253, 284 P. 479; Nider v. Homan, 32 Cal. App.2d 11, 89 P.2d 136; Nider v. Homan, 36 Cal.App.2d 14, 97 P.2d 293.

[15, 16] Plaintiffs point to acts of the legislature, other than this Act, which permit the removal of citrus pests by public authority and at the property owner's expense. They attempt to construe this as permitting double taxation for the same purpose. There is no intimation that any authority other than the District has been organized or is attempting to abate citrus pests in the locality. There is no intimation in the Act that its provisions are intended to be exclusive. Because two remedies to abate the same evil or afford the same remedy are enacted by the legislature has not been found a sufficient reason to hold either unconstitutional. Familiar examples of this are the various street improvement acts under which streets may be improved.

[17] We will next approach the argument that the Act is not a proper exercise of the police powers of the State. This argument is thoroughly answered in Agricultural Prorate Commission v. Superior Court, supra, where it was held that the Agricultural Prorate Act, which provided for the regulation of the shipment of lemons grown in California by limiting the quantity to be shipped into the primary channels of trade, was a valid exercise of the police powers as it tended to promote the general welfare by permitting the lemon growers composing a large group of citizens to receive a fair return for their produce.

[18] The citrus products of the State include lemons, oranges and grapefruit. It is common knowledge that the acreage devoted to the culture of oranges in this State greatly exceeds that of lemons. The same is true of the quantity of production and number of growers. Production of grapefruit is considerable. If the prosperity of growers of lemons and promotion of their welfare is a fit subject for legislation under the police powers, certainly the welfare of all citrus growers, of which the lemon growers comprise a minority fraction, must also be held to be a proper subject for legislation under those powers.

This question presents itself: Does the control of citrus pests promote the general welfare by increasing the prosperity of the very considerable group of citizens engaged in citrus culture? We must again take judicial notice of the condition of this industry as the record is silent on this question, though perhaps this fact alone might be sufficient answer as the courts will not declare an act unconstitutional without supporting fact or reason.

Citrus pests are numerous. If not controlled they propagate rapidly and can ruin a grove of citrus trees and destroy its productivity. Thousands of persons are engaged in the citrus industry and are dependent upon it for their livelihood. The groves cover many thousands of acres and annual returns run into many millions of dollars. Besides the very considerable investment of those directly engaged in raising the fruit there is a very considerable investment in facilities for picking, hauling, packing and preparing it for market which requires the services of many people. The transportation of millions of boxes of citrus fruits provides employment for many more. These facts, and many others that might be mentioned, demonstrate that the general welfare is promoted by protecting an industry that provides a livelihood for so many of our people. In Agricultural Prorate Commission v. Superior Court, supra [5 Cal.2d 550, 55 P.2d 508], the court quoted the following from People v. Nebbia, 262 N.Y. 259, 186 N.E. 694: "But we must not fail to consider that the police power is the least limitable of the powers of government and that it extends to all the great public needs; that constitutional law is a progressive science; that statutes aiming to establish a standard of social justice, to conform the law to the accepted standards of the community, to stimulate the production of a vital food product by fixing living standards of prices for the producer, are to be interpreted with that degree of liberality which is essential to the attainment of the end in view (Austin v. City of New York, supra, 258 N.Y. 113, at page 117, 179 N.E. 313); and that mere novelty is no objection to legislation. People v. La Fetra, 230 N.Y. 429, 130 N.E. 601, 16 A.L.R. 152. 'The State courts should uphold State regulation whenever possible. They should be clearly convinced that a statute is unconstitutional before they declare it invalid. (Citing cases.)' [5 Cal.2d 550, 55 P.2d 508.] See also, Nebbia v. People of State of New York, 291 U.S. 502, 54 S.Ct. 505, 78 L.Ed. 940, 89 A.L.R. 1469; Chicago, B. & Q. Ry. Co. v. Illinois, 200 U.S. 561, 26 S.Ct. 341, 50 L.Ed. 596, 4 Ann.Cas. 1175; Odd Fellows' Cemetery Ass'n v. San Francisco, 140 Cal. 226, 73 P. 987; Laguna Drainage Dist. v. Chas. Martin Co., 144 Cal. 209, 77 P. 933; Jardine v. City of Pasadena, 199 Cal. 64, 248 P. 225, 48 A.L.R. 509; People v. Associated Oil Co., 211 Cal. 93, 294 P. 717; Spinks v. City of Los Angeles, 220 Cal. 366, 31 P.2d 193.

[19] It is urged that as there is no express limitation on the amount of money the District may expend, nor upon the amount of indebtedness it may incur the assessments may become confiscatory and deprive plaintiffs of their properties. There is no suggestion that large debts have been contracted nor that confiscatory assessments have been levied. In fact, the assessments levied for a fiscal year is slightly over $5 an acre which, when compared with the usual cost of past control, is very moderate. The amount of annual assessment is largely determined by the amount of the budget which can be adopted only after notice to the property owners who are given the right to protest and have a hearing. Thus they are given a measure of control over the expenditures by having a voice in fixing the amount available for those purposes. Should the board of trustees ever become so unreasonable and arbitrary as to overrule valid protests and levy assessments that are unjust, discriminatory and confiscatory, plaintiffs may not find the law and the courts so impotent as to be unable to afford relief.

Other questions are argued that are largely subsidiary to those already discussed. We have considered them and believe they have been sufficiently disposed of.

The judgment is affirmed.

BARNARD P. J., and GRIFFIN, J., concur.

62 Cal.App.2d 435

MARSTON v. ROOD.

Civ. 3252.

District Court of Appeal, Fourth District, California.

Jan. 21, 1944.

1. Judgment ⚿90

Where notice of motion to vacate consent judgment and enter another judgment was made within six months, prescribed by statute, after entry of judgment, trial court retained jurisdiction to consider and pass on motion after expiration of such time. Code Civ.Proc. § 473.

2. Judgment ⚿90

The mere fact that order vacating and setting aside consent judgment went beyond relief contemplated by notice of motion to vacate judgment, relieve moving party therefrom, and enter judgment modifying original judgment, was not sufficient ground for vacating order. Code Civ. Proc. § 473.

3. Judgment ⚿363

The statute authorizing relief of party from judgment, taken against him through his mistake, inadvertence, surprise, or excusable neglect, is remedial and should be construed liberally to promote ends of justice. Code Civ.Proc. § 473.

4. Judgment ⚿90

The superior court had power to modify consent judgment, declaring trust for plaintiff on diamonds described in complaint, so as to make it carry out court's intention at time of rendering it to declare trust on diamonds pledged by plaintiff to defendant, as asked in plaintiff's notice of motion to vacate judgment and enter new judgment, even if court had no power to vacate judgment entirely. Code Civ.Proc. § 473.

5. Appeal and error ⚿1169(8)

The District Court of Appeal has power to reverse superior court's order vacating consent judgment for plaintiff, with instructions to modify judgment so as to carry out trial judge's expressed intention at time of rendering it and promote substantial justice, even if not authorized to affirm order as made. Code Civ.Proc. § 473.

Appeal from Superior Court, Orange County; Franklin G. West, Judge.

Action by Grace M. Marston against C. M. Rood for declaration of a trust on diamonds pledged to defendant by plaintiff as security for a loan. From an order vacating a consent judgment for plaintiff, she appeals.

Reversed with instructions.

L. King Caruthers and Harold A. McCabe, both of Fullerton, for appellant.

Cree & Brooks, of Long Beach, and Mize, Kroese & Larsh, of Santa Ana, for respondent.

MARKS, Justice.

This is an appeal from an order vacating a judgment. The judgment was rendered by consent. It was dated March 20, 1942, filed March 23, 1942, and entered March 24, 1942. It decreed that "pursuant to said confession of judgment and stipulation, that a Trust be declared upon the diamonds described in the complaint, to-wit, the ten (10) and six (6) carat diamonds; that the defendant C. M. Rood be declared Trustee * * *."

On September 12, 1942, defendant filed a notice of motion to relieve him from the judgment entered and to enter a judgment in its stead, a copy of which was attached to the notice of motion. This proposed judgment differed from the judgment entered by substituting the following for the portion already quoted: "pursuant to said confession of judgment and stipulation, that a Trust be declared upon the diamonds pledged to Defendant C. M. Rood by the Plaintiff Grace M. Marston; that the defendant C. M. Rood be declared Trustee * * *."

The notice of motion specified that the motion would be made on the grounds of inadvertence, surprise, and excusable neglect. Supporting affidavits were filed with the notice of motion.

The record shows that the motion was made and argued on September 18, 1942, and that further hearings were had and various affidavits submitted and oral evidence taken on September 25, 1942, and on January 28, February 11, February 13, March 4, and March 12, 1943, when the trial court made an order vacating and setting aside the prior judgment without ordering its modification or the entry of the proposed judgment which was merely a modification of the judgment entered.

The motion was evidently made under the provisions of section 473 of the Code of Civil Procedure. The notice of motion was given and the motion was actually made and argued within the six months limitation provided in that section although it was not decided until several months thereafter.

[1] The notice of motion having been served and filed, and the motion having been made within the six months period prescribed in section 473 of the Code of Civil Procedure, the trial court retained jurisdiction to consider and pass on this motion after the expiration of that time. It has been held sufficient if the proceeding has been called to the court's attention within such time. In re Yoder, 199 Cal. 699, 251 P. 205; In re Estate of Grivel, 208 Cal. 77, 280 P. 122; Roseborough v. Campbell, 46 Cal.App.2d 257, 115 P.2d 839.

Plaintiff was the owner of two diamond rings one of which was pledged to secure a debt owed to a company in Albany, New York, and the other to a company in Long Beach, California. She negotiated with defendant for a loan to redeem the diamonds and the ring in Albany was sent to Long Beach for his inspection. He made the loan and she pledged the diamonds as security. She made default and he took proceedings to foreclose the pledge. Plaintiff then instituted this action against him stating two causes of action. The first sought to have a trust in her favor declared on the diamonds, the second sought to recover damages. When the case came on for trial plaintiff abandoned her second cause of action and defendant announced there were no further issues left to try as all he wanted was his money or the diamonds sold to pay the debt. The parties then stipulated that judgment be entered; that defendant hold the diamonds in trust to secure the debt of $3,422.08, plus interest to accrue; that the diamonds be delivered to a third party for sale; that if defendant be not paid $3,422.08 within 180 days from February 24, 1942, the diamonds would be redelivered to him; that he would become their owner free of any claim of plaintiff and her debt to him would be cancelled. Other portions of the stipulation are not important here. Judgment was entered on the stipulation containing the description of the diamonds already quoted.

Two diamonds were delivered to Taylor Jacobsen, a jeweler selected by the court to effect their sale. On March 31, 1942, counsel for plaintiff served by mail on counsel for defendant a notice that the diamonds delivered to Mr. Jacobsen were not the diamonds pledged to defendant.

In July, 1942, plaintiff instituted an action against defendant based on the alleged substitution of the diamonds delivered to Mr. Jacobsen for those pledged to him by plaintiff. Defendant was sick when he was served with process and did not recover for a considerable time. His default was entered and his counsel did not learn of its entry until too late to move to set it aside under the provisions of section 473 of the Code of Civil Procedure. The action for damages was based on the judgment rendered in this case and the description of the diamonds it contained. The diamonds delivered to Mr. Jacobsen were of inferior grade and one weighed between seven and eight carats and the other between five and six carats instead of ten and six carats as described in the judgment.

The evidence produced at the various hearings both in the form of affidavits and through witnesses is irreconcilably conflicting. Plaintiff maintained that the diamonds she pledged to defendant were of good quality and weighed ten and six carats respectively while defendant maintained that the diamonds delivered to Mr. Jacobsen were the stones pledged to him. There is no dispute about the weights and quality of the diamonds delivered to Mr. Jacobsen. They were of inferior quality, smaller and of much less value than those which plaintiff claims were pledged to defendant.

Defendant found himself in the unfortunate position, if he was innocent of a substitution of the stones, of being confronted with a final judgment requiring him to deliver to Mr. Jacobsen diamonds much larger and more valuable than those he claimed to have received, and with an action for damages for failure to deliver those larger and more valuable stones pending against him, with his right to defend cut off by his default based on service when he was sick. The trial judge evidently concluded that under the very unusual facts presented here the question of the substitution of the diamonds should be tried on its merits in the damage action rather than have the judgment in that action based on what might be an entirely incorrect description of the diamonds pledged to defendant as contained in the judgment entered in this action. This conclusion possesses much merit as it may prevent a grave injustice if the position of defendant should be sustained after a trial on the merits.

If the judgment in this action is amended, the trial court may require an amended complaint to be served and filed in the damage action, based on the amended judgment in this action, which would permit the defendant to appear and contest the questions presented in the damage action, including the question of the substitution.

Plaintiff argues that the trial court had no power to vacate the judgment; that as it was entered by consent no appeal could have been taken from it and that the court had no right to accomplish indirectly that which could not be accomplished directly. People v. Hodges, 205 Cal. 476, 271 P. 897; Hunter v. Superior Court, 36 Cal.App.2d 100, 97 P.2d 492.

[2] While this argument is sustained by the authorities, it does not completely answer the problem before us. The notice of motion did not specify a motion only to set aside and vacate the original judgment entered but asked for relief from that judgment and the entry of the proposed judgment. The two differed only in the descriptions of the diamonds. The proposed motion was in effect an attempt to modify the judgment entered to make it conform to the judgment intended to be entered and not to vacate and set aside the entire judgment. As the trial court did not simply modify the judgment, but vacated it and set it aside, we may concede that the order went beyond that contemplated by the notice. However, this in itself is not sufficient grounds for vacating the order. Hammond Lumber Co. v. Bloodgood, 101 Cal.App. 561, 281 P. 1101.

During the course of the several hearings the trial judge repeatedly expressed the opinion that one party or the other had been guilty of a fraud; that he did not intend to enter a judgment other than one requiring defendant to deliver to Mr. Jacobsen the diamonds pledged to him by plaintiff. On one occasion he remarked: "If the Court enters a judgment inadvertently, or assuming that there is no question as to the identity of the subject matter, and it subsequently appears that the reason the judgment is not according to the stipulation is the fact that one party or the other has committed a fraud upon the Court, is the Court powerless to do anything about it?" At another time the trial judge said: "Now, of course, the diamonds described by the complaint are two diamond rings, one ten carat and one of six carats, and obviously if there has been an incorrect description in the complaint, then the only thing for which the defendant is liable is the two diamonds that he had that were turned over. It is just as obvious, if he has made a substitution, then he cannot produce the property that was turned over to him unless he has it secreted some place. It is just as obvious, if the plaintiff claims there has been a substitution and there has not, that she is seeking a remedy which she is not entitled to under the law, and the only reason she would be entitled to it would be because of the technical description of property being incorrect, and she was just as bound to know it was incorrect as the defendants, so regardless of how you look at it, somebody is trying to commit a fraud upon this Court, isn't that true? There isn't any room for an honest difference of opinion, somebody is just lying, that's all."

[3] Section 473 of the Code of Civil Procedure is remedial and it has been repeatedly held that it should be construed liberally to promote the ends of justice. In Stub v. Harrison, 35 Cal.App.2d 685, 96 P.2d 979, 981, it is said: "On appeal from an order granting relief under section 473 of the Code of Civil Procedure all presumptions will be indulged in favor of the correctness of the trial court's action and the burden in all cases is upon the appellant to make it appear that the court's discretion was abused in making the order. Callaway v. Wolcott, 90 Cal.App. 753, 266 P. 574."

[4, 5] While the trial court may not have had the power to entirely vacate the consent judgment in this case, it should have had the power to modify it and make it carry out his intention when rendering it. That is all that defendant had asked in his notice of motion. Such modification would carry out the intention of the trial judge, repeatedly expressed, during the hearings. While we may not have the lawful authority to affirm the order as made, we should have the power to reverse it with instructions to modify the judgment to carry out the intention of the trial judge when rendering it and to promote substantial justice.

The order appealed from is reversed with instructions to the trial court to grant it to the extent of striking from the judgment rendered the following: "Pursuant to said confession of judgment and stipulation, that a Trust be declared upon the diamonds described in the complaint, to wit, the ten (10) and six (6) carat diamonds; that the defendant C. M. Rood be declared Trustee", and in lieu thereof insert the following: "Pursuant to said confession of judgment and stipulation, that a Trust be declared upon the diamonds pledged to Defendant C. M. Rood by the Plaintiff Grace M. Marston; that the defendant C. M. Rood be declared Trustee". Neither party will recover costs of appeal.

BARNARD, P. J., and GRIFFIN, J., concur.

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62 Cal.App.2d 426

CITY OF GLENDALE v. HAAK, City Controller.

Civ. 14314.

District Court of Appeal, Second District, Division 3, California.

Jan. 20, 1944.

Municipal corporations 🔑863

Under city of Glendale charter provision limiting total annual tax rate, appropriations from the city's general reserve fund for parks and library purposes were valid, notwithstanding that a sum exceeding the 15-cent limit had been appropriated for parks and the total current library appropriation exceeded the 15-cent limit.

Application by the City of Glendale against Arthur A. Haak for a writ of mandate to compel respondent as City Controller of the City of Glendale to give effect to certain appropriations. On demurrer.

Demurrer overruled and peremptory writ issued.

Aubrey N. Irwin, City Atty., and Henry McClernan, Asst. City Atty., both of Glendale, for petitioner.

Frank M. Moody, of Glendale, for respondent.

BISHOP, Justice pro tem.

The parties, desirous of obtaining a judicial opinion interpreting a provision of petitioner's charter, have presented twin questions in this proceeding. The respondent, petitioner's controller, has developed a doubt, the petition indicates, as to the legality of two appropriations made by the city council and as a result has declined to perform certain acts which it is plainly his duty to perform, if the appropriations are authorized by law. An alternative writ of mandate was issued ordering him either to perform his duty or to show cause why he had not done so. By way of a return respondent demurred generally. We have concluded that under the facts admitted by the demurrer, the city charter authorized the appropriations which were made, and that respondent's reluctance to recognize them should be overcome by a peremptory writ.

The legal questions involved are identical, and simple in their elements. Each arises out of section 11 of Article XI of the Glendale City Charter which reads: "The total tax rate for any one year shall not exceed one per cent of the assessed valuation, unless a special tax be authorized, as provided in this charter; and the proceeds of any such special tax shall be used for no other purpose than that specified for which it was voted; provided, however, that in addition to said one per cent, there shall be included in every annual levy, a sufficient amount to cover all liabilities of the City for principal and interest of all bonds or judgments due and unpaid or to become due during the ensuing fiscal year and not otherwise provided for; provided, further, that in addition to the taxes above mentioned there shall be levied a tax not exceeding fifteen cents on each one hundred dollars of the assessed valuation for the Library Fund; provided, further, that in addition to the taxes above mentioned, the Council may levy a tax not exceeding fifteen cents on each one hundred dollars of assessed valuation for parks, playgrounds and recreation centers; provided, further, that in addition to the taxes above mentioned, there shall be levied a tax not exceeding fifteen cents on each one hundred dollars of the assessed valuation for the Fire and Police Retirement System. If the Council shall fail to fix the tax rate at the proper time, the rate for the preceding fiscal year shall be adopted and used." The assessed valuation of property subject to city taxes in the city of Glendale this fiscal year is $68,014,900, so that a tax of fifteen cents per $100 valuation would raise $102,022.35. The validity of the appropriations to which the respondent is asked to give effect is in question because a sum in excess of $102,022.35 had already been appropriated for parks, playgrounds and recreation centers before the new appropriation for these purposes was ordered, and the new appropriation for library purposes will make the total current library appropriation exceed $102,022.35. Therefore, argues respondent, the further appropriations from the city's General Reserve Fund which he is asked to honor, are invalid, not because either object is one for which an appropriation may not lawfully be made from that fund, but because appropriations may not be made, for either object, in excess of 15¢ per each $100 of the assessed valuation.

We do not share respondent's doubt. The purpose of the first "provided, further," portion of the charter section was to require, the purpose of the second "provided, further," provision was to authorize, the raising of taxes, for the special objects mentioned, in addition to the $1 per $100 valuation which could be made for general purposes. The limitation that is made is upon the amount of additional tax that must be, and upon the amount that may be, raised. There is no suggestion in the section that of the amount raised by the levy of $1, or less, per $100 valuation, only 15%, or any other maximum, may be devoted to library or to park purposes; nor is the fifteen cents per $100 limitation made referable to any appropriation from any source. We see no purpose in embellishing further the statement of our conclusion. We have weighed all the arguments advanced by the respondent, and have endeavored to see if others could be conjured up on his behalf, and find none that causes us to doubt that the appropriations were within the authority of the city council that made them.

Respondent's demurrer is overruled and it is ordered that a peremptory writ of mandate issue pursuant to the petition.

DESMOND, P. J., and SHINN, J., concur.

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62 Cal.App.2d 546

GASPAR v. UNITED MILK PRODUCERS OF CALIFORNIA.

Civ. 12464.

District Court of Appeal, First District, Division 2, California.

Jan. 26, 1944.

Hearing Denied March 23, 1944.

1. Corporations 🔑119

A contract to buy corporation president's stock if president within seven years was "discharged from those duties which he is now performing" contemplated his continuance in performance of those duties, and implied an agreement that corporation should continue in business so as to furnish such employment during the seven-year period.

2. Master and servant 🔑31

Where employer puts out of his power the further performance of employment contract by selling his entire business, it operates as "discharge" of his employee engaged in such business.

See Words and Phrases, Permanent Edition, for all other definitions of "Discharge".

3. Corporations 🔑116

Where corporation sold its entire business, its president was "discharged" within contract whereby corporation's transferee agreed to purchase from the president certain shares of stock if the president should within seven years be discharged by the corporation.

4. Bankruptcy 🔑56

A person is a "bankrupt", within Bankruptcy Act, only when he has been guilty of one or another of the forbidden acts whose commission stamp him as a bankrupt. Bankr. Act § 1 et seq., 11 U.S.C.A. § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Bankrupt".

5. Corporations 🔑119

Under contract providing that obligation to purchase corporation president's stock should terminate if corporation should become "bankrupt" and president should lose his position because of such "bankruptcy", quoted words, if used in technical sense must be defined by reference to Bankruptcy Act, and, if used in popular sense as meaning "insolvent" and "insolvency", popular definition of insolvency must be adopted as denominating the insufficiency of assets of an individual to pay his debts. Civ.Code, § 1644; Bankr. Act § 1 et seq., 11 U.S.C.A. § 1 et seq.

See Words and Phrases, Permanent Edition, for all other definitions of "Insolvency".

6. Corporations 🔑121(5)

In action by corporation's president on contract which required defendent to purchase president's stock unless corporation should become bankrupt and president should lose his position because of such bankruptcy, defendant had burden of proving defense of bankruptcy of corporation.

7. Evidence 🔑113(16)

When part of consideration for property sold is an agreement to perform services, sale price furnishes no evidence of value unless value of services to be performed is proved.

8. Corporations 🔑121(5)

In action on contract which required defendant to purchase stock of corporation's president unless corporation became bankrupt and president lost his position because of such bankruptcy, defendant failing to prove the value of properties sold by corporation failed to establish defense of bankruptcy.

9. Corporations 🔑121(5)

In action on contract whereby defendant agreed to purchase from corporation's president certain stock at agreed price if president within seven years was discharged from his position, evidence sustained finding that contract was not obtained under duress.

10. Corporations 🔑121(1)

A corporation's president was not precluded from recovering under contract whereby defendant agreed to purchase president's stock on ground that defendant's stock purchase from corporation was induced by fraud, in that president and another assigned subscriptions of their own to make up the total number of shares purchased by defendant and such other took a brokerage commission, where, under commissioner's permit, such other was entitled to a commission, and it was not claimed that any representation was made that there would be no commission.

11. Corporations 🔑118

A corporation's transferee, which under contract was obliged to purchase stock from corporation's president, having required the president to put his stock into voting trust, could not object to tender of stock subject to the trust.

12. Corporations 🔑121(5)

A defendant could not escape liability under contract whereby it agreed to purchase stock from corporation's president on ground that shares tendered by president had been illegally acquired, since court could not assume wrongdoing in absence of proof. Code Civ.Proc. § 1963, subds. 1, 19.

13. Corporations 🔑121(1)

Corporation's transferee could not escape liability under contract whereby it agreed to purchase stock from corporation's president if he was discharged within seven years by the corporation on ground that his discharge was justified because president collected money from employee subscribers which he did not pay over to the corporation until the day on which transferee took over the business, where president acted in good faith.

14. Corporations 🔑121(5)

Corporation's transferee could not escape liability under contract whereby it agreed to purchase president's stock if he was discharged within seven years by the corporation, on theory that discharge was justified because, in order to get back his position after a lay-off, president insisted that he complete payments on his father's stock subscription, and that instead president issued to an employee stock owned by the president, where the president testified that he knew nothing of the transaction.

15. Appeal and error 🔑1011(1)

The appellate court cannot reweigh conflicting evidence.

◆

Appeal from Superior Court, Alameda County; Andrew R. Schottky, Judge.

Action by M. Gaspar against the United Milk Producers of California, a corporation, upon a contract in which defendant agreed to purchase from plaintiff certain shares of capital stock of Dariglen Creameries, Ltd., of which plaintiff had been president. From a judgment for plaintiff, defendant appeals.

Affirmed.

Hardin, Rank, Meltzer & Fletcher and Carleton L. Rank, all of Oakland, for appellant.

Raymond Salisbury, of Oakland, for respondent.

DOOLING, Justice pro tem.

Defendant appeals from a judgment in favor of plaintiff in an action upon a contract in which defendant agreed to purchase from plaintiff, at a minimum price of $10 per share, not to exceed 413 shares of the capital stock of Dariglen Creameries, Ltd., in the event plaintiff within seven years shall "be discharged from those duties which he is now performing for said corporation, save and except his duties now performed by him as president of said corporation or as an official thereof."

Dariglen Creameries, Ltd., was a corporation engaged in the bottling and sale of milk. Defendant is a non-profit corporation whose members are producers of milk and is engaged in the handling and sale of such milk to distributors thereof. In 1934 Dariglen Creameries, Ltd., was indebted to Cooperative Dairymen's League for milk purchased from it in the sum of approximately $47,000. This creditor made an offer to Dariglen Creameries, Ltd., to compromise its claim for $11,340 in cash and approximately $8,000 to be evidenced by a promissory note, payable in instalments.

Plaintiff, who was president of Dariglen Creameries, Ltd., and one Manuel Soares, its manager, negotiated with defendant, and as the outcome of such negotiations defendant agreed to purchase 2,130 shares of the capital stock of Dariglen Creameries, Ltd., for $21,300, $11,340 in cash and the balance evidenced by defendant's promissory note. As a condition of such purchase, and to give defendant control of Dariglen Creameries, Ltd., it was further agreed that defendant should have the right to elect a majority of the trustees under a voting trust agreement which would result in defendant having a majority of the board of directors of the corporation. The 2,130 shares of Dariglen Creameries, Ltd. was to be secured, and was actually secured, by the getting of assignments of unpaid stock subscription agreements. The $11,340 so paid in cash was used by Dariglen Creameries, Ltd., to effect the compromise of its debt to Co-operative Dairymen's League.

Dariglen Creameries, Ltd., in 1940 was operating at a loss, the monthly indebtedness amounting on the average to more then $2,000 in excess of monthly receipts, and the Director of Agriculture had cited Dariglen Creameries, Ltd., to show cause why its license should not be revoked for failure to pay producers for milk delivered. In this condition of affairs a contract was entered into with defendant whereby all of the assets and property, including business and good will, of Dariglen Creameries, Ltd., were transferred to defendant and defendant assumed all of its liabilities. This transfer was effected on July 26, 1940. On August 1, 1940, defendant in turn sold and transferred to The Borden Company the trade routes, business, good-will and certain of the physical assets of Dariglen Creameries, Ltd., and from that date the operation of any business at the plant of Dariglen Creameries, Ltd., was completely discontinued.

On August 3, 1940, plaintiff made a tender of 413 shares of the stock of Dariglen Creameries, Ltd., to defendant and demanded payment by it of $4130 therefor. This demand was refused and the action which resulted in the judgment appealed from followed.

The trial court found "that on or about the 26th day of July, 1940, said Dariglen Creameries, Ltd. ceased to transact the business previously carried on by it and upon said date the employment of said plaintiff herein by Dariglen Creameries, Ltd. ceased and terminated; that said plaintiff was discharged from further employment by Dariglen Creameries, Ltd. and ceased to perform each and every duty which he had been previously performing for said corporation * * *". This finding of plaintiff's discharge is attacked by defendant as unsupported by the evidence, appellant claiming that to constitute a discharge from employment "there must be unequivocal statements by an authorized person to that effect."

On July 26, 1940, Dariglen Creameries, Ltd., having transferred all of its assets including its business to defendant, had thereby not only put it entirely out of its power to employ plaintiff further to perform any of the duties which he had theretofore performed for it in its business, but because of the transfer of all of its assets it was also no longer in a position to pay him his agreed salary. It is difficult to imagine how any mere statement of discharge, however unequivocal, could have made the termination of his employment any more complete.

In 1 Labatt's Master and Servant, 2d Ed., sec. 187c(4), pp. 589, 590, it is stated that a servant is dismissed: "Where the master by some positive act rendered it impossible for the servant to accomplish the stipulated work. The most numerous and important examples of this situation are furnished by the cases which involve a discontinuance of business by the master."

In the same work, Vol. 1, sec. 262b, p. 795, we find the following: "It is fully settled that a servant engaged for a definite term, to perform duties with relation to a certain business, is entitled to maintain an action for wrongful dismissal against his master, if the fulfilment of the contract is rendered impossible by the discontinuance of the business before the expiration of the stipulated term."

The precise question was recently considered by the Supreme Court of Minnesota in Matthews v. Minnesota Tribune Co., 10 N.W.2d 230. In that case the defendant, publisher of a newspaper, sold the newspaper and plaintiffs, theretofore employed on the newspaper, sued for wrongful discharge. The court said at page 232: "When an employer disposes of his business, does it operate as a discharge of his employes? The authorities are almost unanimous that it does, principally for the reason that the employer is no longer able to perform his part of the bargain. The question is usually presented in cases involving suits by the employe for breach of a contract of employment for a definite time. Such a case was White v. Lumiere N. A. Co., Ltd., 79 Vt. 206, 64 A. 1121, 6 L.R.A.,N.S., 807, where the employer leased his business for a term exceeding the duration of the employment contract, and it was held that the employe was dismissed and entitled to sue for its breach. Globe & Rutgers Fire Ins. Co. v. Jones, 129 Mich. 664, 89 N.W. 580, 581, is much in point. There it was held that the consolidation of two insurance companies operated as a breach of the employment contract between one of the companies and its agent, the court saying: 'He (the employe) has a right to say for whom he will work, and under a contract to work for one company he cannot be required to work for an entirely different company.'"

Appellant insists that the California cases announce a different rule. An examination of the cases does not bear out this contention. In Langenberg v. Guy, 77 Cal. App. 664, at page 668, 247 P. 621, 622, it is said that "it must be conceded that where a party to a contract of employment obligates himself by either an express or an implied agreement not to disable himself from continuing the employment for a stipulated time, he will make himself liable in damages for breach of contract if, by a sale of his business before the expiration of the stipulated period, he voluntarily puts it out of his power to continue the employment to the end of its term in the manner agreed to by him."

[1] In the Langenberg case the agreement was to employ plaintiff for one year to haul lumber "as the business of the hirer warrants" and the court held that the quoted words "give to the hirer of the truck a latitude and freedom of action not often found in contracts of employment for a definite period." The court concluded that under the peculiar language of the contract there was no absolute duty to continue in business for the term of one year, but only to give plaintiff such hauling business, if any, as the employer might have during that period. The language of the contract in the case before us on the other hand, imposing on defendant, as it does, the duty to buy plaintiff's stock if he is "discharged from those duties which he is now performing", contemplates his continuance in the performance of those duties and implies an agreement that the employer shall continue in business so as to furnish such employment during the entire seven year period covered by the contract.

The general rule, as above stated, was again recognized in Armstrong v. Cherry, 89 Cal.App. 442, at page 444, 264 P. 798, at page 799, the court saying: "It is a rule universally recognized, that while a master may not close out his business without becoming liable in damages to an employee under a contract of employment for a specific term, still, an immaterial change gives no cause of action for damages where there is otherwise no change in the manner of conducting the business and the employer continues in a way to be the real owner."

In that case an employer father had "turned the business over to his sons" because of ill health and the court held that the case fell outside the general rule because the trial court had found that the employee "after knowledge of the change in the business, voluntarily continued his employment with the sons at an increased wage * * *" (89 Cal.App. page 444, 264 P. page 799), and the appellate court determined that this finding was supported by the evidence. 89 Cal.App. page 445, 264 P. 798. The basis of the decision was that plaintiff "willingly continued in his employment under the new arrangement, and accepted the sons as his employers in the place of the father." 89 Cal.App. page 445, 264 P. page 799.

Percival v. National Drama Corporation, 181 Cal. 631, 185 P. 972, most strongly relied upon by appellant, is readily distinguishable on its peculiar facts. There the plaintiff was employed by a motion picture production company which was not currently producing any pictures to render to it "such services as may be required of him" from April 21, 1916, to September 1, 1917. The court said at page 638 of 181 Cal., at page 975 of 185 P.: "Plaintiff lays some stress in his argument on the fact that defendant closed up its plant at Los Angeles and went out of business. But this occurred a long time before the alleged discharge. Defendant was practically out of business when the contract was made, and plaintiff undoubtedly entered into it knowing that defendant would have little, if anything, for him to do unless and until it should resume production."

In Stone v. Bancroft, 112 Cal. 652, 44 P. 1069, and Stone v. Bancroft, 139 Cal. 78, 70 P. 1017, 72 P. 717, both cases involving the same contract of employment for a ten year period, the employer continued in business but the employee although ready and able to perform his duties did not do so because none were required of him by the employer. The Supreme Court said, 112 Cal. page 658, 44 P. page 1070: "Bancroft was president of the corporation, and it is evident that neither he nor the History Company wanted the plaintiff to assist in the conduct of the business. At the same time plaintiff was not discharged, and there is evidence in the record to indicate that the intention of Bancroft was not to discharge him, but rather to make his position as an employe so unpleasant and disagreeable as to cause him to withdraw from the contract under which he began his labors."

These cases on the facts are not in point on the question here presented.

In the early case of Webster v. Wade, 19 Cal. 291, 79 Ann.Dec. 218, the plaintiff was employed to serve as steward on a boat for one year. During parts of the years the boat was laid up. It appears from the statement of facts that: "During this interval, defendant neither notified Collins that he, defendant, should employ him no longer, nor in any manner discharged him from the contract, but on the contrary, spoke of and recognized Collins as his employe." The case, in any event, can be of little weight, since as noted in Stone v. Bancroft, supra, 112 Cal. 652, at pages 657, 658, 44 P. at page 1070: "It was further said in that case that a discharge of the employe without cause did not defeat an action upon the contract. But it would seem that in later years the true rule has been recognized to be that an action in damages for the breach is the proper remedy in such a case."

Winsor v. Silica Brick Co., 31 Cal.App. 85, 159 P. 877, and Palmer v. Harlow, 52 Cal.App. 758, 199 P. 844, also cited by appellant, in no wise deal with the question whether an employee is discharged by the employer's disabling himself from the performance of the contract by the sale of his entire business.

[2] No California case which we have found announces a rule contrary to the rule generally recognized that where an employer puts out of his power the further performance of an employment contract by selling his entire business it operates as a discharge of his employee engaged in such business. On the contrary, this rule is recognized in Langenberg v. Guy, supra, 77 Cal.App. 664, 247 P. 621, and Armstrong v. Cherry, supra, 89 Cal.App. 442, 264 P. 798, although on their facts the courts held that it was not applicable in the cases before them.

[3] We are satisfied that the finding of plaintiff's discharge by reason of the sale of its entire business by Dariglen Creameries, Ltd., is supported in fact and in law.

The contract sued upon contained the following provision: "Or, in the event said Dariglen Creameries, Ltd. shall become bankrupt and said second party shall lose his position by reason of such bankruptcy, then such obligation to purchase said stock shall cease and terminate."

Defendant pleaded as an affirmative defense that on and prior to July 26, 1940, Dariglen Creameries, Ltd., had become and was bankrupt. The trial court found against this defense and this finding is attacked.

[4] Much of the briefs is taken up with a discussion of the meaning of the words "become bankrupt" and "bankruptcy" as used in this contract. If the words "bankrupt" and "bankruptcy" are to be construed in their technical sense, the finding that Dariglen Creameries, Ltd., did not become bankrupt is admittedly correct. It was neither adjudicated a bankrupt nor did it commit any of the acts of bankruptcy enumerated in the National Bankruptcy Act, 11 U.S.C.A. § 1 et seq. "A person is a bankrupt, within the meaning of the federal statute, only when he has been guilty of one or another of the forbidden acts whose commission stamp him as a bankrupt." Continental B. & L. Ass'n v. Superior Court, 163 Cal. 579, 583, 126 P. 476, 478.

Appellant argues that "bankrupt" and "bankruptcy" as used in this contract should be construed as synonymous with "insolvent" and "insolvency". If this be conceded, we are confronted with the further fact that the words "insolvent" and "insolvency" are themselves used with at least two meanings.

"Insolvency, in its popular and general sense, is used to denominate the insufficiency of the entire property and the assets of an individual to pay his debts." In re Estate of Boggs, 19 Cal.2d 324, 329, 121 P.2d 678, 681. This is the sense in which the term "insolvency" is used in the National Bankruptcy Act (8 C.J.S., Bankruptcy, § 72, pp. 487, 488) and in the Uniform Fraudulent Conveyance Act (Civ. Code, sec. 3439.02), and this is the meaning generally ascribed to the term in cases involving fraudulent conveyances independent of the statute. 37 C.J.S., Fraudulent Conveyances, § 106, p. 945.

On the other hand, decisions may be found holding that a debtor is insolvent, even though the present fair salable value of his assets exceeds the amount of his debts, "when he is unable to pay his debts from his own means as they become due". Alpha H. & S. Co. v. Ruby Mines Co., 97 Cal.App. 508, 515, 275 P. 984, 986. Occasionally the two definitions are used interchangeably in the same opinion without any apparent realization that there may be a distinction between them. Cf. Cain v. Richmond, 126 Cal.App. 254, 259, 14 P.2d 546.

This confusion in the meaning to be given to the term "insolvency" was one of the reasons for the drafting of the Uniform Fraudulent Conveyance Act. See Commissioners' Prefatory Note, 9 Uniform Laws Annotated 326.

[5] If we concede that the words "bankrupt" and "bankruptcy" as used in the contract should be held synonymous with "insolvent" and "insolvency", we are convinced that the meaning of those words should not be extended beyond their popular and general sense as defined in Re Estate of Boggs, supra, 19 Cal.2d 324, 329, 121 P.2d 678. The words of a contract are generally to be understood in their ordinary and popular sense, unless used by the parties in a technical sense. Civil Code, sec. 1644. If used in a technical sense, the words "bankrupt" and "bankruptcy" must be defined by reference to the National Bankruptcy Act. If used in a popular sense as meaning "insolvent" and "insolvency", the popular and general definition of insolvency must be adopted, rather than another, and strictly legal, meaning.

[6-8] The burden was on defendant to prove its defense of the bankruptcy of Dariglen Creameries, Ltd. It made no proof of the value of the portion of the properties sold by it to The Borden Company, other than the price paid by The Borden Company for such property. In addition to the cash paid by The Borden Company, a further consideration for the transfer to it of this property was the purchaser's agreement to handle appellant's milk on certain terms for a fixed period of time. No attempt was made to prove the value of this agreement to appellant, or the value that it was believed to have by appellant at the time. Even if the sale price to The Borden Company, if measured solely in money, would be competent to prove the value of the property sold, a matter at least open to considerable doubt (see Merchants' Trust Co. v. Hopkins, 103 Cal.App. 473 and the cases cited and discussed at pages 478, 479, 284 P. 1072, 1074),

when a part of the consideration for the property sold is an agreement to perform services, the sale price obviously can not possibly furnish any evidence of value unless the value of the services to be performed is proved in some manner. The book value of the assets of Dariglen Creameries, Ltd., after deducting depreciation, substantially exceeded its liabilities. The trial judge was justified in the state of the proof in finding against the defense of bankruptcy, even if that word was to be construed as synonymous with insolvency in the popular and general sense.

[9] Appellant further argues that the evidence shows without contradiction that the contract here sued upon was obtained by duress. This defense arises by reason of the fact that the $11,340 in cash was advanced by appellant to Dariglen Creameries, Ltd., on an oral understanding that the shares of stock would be transferred to appellant and the voting trust agreement effectuated at a later time. When this time arrived respondent refused to sign the voting trust agreement unless appellant would execute the contract here in suit, claiming that appellant had agreed to do so at the time of the original negotiations. Two witnesses testified regarding this occurrence, one the secretary and the other the manager of appellant. From their testimony it appears that a dispute arose between the directors of appellant and the respondent, as to whether the directors had orally agreed to sign the contract to purchase respondent's stock in case of his discharge, respondent insisting that they had and the directors claiming that they had not done so. Both witnesses testified that they had not known of any such oral agreement at the time of the original negotiations, but the secretary testified that he was in and out of the meeting and did not hear all that took place and the manager's testimony was not positive, but qualified as to his recollection. In answer to the direct question whether anything had been said about respondent's employment being guaranteed by appellant, his answer was: "Not to my recollection at that time." None of the directors was called to testify to what had taken place. In this state of the evidence we cannot hold that the trial court committed error in finding against the defense of duress.

[10] Appellant also claims that the original stock purchase was induced by fraud in that, without disclosing that fact, Soares and the respondent Gaspar assigned subscriptions of their own to make up the total number of shares purchased by appellant and Soares took a brokerage commission on the sales which he divided with respondent.

Under the corporation commissioner's permit Soares was entitled to a commission at the time the stock was paid for on the sales to all subscribers whose subscriptions were assigned to appellant and it is not claimed that any representation that there would be no commission was made; and the manager testified: "No, we didn't inquire about the stock whatsoever, where the stock was coming from". In answer to a question whether the directors of appellant would have entered into the transaction if they had known these facts the following testimony was given:

"A. I don't think they would.

"The Court: Q. But you don't know, do you? A. No."

It appears clear that neither actionable fraud nor inducement was proved.

[11] The tender of the 413 shares is attacked on various grounds. As to 241 shares the tender was of that number of shares in a voting trust agreement which had been set up at the insistence of the lender at a time when Dariglen Creameries, Ltd., borrowed a substantial sum of money. This voting trust was created after appellant controlled the corporation and appellant's manager testified that appellant guaranteed the debt and as a condition to that guarantee required that the stock be placed in this voting trust. Respondent testified that he placed his stock in the voting trust at the suggestion of appellant. Having required respondent to put his stock into the voting trust, appellant is in no position to object to the tender of the stock subject to the trust.

[12] A portion of the tender was a certificate for 78 shares acquired in the following manner: When the balance of any partially paid subscription which was assigned to appellant was paid by it a certificate for the number of shares paid for by the original subscriber was issued to him and a certificate for the number of shares paid for by appellant was issued to it. In some cases the original subscribers had paid amounts which would call for a certain number of shares plus a

fraction of a share. No fractional shares were issued in such cases, and the stock records show that the total of such fractions amounted to 156 shares, 78 of which were issued to Soares and 78 to respondent Gaspar. Respondent testified that this transaction was handled entirely by Soares and that he knew nothing about it. Neither Soares nor any of the subscribers involved was called as a witness. We cannot assume wrong doing in the absence of proof, the presumption being that Soares acquired their fractional shares from the subscribers in some legitimate manner. Code Civ. Proc. § 1963, subds. 1, 19.

A certificate for 76 shares included in the tender represented stock received by respondent as a result of appellant paying the balance due on respondent's assigned subscription. We have already held that appellant's claim that this transaction was tainted with fraud is not supported by the evidence.

[13] It is finally argued that respondent's discharge was justified by his misconduct. This argument is based on two grounds: 1. That respondent collected $650 over a period of four or five months on their stock subscriptions from employee subscribers which he did not pay over to Dariglen Creameries, Inc., until July 26, 1940, the day on which appellant took over the business. Respondent's explanation of this is that he held the money out to pay back to the subscribers in case a rumored sale to the Borden Company should be made. In any event, he did pay the money to Dariglen Creameries, Ltd., and the trial court was entitled to conclude that he acted in good faith and that there was nothing in this transaction to support a finding of misconduct justifying his discharge.

[14, 15] 2. One Almada, an employee of Dariglen Creameries, Ltd., testified that in order to get back his position after a lay-off respondent insisted that he complete the payments on his father's stock subscription and that instead respondent issued to Almada stock owned by himself. Respondent testified that Soares handled all stock sales, that respondent did not deal personally with Almada and knew nothing of the transaction except that Soares sold some of respondent's stock for him after the corporation had no more stock to sell. This conflict was resolved in favor of respondent by the trial court, and we cannot reweigh the evidence here.

We find no error in the record and the judgment is therefore affirmed.

NOURSE, P.J., and SPENCE, J., concur.

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62 Cal.App.2d 570

GREEN et al. v. MERCED COUNTY et al.

Civ. 6965.

District Court of Appeal, Third District, California.

Jan. 27, 1944.

1. New trial 🔑140(3)

Application for new trial on ground of misconduct of counsel is covered by subdivision 1 of section 657, and hence such application must be made upon affidavits as required by section 658. Code Civ. Proc. § 657, subd. 1; § 658.

2. Appeal and error 🔑1161

Plaintiffs' admission that alleged misconduct of counsel did not appear in reporter's transcript, in view of fact that no affidavits in support of motion for new trial were filed, constituted an admission that error was committed in granting a new trial on ground of such alleged misconduct. Code Civ.Proc. § 657, subd. 1; § 658.

3. Negligence 🔑93(3)

The alleged negligence of son driving his automobile could not be imputed to father who was riding in automobile as a guest at time of accident.

4. Appeal and error 🔑977(3, 5)
New trial 🔑6

The granting or refusing of new trial rests largely within discretion of trial court, whose action in granting new trial will not be disturbed in absence of clear showing of unmistakable abuse of such discretion. Code Civ.Proc. §§ 657, 658.

5. New trial 🔑71

On motion for new trial for insufficiency of evidence to justify the verdict, court is not restricted as in motions for directed verdict or nonsuit, but may grant motion for new trial notwithstanding a substantial conflict in the evidence. Code Civ.Proc. §§ 657, 658.

6. Negligence ⚷93(1)

Even if host was guilty of negligence constituting proximate cause of accident when automobile struck a bridge abutment in effort to avoid striking county's dump truck, guest would not be precluded from recovering as against county and truck driver if truck driver was also guilty of negligence which was proximate or contributing cause of guest's injuries. Vehicle Code, § 544(a, b), St.1935, p. 185.

7. Automobiles ⚷151

If driver of county's dump truck turned to the left blocking the highway immediately upon giving signal for such turn, driver was guilty of negligence per se in violating provisions of the Vehicle Code. Vehicle Code, § 544(a, b), St.1935, p. 185.

8. Automobiles ⚷245(53)

Whether negligence of county's dump truck driver in turning to the left blocking highway immediately upon giving a signal for such turn constituted a proximate cause of injuries to guest in automobile, which struck bridge abutment in effort to avoid striking the truck, was one of mixed law and fact. Vehicle Code, § 544(a, b), St.1935, p. 185.

9. Negligence ⚷56(1)

Independent negligence of one defendant constitutes "sole proximate cause" of injuries if such negligence was so disconnected as to make it plain that the damage was not a natural consequence of negligence of person urging nonliability.

See Words and Phrases, Permanent Edition, for all other definitions of "Sole Proximate Cause".

10. New trial ⚷70

In action for injuries to guest when automobile in which he was riding struck bridge abutment when host turned to left to avoid striking county's dump truck which was making a left turn immediately upon giving a signal for such turn, granting guest a new trial was not an abuse of discretion where testimony might support a judgment for guest on theory that negligence of truck driver contributed as proximate cause to injuries notwithstanding it might be concluded that host's negligence precluded recovery in his own behalf. Code Civ.Proc. §§ 657, 658; Vehicle Code, § 544(a, b), St.1935, p. 185.

◆

Appeal from Superior Court, Merced County; B. C. Hawkins, Judge.

Action by Harold Green and Daniel Green against the County of Merced, a political subdivision of the State of California, and another, to recover for injuries sustained when an automobile in which plaintiffs were riding was driven into the concrete abutment of a bridge because of the alleged negligence of named defendant's employee who was operating a dump truck upon the highway. From an order granting a new trial to plaintiffs, defendants appeal.

Affirmed in part and reversed in part.

F. M. Ostrander, of Merced, for appellants.

C. Ray Robinson, of Merced, Deadrich & Spencer, of Oakland, and Belli & Leahy, of San Francisco, for respondents.

THOMPSON, Justice.

This is an appeal from an order of the trial court granting a new trial to plaintiffs Daniel and Harold Green. The notice of motion for a new trial specified therein that it would be made on all grounds set forth in Section 657 of the Code of Civil Procedure, and that such motion as to the first nine grounds would be made upon affidavits. The plaintiffs failed to file affidavits in support of their motion.

The order of the court granting the motion for new trial reads as follows: "The motion for new trial in the above entitled case having been heretofore submitted to the Court on this 4th day of November 1942, and after due consideration thereof, it is ordered that said motion be granted as to the plaintiff Daniel Green on the ground of insufficiency of the evidence to justify the verdict and as to both plaintiffs on the ground of misconduct of counsel for defendants."

Section 658 of the Code of Civil Procedure provides: "When the application is made for a cause mentioned in the first, second, third and fourth subdivisions of the last section, it must be made upon affidavits; otherwise it must be made on the minutes of the court."

[1, 2] Application for new trial on the ground of misconduct of counsel unquestionably comes within the provisions of Subdivision 1 of Section 657 of the Code of Civil Procedure, and Section 658 of the Code requires that such application be made upon affidavits. An exception to the rule requiring affidavits in support of a motion for new trial on the ground of alleged misconduct has been recognized in a number of cases. It is reasoned therein that where the alleged misconduct fully appears from a reading of the reporter's transcript that the further requirement of affidavits would be unreasonable as such affidavits setting forth the misconduct would simply constitute a mere copy of those particular portions of the transcript. It is unnecessary for this court, however, to consider the question as to whether the alleged misconduct of counsel appears in the reporter's transcript, or to determine the question of error on the part of the trial court in granting the motion for new trial on the ground of misconduct of counsel for defendants, as both plaintiffs Daniel and Harold Green admit that such misconduct does not appear in the reporter's transcript. This acknowledgment by plaintiffs, in view of the fact that no affidavits in support of this motion for new trial were filed, constitutes an admission that error was committed in granting a new trial on the ground of such alleged misconduct. Plaintiff Daniel Green, however, having been granted a new trial on the additional ground of insufficiency of the evidence to justify the verdict, maintains that the trial court in granting his motion for new trial on this ground ruled in the only way possible in the light of the evidence presented at the trial of the case. It follows that the only remaining issue before this court is the determination of error, if any, on the part of the trial judge in granting plaintiff Daniel Green's motion for new trial on the ground of insufficiency of the evidence to justify the verdict.

This suit was commenced by plaintiffs Harold and Daniel Green, the complaint setting forth separate causes of action, to recover damages for injuries received as a result of the car in which they were riding being driven into the concrete abutment of a bridge. It is alleged that the accident was occasioned by the negligent manner in which Charles S. McBride, defendant, was operating a dump truck upon the highway at the particular time. The truck was owned by defendant County of Merced.

[3] A short time prior to the accident in question, plaintiffs Harold and Daniel Green, who were father and son, were proceeding south on State Highway number 33, approximately six miles south of Gustine. They were riding in a car owned and being driven by Harold, the son. He was forty-two years of age, while the father, Daniel Green, who was riding in the back seat at the time, was eighty-two years of age. The time was approximately three o'clock in the afternoon and the driving conditions were good, including excellent visibility. According to the testimony of plaintiff Harold Green, the dump truck operated by defendant McBride was first observed about one quarter of a mile down the highway proceeding in the same direction as that of plaintiffs' car, and it was being driven on the proper side of the highway. The plaintiff, traveling at a speed of approximately fifty miles per hour, pulled over into the left lane of the highway, intending to pass the dump truck. At this time the plaintiff observed that defendant's truck was approaching a small bridge and it was concluded, according to the testimony of plaintiff, that he would pass defendant after the truck had traversed this bridge which was about thirty-five feet in length. As the truck started to cross this bridge, and when the plaintiffs' car was approximately 100 feet to the rear and to the left of the truck, the plaintiff testified the defendant put out his hand, indicating a left hand turn and simultaneously turned the truck to the left so that at least a portion of the truck was straddling the center line of the highway. The plaintiff immediately applied his brakes and sounded his horn in an endeavor to prevent a collision, but as plaintiff testified, it appearing imminent that he would crash into the rear of the truck he acted as he thought best under the circumstances and turned his car to the left, striking the concrete abutment of the bridge. Both occupants of plaintiffs' car were quite seriously injured as a result of the impact. It was determined subsequent to the accident that defendant at the time he turned his truck to the left was doing so in preparation for making a complete left turn into a side road which was located a very short distance beyond the bridge. Plaintiff admitted that after he had sounded his horn the defendant pulled his truck back toward the right side of the highway and that it is possible that he might have driven his car past the truck without contacting either the bridge or the

truck, but that at the time such circumstance did not seem possible. The defendants concede that negligence on the part of plaintiff Harold Green, if any, may not be imputed to the plaintiff Daniel Green who was riding in his son's car as a guest at the time of the accident.

The testimony of Harold Green is, in part as follows:

"Q. About how far was that truck down the highway when you first saw it? A. I noticed the truck on the highway ahead of me when I was perhaps a quarter of a mile behind the truck.

"Q. Was the visibility good that day? A. Yes, sir. * * *

"Q. And on what side of the highway was this truck when you first observed it? A. He was going south on the west lane.

"Q. Did that truck keep its course on the west lane? A. No; it did not.

"Q. What did it do? A. It pulled over into the center of the highway.

"Q. About how far were you in back of it when it pulled over? Can you estimate that? A. A hundred feet. * * *

"Q. How fast were you going? A. Fifty miles an hour.

"Q. Did the driver of the truck give any arm signal when he pulled over? A. Yes; he did.

"Q. With reference to his actual pulling over to your side of the highway, or to his left lane, where was he when he gave that signal? A. He was at the north approach of the bridge across the canal.

"Q. About how far away would you say from the canal? A. He was right at it. Q. What? A. Right at the bridge.

"Q. At that time which lane were you in? The left or the right? A. I was in the east lane.

"Q. That is your left lane? A. Left lane. * * *

"Q. What did you do when the truck pulled over into that lane? A. I applied my brakes and sounded my horn. * * *

"Q. What did the truck driver do, if anything, upon your sounding of the horn? A. He continued south on the highway.

"Q. In a straight line down the highway? A. Yes.

"Q. What did you do? A. I continued to attempt to stop my car and signaled vigorously to the truck.

"Q. When you say you signaled vigorously, what do you mean by that. Auditory or visually or how? A. With the horn of my car. * * *

"Q. Now, tell us what you did with your car, the path of your car and the path of the county truck. * * * A. I drove my car into the northeast end of the bridge.

"Q. Why did you drive your car into the northeast end of the bridge? A. Because I concluded that it was the lesser evil that I had to face at the time."

On cross-examination of plaintiff Harold Green, the following questions were asked and answers given:

"Q. At that time did you make any estimate as to the speed of the truck that you were going to pass? A. No.

"Q. Did you observe any signal on the part of the truck? A. Subsequently I did.

"Q. What signal did you observe? A. I saw the truck driver put out his arm.

"Q. Indicating a left-hand turn? A. Yes, sir.

"Q. Did he change the direction of his truck? A. Yes, sir.

"Q. And which was done first, or were they done simultaneously? A. They were done simultaneously.

"Q. Where was the truck when you observed that signal; that is, where was the truck in relation to the bridge? A. He was at the north approach. Q. He was at the north approach? A. Yes.

"Q. Approximately just going onto it? A. Yes, sir."

[4, 5] It is well established that the granting or refusing of a new trial in any case rests, very largely, within the discretion of the trial court, and its action in granting a new trial will not be disturbed in the absence of a clear showing of an unmistakable abuse of such discretion. Gray v. Robinson, 33 Cal.App.2d 177, 91 P.2d 194. The trial court, in the consideration of a motion for new trial on the ground of insufficiency of the evidence to justify the verdict, is also not restricted as it is in motions for a directed verdict or nonsuit, but may grant the motion for new trial notwithstanding a substantial conflict in the evidence. In jury cases, the moving party has in fact two hearings, one before the jury, and the other before the court on motion for new trial. Myers v. Moose, 36 Cal.App.2d 739, 98 P.2d 551.

[6] Applying the foregoing rules of law pertaining to a motion for new trial on the ground of insufficiency of the evidence, the action of the trial court in awarding plaintiff Daniel Green a new trial on that ground constitutes error only if it can be said that the jury reached the sole conclusion supported by the record. In support of such a conclusion it would be necessary to determine that as a matter of law the evidence introduced failed to support any theory of negligence on the part of defendant McBride, or at least that his negligence was not a proximate or contributing cause of the accident. Even assuming that plaintiff Harold Green was guilty of negligence constituting a proximate cause of the accident, plaintiff Daniel Green nevertheless would not be precluded from recovering as against defendants, if defendant McBride was also guilty of negligence which was a proximate or contributing cause of the injuries received by Daniel Green. This is true by virtue of the fact that Daniel Green was a guest in his son's car and the negligence of the driver, if any, cannot be imputed to him.

Section 544 of the Vehicle Code, St.1935, p. 185, provides in part as follows:

"(a) No person shall turn a vehicle unless and until such movement can be made with reasonably safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement.

"(b) Any signal of intention to turn right or left shall be given continuously during the last fifty feet traveled by the vehicle before turning."

[7, 8] According to the testimony of Harold Green, defendant McBride failed to give the appropriate signal during the last fifty feet traveled by the dump truck, but in violation of Section 544, above quoted, turned to the left blocking the highway immediately upon giving a signal for a left hand turn. If this testimony is a correct statement of conduct, defendant McBride was guilty of negligence per se in violation of the provisions of Section 544 of the Vehicle Code. There remains the further inquiry as to whether such negligence constituted a proximate cause of Daniel Green's injuries. That question was one of mixed law and fact and although it was properly placed before the jury for their consideration it certainly cannot be concluded as a matter of law that the jury arrived at the only decision possible under the evidence presented. To the contrary, the testimony of plaintiff, Harold Green, might well support a judgment in favor of plaintiff Daniel Green on the theory that the negligence of defendant McBride contributed as a proximate cause to the injuries received by Daniel Green, even though it might be concluded that the negligence of Harold Green precludes a recovery on his own behalf.

[9] The law applicable to situations where injury results from two separate and distinct acts of negligence, operating and concurring simultaneously, and both constituting a proximate cause thereof, is applied in the case of Fishman v. Silva, 116 Cal.App. 1, 2 P.2d 473. At page 7 of 116 Cal.App., at page 475 of 2 P.2d, language which might well be deemed appropriate as applying to the issues as presented in the instant case, is as follows: "In order that the independent negligence of one of the defendants might constitute the sole proximate cause of the injuries to plaintiff and displace the negligence of the other, it must appear from the evidence that such negligence was so disconnected in time and nature as to make it plain that the damage occasioned was in no way the natural or probable consequence of the negligence of him thus urging his nonliability."

[10] In stating the foregoing rules of law applying to "proximate cause," we have proceeded on the theory that the evidence supported the conclusion that plaintiff Harold Green was guilty of negligence constituting a proximate cause of Daniel Green's injuries. Such presumption was simply for the purpose of indicating that defendants might be legally liable to Daniel Green for his injuries, regardless of the negligence on the part of plaintiff Harold Green. It should not be assumed from what we have previously said that we conclude that Harold Green was in fact guilty of negligence which was a proximate cause of the injuries received, or that he was negligent at all under the circumstances of this case.

That portion of the order granting a new trial "on the ground of misconduct of counsel for defendants" is reversed, and that portion of the order granting Daniel Green a new trial on the ground of insufficiency of the evidence is affirmed, respondents to recover costs on appeal.

ADAMS, P. J., and SCHOTTKY, Justice pro tem., concur.

62 Cal.App.2d 320

SAMUELSON v. SIEFER et al.

Civ. No. 6817.

District Court of Appeal, Third District, California.

Jan. 14, 1944.

1. Automobiles ⚷244(21)

The violation of a statute prescribing traffic rules is prima facie evidence of negligence as a matter of law.

2. Automobiles ⚷244(47, 58)

Burden was on defendants of proving by preponderance of evidence that plaintiff was guilty of contributory negligence which proximately caused collision between plaintiff's motorcycle and defendants' automobile.

3. Appeal and error ⚷996

Trial judge's conclusion that plaintiff was not guilty of contributory negligence which proximately caused collision between his motorcycle and defendants' automobile could not be disturbed on appeal, if there was any evidence or reasonable inferences to be drawn therefrom to support the findings

4. Automobiles ⚷213

Plaintiff who was injured when motorcycle which he was riding collided with defendants' automobile which was traveling in same direction when driver of defendants' automobile attempted to make left turn without giving warning required by statute was required to use that degree of care only which would be required of a reasonably prudent motorcyclist under similar circumstances. Vehicle Code, § 546, St.1935, p. 186.

5. Automobiles ⚷244(47)

Evidence supported finding that plaintiff who was injured when motorcycle which he was riding collided with defendant's automobile which was traveling in same direction when driver of defendants' automobile attempted to make left turn without giving warning required by statute was not guilty of contributory negligence either in failing constantly to watch defendants' automobile or in driving at excessive speed. Vehicle Code, § 546, St. 1935, p. 186.

Appeal from Superior Court, Sacramento County; Malcolm C. Glenn, Judge.

Action by John W. Samuelson against Willis F. Siefer and another for injuries received by the plaintiff in a collision between plaintiff's motorcycle and defendants' automobile. From a judgment for plaintiff, the defendants appeal.

Judgment in accordance with opinion.

Wallace Shepard, and R. C. Fleming, both of Sacramento, for appellants.

Van Dyke & Harris, of Sacramento, for respondent.

THOMPSON, Justice.

Judgment was rendered against the defendants for injuries received by the plaintiff in a collision between plaintiff's motorcycle and defendants' automobile which occurred on Del Paso Boulevard in North Sacramento. The cause was tried by the court sitting without a jury. The court found that the accident occurred as the result of negligence on the part of the driver of defendants' car in suddenly turning the machine across the course of plaintiff's approaching motorcycle, in an effort to cross the boulevard, without giving the warning signal or complying with the other provisions of Section 544 of the Vehicle Code, St.1935, p. 185. From the judgment which was rendered accordingly, the defendants have appealed.

Del Paso Boulevard is the main traveled highway extending north and south through the business portion of North Sacramento. It is more than sixty feet in width, and contains three traffic lanes on either side of the center white line of the street. Douglas Avenue enters the boulevard at a right angle at the point where the accident occurred. The defendant, D. P. Siefer, maintains a store in a building fronting the boulevard on the west side at a point about one hundred feet north of Douglas Avenue. The Original Auto Wreckers building is located on the same (west) side of the boulevard about fifty feet north of defendants' store building.

On November 18, 1940, at six o'clock in the evening on which the accident occurred, the defendants' automobile was parked at the curbing in front of the store. It was then dark, and the lights on all vehicles were turned on. It was not raining and the paved surface of the boulevard was dry. At the time last mentioned Willis P. Siefer, at the request of his father, D. P. Siefer, entered their Hudson automobile and slowly drove southerly along the second lane from the western curbing of Del Paso Boulevard, with the intention of crossing to the easterly side of the boulevard when he reached Douglas Avenue, about a hundred feet distant. There was then no traffic to prevent him from driving in the third lane adjacent to the center line of the street. Just at that time the plaintiff, riding his motorcycle southerly along a course about two feet west from the center white line of Del Paso Boulevard, reached a point fifty or sixty feet north of the store where defendants' car was parked. The motorcycle was traveling at the rate of "twenty or twenty-five miles an hour." Plaintiff saw defendants' machine "pulling away from the west curb." He testified that he first observed defendants' car "right around opposite the Original Auto Wreckers." That is clearly a mistake for defendants' car started from a position in front of their store, which was fifty feet further south on the boulevard. Plaintiff's motorcycle was then fifty or sixty feet north of the store, which would place it about opposite the Original Auto Wreckers building. The defendants' Hudson machine was slowly driven along the second lane at a rate of speed not to exceed eight to twelve miles per hour. At that time a man by the name of Alvin Cowing was also driving his Chevrolet machine southerly along the second lane of Del Paso Boulevard at the rate of twenty-five miles an hour. Cowing said he saw the defendants' car "come out in front of me from the curb." The plaintiff's motorcycle was then traveling along the third lane near the center line a few feet to the rear of Cowing's machine. The plaintiff saw Cowing's car and also the defendants' automobile as it turned out from the curbing in front of Cowing's machine. We assume that Willis Siefer's conduct in slowly driving his car along the second lane in front of Cowing's machine had the effect of diminishing his rate of speed so as to enable the plaintiff to overtake those automobiles without increasing his speed from the asserted rate of twenty or twenty-five miles an hour. After the two automobiles had traveled the distance of nearly one hundred feet from the store to Douglas Avenue, at which point the defendants' car suddenly turned left to cross the boulevard without a warning signal, Cowing's machine was still following behind defendants' car. It is not disputed that Willis Siefer suddenly turned to his left across the third lane in front of the approaching motorcycle without a warning signal. It is also reasonable to assume he made that turn without due caution to first ascertain that it was "reasonably safe" to do so. Cowing testified that Willis Siefer "with no signal whatsoever turned left right in front of me." Cowing was then driving his car about twenty-five feet behind defendants' machine, and he was compelled to "swerve" to his right to avoid a collision. Cowing stated that plaintiff's motorcycle was then traveling in the left lane near the center line of the highway only about fifteen or twenty feet to the rear of his car when the defendants' automobile suddenly turned across the highway without a warning signal. The plaintiff was unable to turn to his left across the white line on account of an approaching automobile. Confronted with that emergency, and being unable to turn to his right because of the presence of Cowing's machine, he applied his rear and front emergency brakes with full force. The motorcycle toppled over and threw the plaintiff to the pavement. Both the plaintiff and his motorcycle slid with great force directly into the defendants' automobile. The plaintiff was seriously bruised and suffered fractures of both the tibia and fibula bones of the left leg. He remained in a hospital for treatment for sometime. The fractures were reduced with difficulty. It was necessary to use Lane plates and screws to retain the fractured bones in proper position.

The defendants contend that the findings and judgment are not supported by the evidence for the reason that even if Willis Siefer, the driver of defendants' automobile, was guilty of negligence in failing to comply with the provisions of Section 544 of the Vehicle Code before turning to his left across the boulevard, those omissions were not the proximate cause of the accident. It is further asserted that plaintiff was guilty of contributory negligence as a matter of law, in failing to continuously watch defendants' machine, and in driving his motorcycle at an excessive rate of speed. It is not contended the judgment is excessive.

Section 544 of the Vehicle Code provides in part that:

"(a) No person shall turn a vehicle unless and until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided herein in the event any other vehicle may be affected by such movement.

"(b) Any signal of intention to turn right or left shall be given continuously during the last 50 feet traveled by the vehicle before turning."

[1] We may assume, in support of the findings, that the driver of defendants' automobile was prima facie guilty of negligence in attempting to turn to his left across the boulevard without giving the required warning signal of extending his arm horizontally, Sec. 546, Vehicle Code, while he was driving the last fifty feet before he made the turn, and also in failing to ascertain that it was reasonably safe to then attempt to cross the boulevard ahead of the approaching motorcycle, as required by the above-quoted section. The violation of a statute prescribing traffic rules is prima facie evidence of negligence as a matter of law. 19 Cal.Jur. 632, sec. 65; 13 Cal. Law Rev. 428. The findings are amply supported by the evidence in that regard.

[2] The appellants, however, contend that the violation of Section 544 of the Vehicle Code was not the proximate cause of the accident because it appears the plaintiff was also guilty of contributory negligence in failing to continuously watch the defendants' car, and that the plaintiff therefore would not have seen the warning signal if it had been given. We think there is no merit in that contention. The burden was on the defendants to prove by a preponderance of the evidence that the plaintiff was guilty of contributory negligence which proximately caused the accident. That was a problem for determination of the trial judge. His conclusion in that regard may not be disturbed on appeal, if there is any evidence or reasonable inferences to be drawn therefrom to support the finding that plaintiff was not guilty of contributory negligence. Even if reasonable minds may differ regarding that question, this court is not warranted in reversing the conclusion of the trial court. The application of the foregoing rule is aptly stated in the case of Wynne v. Wright, 105 Cal.App. 17, 286 P. 1057, quoting from Johnson v. Southern Pac. R. Co., 154 Cal. 285, 97 P. 520, as follows: "' "It is only where no fact is left in doubt, and no deduction or inference other than negligence can be drawn by the jury from the evidence, that the court can say as a matter of law that contributory negligence is established. Even where the facts are undisputed, if reasonable minds might draw different conclusions upon the question of negligence, the question is one of fact for the jury." ' "

[3, 4] It was not absolutely necessary for the plaintiff to keep his eyes on defendants' automobile all the time he was approaching the intersection. Several vehicles were traveling both ways along the boulevard in that vicinity. It was essential for him to observe the movements of all cars in his vicinity. The degree of care required in watching the movements of a particular machine depends upon the facts and circumstances existing at the time and place of the accident involved in the suit. It was necessary for plaintiff to use that degree of care, only, which would be required of a reasonably prudent driver of a motorcycle under similar circumstances. 4 Blashfield's Cyclopedia of Automobile Law and Practice, Perm.Ed., p. 189, § 2391. Considering the testimony as a whole, we are of the opinion the finding of the court that plaintiff was not guilty of contributory negligence is adequately supported by the evidence.

It is true that in response to direct questions propounded by defendants' attorney, the plaintiff conceded that he "only had a fleeting glimpse" of the defendants' car before he saw it directly ahead of his motorcycle. It is also true that when he was asked if he did not see that car "traveling right down the extreme outside of that road," he said "I didn't keep my eyes on it * * * there was other traffic on the highway." But on the contrary the plaintiff was examined at length by defendants' attorney, regarding the rate of speed at which defendants' car was traveling. In effect, he said he was watching it and that it was traveling about five to ten miles an hour. This colloquy occurred upon that subject:

"Q. There wasn't any time that night that you even saw that automobile while you were traveling other than in a distance of twenty feet. Isn't that true? A. That's true, yes.

"Q. And even during that twenty feet you weren't watching it, were you? A. Well, I must have watched it if I saw it."

[5] A reading of plaintiff's entire testimony convinces us that he was entirely fair and frank. It is quite evident that he was alert and watchful to see the movements and approximate locations of all vehicles in

the vicinity of the accident. He saw defendants' machine leave the curbing in front of the store, and says that it traveled slowly. He also observed Cowing's car traveling behind the defendants' machine in the second lane. It follows that if defendants' car was traveling only about ten miles an hour, then Cowing's machine could not have exceeded that rate of speed. The evidence shows that plaintiff's motorcycle was only fifty or sixty feet behind Cowing's machine when defendants' car left the curbing. It was a hundred feet from the store to Douglas Avenue where the turn was made. The slow speed of the other machines enabled the plaintiff to reach a point opposite Cowing's car by the time the defendants' machine appeared in his pathway. There is evidence that defendants' machine did not slacken its speed before making the turn. Fairly construing the entire evidence, it reasonably appears the plaintiff was sufficiently alert and watchful to have seen Willis Siefer's arm signal if he had extended the arm continuously, as the statute requires, for a distance of fifty feet before the left turn was made. The only obstacle that could have possibly prevented plaintiff from seeing defendants' car all the time was the Cowing machine. Even that should not have prevented plaintiff from seeing an extended arm the moment the forward car began to turn to the left. Moreover, due caution on the part of the driver of defendants' machine should have prompted him to travel in the easterly lane since he was intending to make a left turn at Douglas Avenue. If he had done so, the plaintiff would have been in no danger of a collision. The court was entitled to take into consideration all those circumstances in determining whether the respective parties were guilty of negligence. At least, we are unable to say, as a matter of law, that the plaintiff was guilty of contributory negligence in failing to constantly watch the defendants' automobile since he had no reason to assume it would suddenly turn from the second lane to cross the boulevard ahead of his motorcycle.

Nor may we say the plaintiff was guilty of contributory negligence in driving his motorcycle at an excessive rate of speed. There is some conflict of evidence in that regard. But there is an abundance of testimony to support his statement that he was not running at a rate of speed in excess of twenty or twenty-five miles an hour. The very fact that he traveled less than a hundred and fifty feet before he overtook Cowing's car which was running only about ten miles an hour, is substantial proof of that assertion. The evidence does not warrant this court in determining, as a matter of law, that the plaintiff was driving his motorcycle at an excessive rate of speed.

The defendants are not aggrieved by the order of court granting them a new trial with respect to that portion of the judgment which awarded plaintiff special damages in the further sum of $450 for loss of wages during the time he was incapacitated from work on account of the injuries he received as a result of the accident. The defendants' motion for new trial on other grounds for the reasons heretofore stated was properly denied.

The order granting a new trial on the issue of damages resulting from loss of wages only, and the judgment, other than the award of $450 special damages, are affirmed, respondent to recover costs on appeal.

ADAMS, P. J., and PEEK, J., concur.

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62 Cal.App.2d 582

Ex parte KNIGHT.

Cr. 1849.

District Court of Appeal, Third District, California.

Jan. 27, 1944.

Rehearing Denied Feb. 10, 1944.

1. Habeas corpus 🔑85(1)

Burden was on petitioner seeking release on habeas corpus to establish by a preponderance of evidence allegations that his conviction was obtained by means of perjured testimony known by the prosecuting attorney to be false at the time it was presented.

2. Habeas corpus 🔑4, 85(1)

A presumption of regularity applies to the judgment of the trial court when it is attacked on habeas corpus, and the writ may not be used to serve the purposes of an appeal.

3. Habeas corpus ⚷85(1)

Evidence in habeas corpus proceeding was insufficient to show that petitioner was convicted upon perjured testimony, or, if testimony was perjured, that it was knowingly used by the prosecution.

4. Habeas corpus ⚷22(1)

It is not the province of the writ of habeas corpus to retry issues already passed upon by the trial court and reviewed by the District Court of Appeal.

◆

Proceeding in the matter of the application of Harry Knight for a writ of habeas corpus, opposed by the People of the State of California and Clyde I. Plummer, Warden, and others.

Writ discharged and petitioner remanded.

A. Brigham Rose, of Los Angeles, for petitioner.

Robert W. Kenny, Atty. Gen., and David K. Lener, Deputy Atty. Gen., for respondent.

ADAMS, Presiding Justice.

Petitioner herein was convicted in Los Angeles, October 8, 1940, of the crime of robbery of the first degree and assault with a deadly weapon, and was sentenced to imprisonment in the State Prison. Seeking his release from such imprisonment by writ of habeas corpus, he contends that his conviction was obtained by the use of the testimony of one Alvin M. Cowart, whose testimony was perjured and was known by the prosecuting attorneys to be false at the time it was presented. The petition is accompanied by copies of affidavits of Roy Galbraith, a witness at the original trial, dated May 22, 1943, Selma K. Ellner, who was petitioner's attorney at one stage of the proceedings prior to his trial, dated May 18, 1941, Alvin M. Cowart, dated October 1, 1940, and Tom O'Brien, a Deputy Sheriff of Los Angeles County, dated October 27, 1943.

The writ having issued, respondent Clyde I. Plummer, Warden of Folsom Prison, filed herein an answer and return denying that the testimony of Cowart given at Knight's trial was false, or that it was given under duress, coercion, fraud or promise of reward. Said answer is supported by the affidavit of George H. Johnson, a Deputy District Attorney of Los Angeles County, who was in charge of the prosecution of Knight, the original of which affidavit has been filed herein, in which affiant alleges that at no time was it suggested to Cowart by him, or by anyone with his knowledge or consent, what Cowart's testimony should be, nor were any threats or promises made to Cowart either in connection with his testimony or otherwise.

To this answer petitioner has filed a traverse which consists of an affidavit by petitioner, dated November 1, 1943, in which he sets forth in argumentative form his version of the circumstances attending the commission of the crime of which he stands convicted, copies of the same affidavits of Roy Galbraith, Selma K. Ellner and Alvin M. Cowart which were attached to the original petition, the original of the affidavit of Tom O'Brien, copy of which was attached to the original petition, the affidavit of A. Brigham Rose, petitioner's attorney, who attacks the fairness of Knight's trial in the trial court and the review thereof by the District Court of Appeal of the Second District (People v. Knight, 44 Cal.App.2d 887, 113 P.2d 226), and an affidavit of one Braulio Galinto, an inmate of Folsom Prison, dated November 1, 1943.

There has also been filed in this court, in this proceeding, the entire reporter's transcript in People v. Knight, and a transcript of the proceedings on said defendant's motion for a new trial. This latter transcript shows that in support of his motion for a new trial Knight presented and relied upon the same affidavit of Cowart which is presented in support of the petition before us. It also shows that in opposition to the said motion for a new trial the affidavits of George H. Johnson, Alfred S. Colgrove and Daniel Beecher, Deputy District Attorneys of Los Angeles County, were filed, together with a statement made by Cowart in the District Attorney's office in Los Angeles on September 18, 1940; also an affidavit of the Chief Clerk of the District Attorney's office relative to payments made to Cowart as a witness at the trial of Knight, and affidavits of Ray L. Marchant, Glenn Lamkin, Samuel Angier and Earl Gilmore, Deputy Sheriffs of Los Angeles County. No other evidence was offered.

Considering first the affidavits presented by petitioner in support of his petition, that of Knight himself consists of nothing more than an argument that he was not guilty of the offense charged. It throws no light upon the matter relied upon to secure his release, to wit, that his conviction was the result of perjured testimony, which testimony was known to be false by the prosecuting attorneys who convicted him.

The affidavit of Galbraith also presents nothing in support of the petition herein, but only alleges matters tending to discredit the testimony of Kast, the victim of the robbery. Kast's veracity was a matter for the jury. The affidavit of Selma K. Ellner furnishes nothing but a purported statement made to her by Cowart prior to the trial which is inconsistent with his testimony there given. This same statement was read at the trial in cross-examination of Cowart by Knight's present counsel, and Cowart at that time testified that this statement had been induced by promises that he would be "taken care of" if he made it, and that it was untrue.

The affidavit of Tom O'Brien alleges that two Deputy Sheriffs who worked in the township in which Knight resided disliked Knight because it was known that he had been convicted of murder, and had been proceeded against in the Justice's Court of said township, and that on May 14, 1940, one of said deputies had said that the next time they would "book" Knight "by fair means or foul"; also that the deputies who "worked up the case" against Knight were prejudiced against him, and that the reputation of one of them, Angier, was that "you wouldn't believe him under oath." This affidavit also has nothing to do with the question now before this court, and throws no light on whether Cowart's testimony was perjured or that it was known to the prosecuting attorneys to be false. Angier was a witness at the trial and his veracity was not then put in issue.

The affidavit of A. Brigham Rose, petitioner's counsel, avers that prior to the preliminary hearing of Knight and Cowart in the Justice's Court, the "co-defendant" informed affiant that Knight was innocent of the charge. The remainder of his affidavit consists mainly of assertions as to the alleged unfairness of Knight's trial, the alleged misconduct of the prosecuting attorney, and a charge that on appeal the justice who wrote the opinion was prejudiced against affiant, and that therefore Knight was deprived of fair consideration on said appeal. Except for this affiant's allegation that Cowart stated before the trial that Knight was innocent, this affidavit contains nothing pertinent or persuasive in support of the petition before us, and much of it is entirely improper. Obviously the alleged statement made to this affiant by Cowart was known to affiant before Cowart testified at the trial, but we find no reference to it in the record, and Cowart was not asked about it on cross-examination by this affiant. Also it is not alleged that the prosecution was informed of such statement prior to the trial.

As for the affidavit of Cowart himself, in which he alleges that Knight was not implicated or involved in the robbery or assault, and that his testimony at the trial was untrue and was "inspired at the insistence and solicitation" of the Deputy District Attorney George Johnson and Deputy Sheriffs Angier and Lamkin—that they suggested the testimony he gave at the trial, under threat that if he did not they would send him to San Quentin or keep him in jail, and that the office of the District Attorney "as an inducement for my false testimony, gave me six checks" which approximated $100, this affidavit is dated October 1, 1940, and, as the record before us shows, was used by defendant and his present counsel on motion for a new trial. The circumstances under which it was made do not appear; but the counter affidavits filed herein indicate that it was secured by means which strongly tend to discredit it. Also the trial court, which had heard the testimony of this witness at the trial, apparently was not impressed by it when it was presented on motion for a new trial; and it is significant that on his appeal petitioner raised no point about the denial of his motion for a new trial.

As for the affidavit of Braulio Galinto that he committed a robbery in connection with two persons occupying premises such as those where the robbery of which Knight was convicted occurred, that he saw Knight there, but that affiant, and not Knight, committed the robbery, it is not pertinent to the issues here presented and furthermore we find said affidavit unworthy of credence.

[1, 2] Assuming on the authority of cases cited by petitioner that a proceeding by way of petition for a writ of habeas corpus is an appropriate one to afford him an opportunity to prove that his conviction was secured by means of perjured testimony knowingly used at his trial (Mooney v.

Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406; Pyle v. Kansas, 317 U.S. 213, 63 S.Ct. 177, 87 L.Ed. 214; Waley v. Johnston, 316 U.S. 101, 62 S.Ct. 964, 86 L.Ed. 1302), nevertheless in this proceeding the burden is upon petitioner to establish by a preponderance of the evidence the truth of the allegations of his petition. In re Mooney, 10 Cal.2d 1, 15, 73 P.2d 554. A presumption of regularity applies to the judgment of the trial court when it is attacked on habeas corpus, and the writ may not be used to serve the purposes of an appeal. Ex parte Connor, 16 Cal.2d 701, 108 P.2d 10; Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969.

[3, 4] We are of the opinion that petitioner has failed to show that he was convicted upon perjured testimony, or, if Cowart's testimony was perjured, that it was knowingly employed by the prosecution, as is charged. It is not the province of the writ of habeas corpus to retry issues already passed upon by the trial court and reviewed by the District Court of Appeal. Giving the affidavits filed by petitioner their fullest weight, he has not sustained the burden of proof cast upon him in this proceeding. His allegations are denied by the affidavit of George H. Johnson, Deputy District Attorney in charge of the prosecution of Knight, and by the seven other affidavits which were presented on petitioner's motion for a new trial. These affidavits deny that any suggestions, promises or threats were made to Cowart to influence his testimony. They also present a statement made by Cowart prior to the trial in which he identified Knight as the person who committed the robbery and assault of which he was convicted, and in which he asserted that he was not making his statement because anyone had threatened him, or made him any promises. The affidavit of Ray L. Marchant, an employee of Knight at the place of the robbery and assault, states that Cowart on several occasions prior to and after the trial stated to him that Knight was the guilty party. The two deputy sheriffs charged by Tom O'Brien with having threatened to "book" Knight, also deny that any threats or promises were made to influence Cowart's testimony.

Petitioner has failed to show that at his trial he was not accorded due process of law. He has not shown by any substantial or credible evidence that the testimony given by Cowart at the trial was false, and he has signally failed to show, if such testimony was, in fact, false, that its falsity was known to the officials who prosecuted him. He apparently presents nothing bearing upon his contention that he was convicted on perjured testimony that was not known to him and his counsel at the time he made his motion for a new trial; and he did not see fit to rely thereon on his appeal from his conviction, or even raise such question on his appeal. Also, as was stated by the Appellate Court, there was ample evidence in the record to convict defendant, other than the testimony of Cowart.

The writ is discharged and the prisoner is remanded.

THOMPSON, J., and SCHOTTKY, Justice pro tem., concur.

McCLATCHY NEWSPAPERS v. GLENN, Judge.

Civ. 6995.

District Court of Appeal, Third District, California.

Jan. 25, 1944.

Hearing Granted March 23, 1944.

1. Mandamus ⇨28, 31, 40

Mandamus will not issue to compel performance of an act which is merely discretionary, but it will issue to compel a court to accept jurisdiction conferred by statute, and it is a proper remedy to enforce a statutory right to take deposition, or for purpose of discovery of evidence addressed to a valid issue.

2. Mandamus ⇨26

Where exercise of judicial discretion is not involved, and duty of a court to act in a particular way becomes absolute, mandate will issue for relief of an aggrieved party.

3. Mandamus ⇨28

Mandamus will issue to correct an abuse of discretion.

4. Depositions 🔑9
Discovery 🔑85

In libel action, refusal to permit defendant to take depositions of certain officials of banks, title companies, and investment brokerage firms, and to secure inspection of certain documents for purpose of checking upon plaintiff's financial affairs during his incumbency as district attorney, on ground that newspaper article purportedly charging plaintiff with corruption in office was libelous per se, was an abuse of discretion. Code Civ.Proc. § 2021.

5. Depositions 🔑8

A newspaper article posing question as to how it was possible for plaintiff, going into office of district attorney without any money, to buy an office building at a purported price of $80,000 on a salary of $4,500, was ambiguous, as respects defendant's right to take depositions for purpose of checking plaintiff's financial affairs.

6. Libel and slander 🔑86(1, 2)

An innuendo need be pleaded only when alleged libelous language is ambiguous, but cannot be used to alter, enlarge, extend, or restrict alleged libelous language.

7. Libel and slander 🔑48(2, 3)

A newspaper or an individual may make statements regarding character or fitness of public officers or candidates therefor, so long as statements are confined to the truth. Civ.Code, § 47.

8. Libel and slander 🔑54

The truth of alleged libelous publications is a complete defense to an action for damages therefor.

9. Libel and slander 🔑48(2), 54

Even if newspaper article was libelous per se because it charged plaintiff with corruption in public office or in engaging in business in violation of county charter, defendant newspaper had absolute right to set up and prove as matter of defense either a privileged communication, or facts which justified the publication, or truth of proper inferences to be drawn therefrom. Civ.Code, § 47.

10. Libel and slander 🔑109

If defense in libel action merely amounts to a qualified privilege, defendant is entitled to elicit evidence in support of such defense for purpose of reducing amount of any judgment which might be rendered against him. Civ.Code, § 47.

11. Depositions 🔑8
Discovery 🔑84

To establish defenses of absolute privilege, qualified privilege, or justification by proof of the charge, defendant in libel action was entitled to statutory privilege of ascertaining facts by means of depositions and inspection of documents. Civ.Code, § 47; Code Civ.Proc. §§ 1000, 2021.

12. Discovery 🔑80

The statute relating to obtaining of evidence by inspection of books and records was enacted to provide a more speedy and less expensive remedy than that afforded in chancery, and should be liberally construed. Code Civ.Proc. § 1000.

Original proceeding by McClatchy Newspapers against Honorable Malcolm C. Glenn, as Judge of the Superior Court of the State of California, in and for the County of Sacramento, for a writ of mandate or other appropriate writ to compel the respondent to set aside and annul certain orders made by him in a certain action pending before the superior court, entitled Babcock v. McClatchy Newspapers and others.

Peremptory writ issued.

Alex J. Ashen and Downey, Brand & Seymour, all of Sacramento, and Sullivan, Roche, Johnson & Farraher and Theo. J. Roche, all of San Francisco, for petitioner.

Malcolm C. Glenn, of Sacramento, in pro. per.

Otis D. Babcock and John L. Brannely, both of Sacramento, amici curiae.

PER CURIAM.

Petitioner has applied to this court to issue a writ of mandate or other appropriate writ to compel respondent Superior Court to set aside and annul certain orders made by respondent in that certain action pending before said Superior Court, entitled Babcock v. McClatchy Newspapers, a corporation, et al. The allegations of the petition not controverted here show the following facts:

Otis D. Babcock, who will be referred to hereinafter as plaintiff, on January 27, 1943, filed in the Superior Court of the County of Sacramento an amended complaint in an action against McClatchy Newspapers, a corporation, and one A. J. Harder, for damages for alleged libel. In said complaint plaintiff alleged that he was the District Attorney of Sacramento County, and a candidate for reelection to said office, and that defendant McClatchy Newspapers was publisher of "The Sacramento Bee"; (par. III) that on August 8, 1942, defendants falsely and maliciously and with the intent and design to injure, disgrace and defame plaintiff, published in said Sacramento Bee an article containing false, libelous and malicious matter as follows: "How was it possible for you, Mr. Babcock, going into office dead broke, on a salary of $4,500, to buy an office building at a purported price of $80,000? * * * In contrast to the record of the incumbent Babcock, John Quincy Brown, deputy state attorney general, has an exemplary record, both as a member of the bar and in his private life. Sacramento County needs this man." (par. IV); that "defendants meant thereby to be understood as meaning and asserting, and the readers of said publication, in fact, understood as meaning and asserting, that plaintiff was a dishonest public official and that he was guilty of corruption in his official duties while occupying the office of District Attorney of Sacramento County"; (par. V) that by reason of such publication plaintiff was injured in his reputation, etc., to his damage in the sum of $50,000. The plaintiff further alleged (par. VI) that in publishing and circulating said libel defendants acted maliciously and with intent to injure, disgrace and defame plaintiff, and that by reason thereof plaintiff was entitled to recover exemplary damages in the sum of $20,000.

To said complaint defendant McClatchy Newspapers filed its answer, denying the allegations of paragraphs III, IV, V and VI, but admitting that it published in its paper an article[1] a portion of which consisted of the language stated in plaintiff's complaint.

In a *second* separate defense defendants pleaded that the matter published was privileged, in that the nature and source of the assets of a public officer and consideration of his record are proper matters of newspaper comment upon the issue of his reelection, and that said matter was published without malice and for an honest purpose.

In a *third* separate defense it was alleged that the published matter was a mere reiteration of a news item theretofore published in a morning newspaper, and that it was published for the public benefit and without malice.

In a *fourth* separate defense it was alleged on information and belief that the supposed defamatory words were true in that during his term of office plaintiff had increased his net worth to an extent and degree not reasonably to be accounted for by his salary of $375 per month, and that the source of said assets was proper matter of public comment and inquiry upon the issue of plaintiff's reelection.

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[1] The entire article was as follows:

"Harder Issues Challenge, Gets Babcock Reply

"District Attorney Accepts Offer to Debate on Vice, Convictions

"A. J. Harder, Sacramento attorney and supporter of John Quincy Brown for district attorney of Sacramento County, today issued a challenge to District Attorney Otis D. Babcock and Babcock immediately accepted.

"'I'll meet Harder any place he says. Let him arrange the date and the hall and I'll be there,' Babcock declared.

"Harder's challenge was for the district attorney to answer 'at a public meeting three questions which the people of this county have the right to ask.'

"Asks Three Questions

"The Questions follow:

"'How was it possible for you, Mr. Babcock, going into office dead broke, on a salary of $4500 to buy an office building at a purported price of $80,000?

"'Why do you, Mr. Babcock, through your special emissary, contend that vice in the delta has been cleaned up, when venereal disease reports from the public clinics show an increase?

"'How can you, Mr. Babcock, claim to have efficiently run your office in the face of the many dismissals and failures to convict on your cases in Sacramento courts—the state legislative lobbying case for one; the recent North Sacramento rape case, for another?'

"Harder, asserting that the office of district attorney has needed a cleaning out for at least six years, said he would pay for the hall and arrange all the details of a public meeting if Babcock will appear and explain these things to him.

"Contrasts Brown's Record

"Harder added:

"In contrast to the record of the incumbent Babcock, John Quincy Brown, deputy state attorney general, has an exemplary record, both as a member of the bar and in his private life. Sacramento County needs this man."

As a *fifth* separate defense defendants alleged that at the time of the publication of the alleged defamatory matter defendants believed, with good reason, that plaintiff had during his term of office accumulated property not to be accounted for out of his salary, and that plaintiff had, to defendants' knowledge, bought an office building at a purported price of over $80,000.

For a *sixth* separate defense it was alleged that by becoming a candidate for reelection plaintiff tendered as issues to be tried out publicly before the people, his honesty, etc., that the voters were interested in such issues, that defendant Harder had proposed the question and made the statement for the consideration of the voters and for plaintiff to answer; that the same were relevant to the issue of plaintiff's honesty, etc., and that defendant published same without malice and in the public interest, and that the same was privileged under subdivisions 3 and 5 of section 47 of the Civil Code.

In a *seventh* separate defense it was alleged on information and belief that when plaintiff became District Attorney he owned certain described real and personal property having a net worth of approximately $20,000; that after he became District Attorney he began to accumulate property rapidly and at the time of the alleged libel had a net worth in excess of $100,000, and an annual income from certain of his properties of approximately $28,000; and that the increase in plaintiff's net worth was not reasonably to be accounted for out of his salary as District Attorney.

As an *eighth* separate defense section 78 of the Charter[2] of Sacramento County was set forth, and it was alleged, also on information and belief, that while acting as District Attorney, plaintiff engaged in private business and activities in violation of said section, including the buying and selling of real estate on a large scale, and the running and operating of properties and business.

The day after the filing of the foregoing answer, defendant McClatchy Newspapers filed and served notice of the taking of the depositions of certain named officials of banks, title companies and investment brokerage firms, and secured the issuance by the clerk of the Superior Court of subpoenas duces tecum directed to said officials, and had said subpoenas served upon said persons. Said subpoenas requested the production of the records of the respective witnesses pertaining to bank deposits and withdrawals, loans from and financial statements made to said banks by plaintiff during the period of his incumbency as District Attorney; records of securities bought and sold during said period by plaintiff from said brokers; and records of real estate transactions handled for plaintiff by said title companies during said period. On the same day said defendant served on plaintiff and filed a notice of motion for inspection of plaintiff's state and federal income tax statements during the years of his incumbency as District Attorney, his financial statements and records of loans from named banks and his records of deposits and withdrawals, his brokerage account with Dean Witter & Company, and his records of transactions for the same period with named title companies, in particular those involving some forty-two described pieces of real property in Sacramento, Placer and Alameda Counties.

Shortly after the filing of defendant's notices of the motions aforesaid, plaintiff filed a demurrer to defendants' answer, and, at the same time, a notice of motion to quash the subpoenas duces tecum theretofore issued. The latter notice was based upon an affidavit of plaintiff's attorney alleging that the said subpoenas duces tecum were unreasonable and oppressive in that the issues in the case had not been defined; that defendant's affidavits failed to disclose the contents of the papers to be produced or to show their materiality or relevancy to the issues of the case, and that they failed to describe the documents so that they could be identified.

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[2] Section 78 of the Charter of Sacramento County provides: "Except as otherwise herein provided elective and appointive officers, their deputies and employees, serving full time with compensation, shall not engage in any private practice or business. The provision of this section shall not, however, apply to members of the Board of Supervisors nor to the Justices of the Peace or Constables outside of Sacramento township."

Defendant's motion for inspection and plaintiff's demurrer and motion to quash were heard by the trial court on February 8, 1943, and submitted; and on February 26th the court made its ruling sustaining a general demurrer to defendants' *fourth, fifth, seventh* and *eighth* separate defenses, the demurrer to said eighth defense being sustained without leave to amend; and quashing and recalling the subpoenas duces tecum, and denying defendant's motion for inspection, said ruling being based upon the proposition that no issues relating to plaintiff's financial transactions or the increase in his assets while he was District Attorney were material. Regarding the subpoenas and the requested inspection the court said "there is no plea upon which such an investigation can be buttressed."

The petition herein further alleges that defendants, after the foregoing rulings on demurrer, amended their *fourth* separate defense to allege that the asserted libel referred to by plaintiff consists of (a) an underlying factual statement substantially to the effect that plaintiff had made approximately $80,000 during his term of office, and (b) a challenge or demand for an answer at a public meeting, how plaintiff had made that much money on his salary of $4,500 per year; also alleging, on information and belief, that during his term of office plaintiff had increased his net worth more than $80,000. To this amended defense a demurrer was sustained without leave to amend.

Thereafter defendants amended their *fifth* defense to allege that prior to his election as District Attorney in 1935 plaintiff had announced publicly that he was a "poor man" and was running for office as such and that defendants had knowledge of this statement; that prior to the publication of the alleged libel defendants also had knowledge that plaintiff was buying many pieces of real property during his incumbency, among which was the Bryte Building in Sacramento; that defendant acquired immediate knowledge of this purchase and that the purchase price was $80,000, and published the fact in said paper on August 1, 1940; also that revenue stamps on the deed indicated that the price of the property was $80,000, and that when the building burned in November, 1940, the fact that plaintiff owned the building was given newspaper publicity; and that in view of the foregoing, defendant believed, at the time of the alleged libel, that plaintiff had gone into office a poor man and had thereafter purchased the Bryte Building for $80,000, and had purchased many other properties; and believed that the public had a right to know these facts and to have an explanation by plaintiff as to the source of his assets; and that said publication was without malice. Also defendants denied that the alleged defamatory matter charged or was meant to be understood as asserting, that plaintiff was a dishonest public official or that he was guilty of corruption. Demurrer to this defense was overruled.

However, an amendment to the *seventh* defense was filed in which defendants set forth a list of properties, which they were informed and believed were owned by plaintiff when he went into office, with their alleged values, and a list of properties which he had subsequently acquired; but a general demurrer thereto was sustained without leave to amend.

The petition herein also alleges that plaintiff's deposition had originally been taken in the action at which time plaintiff had been questioned generally as to his financial status and business transactions while in office, and that plaintiff had then referred defendants to various financial records and had consented to defendants' examination of the same; that relying on said consent defendants had not completed their examination of plaintiff; but that subsequently plaintiff had withdrawn his consent; that the court had thereafter made an order permitting defendants to take plaintiff's deposition on matters not previously covered, but that on the taking thereof plaintiff had refused to answer certain questions. Questions 1 to 12, inclusive, inquired as to whether plaintiff had filed income tax returns during his term of office, whether he had copies of them, and whether he would produce them at the trial; who, if anyone, helped prepare such returns, what was his gross income shown thereby for the years 1935–1942, and other matters contained therein. A 13th question was whether plaintiff had purchased certain described properties during said years, and, if so, when, what was paid down on it and where plaintiff got the money for such payment. On application to the court for an order to compel plaintiff to answer said questions, the court denied the request, except that it allowed inquiry as to whether plaintiff purchased the real property described in the 13th question, and when, thus limiting defendants' inquiry to matters relevant to the *fifth* defense dealing with mitigation.

In this court it is contended by respondent that mandamus does not lie to control judicial discretion, and that it is not a proper remedy to be pursued by petitioner.

[1-3] While it may be conceded that mandamus will not issue to compel performance of an act which is merely discretionary (Woolwine v. Superior Court, 182 Cal. 388, 188 P. 569; Bender v. Hutton, 160 Cal. 372, 117 P. 322), it will issue to compel a court to accept jurisdiction conferred by statute (Texas Co. v. Superior Court, 27 Cal.App.2d 651, 81 P.2d 575), and it is a proper remedy to enforce a statutory right to take a deposition, or for the purpose of discovery of evidence addressed to a valid issue. San Francisco Gas & Electric Co. v. Superior Court, 155 Cal. 30, 99 P. 359, 17 Ann.Cas. 933; Hays v. Superior Court, 16 Cal.2d 260, 105 P. 2d 975; Moran v. Superior Court, 38 Cal. App.2d 328, 100 P.2d 1096; Levin v. Superior Court, 139 Cal.App. 693, 34 P.2d 832; 9 Cal.Jur. 407, sec. 10; Crocker v. Conrey, 140 Cal. 213, 218, 73 P. 1006; Austin v. Turrentine, 30 Cal.App.2d 750, 87 P.2d 72, 88 P.2d 178; Zellerbach v. Superior Court, 3 Cal.App.2d 49, 39 P.2d 252; Golden State Co. v. Superior Court, 25 Cal. App.2d 176, 76 P.2d 728. And where the exercise of judicial discretion is not involved and the duty of a court to act in a particular way becomes absolute, mandate will issue for relief of an aggrieved party. Bales v. Superior Court, 21 Cal.2d 17, 25, 129 P.2d 685. It will issue to correct an abuse of discretion. Hays v. Superior Court, supra, 16 Cal.2d at page 266, 105 P.2d 975.

In the case before us we believe that an abuse of discretion by the trial court has been shown. Its rulings appear to be based upon the ground that the published article is libelous per se for the reason alleged in the innuendo in the complaint; that it charges plaintiff with corruption in office, and is not susceptible of any other construction. This is the ground upon which defendants' special defenses were eliminated from their answer; and having in effect stricken them out the trial court appears to hold that defendants may not by depositions develop any testimony not presently material to the pleadings as limited by the rulings on demurrer.

A similar contention was made in San Francisco Gas & Electric Co. v. Superior Court, supra [155 Cal. 30, 99 P. 360], and held reviewable on petition for writ of mandate. There it was sought to take the deposition of one Orchard after trial of the case, and while the same was pending on appeal; and plaintiff contended that after verdict and findings there was no issue of fact to be tried, and therefore no occasion for taking of depositions. But the court there said:

"It may be answered to this objection that in case of an *action* it is not requisite that an issue of fact should have arisen in order to authorize the taking of depositions. As soon as the summons has been served, either party may commence the taking of depositions relevant to any possible issue that may arise upon a denial of the allegations of the complaint or upon the allegation of new matter in the answer, and there is perhaps some significance in the distinction made by the statute in this particular between actions and special proceedings. Clearly, therefore, the existence of an actual, as distinguished from a potential, issue of fact, is not, by the terms of the statute, made a conclusive test of the right to take depositions de bene esse. On the contrary, it is, as we have seen, broad enough in its express terms to include this very case, and, if it is to be construed in a narrower sense, the reasons for that construction must be sought in the policy which prompted its enactment. The Code provisions in respect to this matter, like other Code provisions, were designed to simplify procedure—to promote the ends of justice by enabling litigants to protect their substantial rights by simpler, speedier, and more efficacious means. Among the most important rights of a litigant is that of securing the evidence by which the justice of his claim or defense may be established, and when there is but a single witness upon a material point, or the witnesses are old and infirm, or without the jurisdiction, the necessity of taking their depositions is apparent. It was therefore an important part of what has been called the auxiliary jurisdiction of courts of equity to provide for the perpetuation of testimony in view of anticipated litigation, as well as for the taking of depositions de bene esse in causes actually at issue. * * *

"There was also some reason to expect that the case of Linforth v. Gas Co. might be retried. On principle there does not seem to be any valid distinction between a case on appeal from an order denying a new trial, and a case in which an action may never be commenced. The difference is one of degree, and not of kind. In either case, the issue may or may not come to be tried, and under our statute it is plain that the proceeding to perpetuate testimony would lie in cases involving even a remoter possibility that the testimony would ever be required than there is in the average of appealed cases that there will be a reversal. * * *

"Our conclusion is that the right of the petitioner to take the deposition of Orchard is plain, unless it be a valid objection, as contended by respondent, that the answer of the petitioner in the damage suit raises no issue as to the cause of the explosion by which Linforth's house was damaged. The answer, it is said, makes no denial that the explosion was caused by the ignition of escaping gas. It is true that the answer fails to make a direct issue upon this point, but it does make a very plain issue upon the alleged negligence of the corporation in allowing gas to escape from its pipes. This question of negligence is certainly material. The mere fact of the explosion, otherwise unexplained, would perhaps justify the inference of escaping gas—an essential step in the proof of negligence, and Orchard's testimony, if believed, would refute the theory of a gas explosion.

"But, aside from this, the real question is not whether Orchard's testimony would be material to the issues which were tried, but whether it will be material on a new trial, and under such an amendment to the answer as the circumstances of the case would warrant the court in allowing." (Latter Italics ours.)

In Most v. Superior Court, 25 Cal.App. 2d 394, at pages 397, 398, 77 P.2d 532, 533, the court cited Rossbach v. Superior Court, 43 Cal.App. 729, 185 P. 879, saying:

"It was there held that the filing of the complaint constitutes the bringing of the action, and the plaintiff's right to have the defendant's deposition taken depends, not alone upon whether it is material to issues tendered thereby, but the right thereto is equally clear *if it would be material to any possible issue* raised by new allegations contained in an amended complaint which the court might properly permit the plaintiff to file. Indicative of the trend of judicial decisions in this regard, it was held in the case last above mentioned that the ruling of the court in sustaining the general demurrer to the complaint *might* on appeal by plaintiff be reversed, thus upholding the right to have a deposition taken for use in a possible new trial. [Citing San Francisco Gas & Electric Co. v. Superior Court, supra.] * * *

"In the instant case, it is clear that the question of an accounting is raised as a potential, if not an actual, issue of fact, and, such being the case, it is evident, upon the authority of San Francisco Gas & Electric Co. v. Superior Court, supra, that section 2021 of the Code of Civil Procedure is broad enough in its express terms to include the case now before us, and to confer upon the superior court the right to compel petitioner to answer questions pertinent and material to the *possible* issue of an accounting, which, under the pleadings, at least *may* arise. Whether the issue of an accounting may or may not come to be tried is not determinative, but the real question is whether the questions asked would be material to issues raised by an accounting in the event such issues *might* come before the trial court under the issues as framed by the pleadings."

In Rossbach v. Superior Court, supra, where defendant's demurrer to plaintiff's complaint had been sustained and plaintiff was seeking to take defendant's deposition, defendant contended that plaintiff had no right to take such deposition because there was no pleading on file. But the court said, page 730 of 43 Cal.App., page 880 of 185 P.:

"We are not in accord with this contention. Section 2021 [of the] Code of Civil Procedure is broad and comprehensive. It provides: 'The testimony of a witness in this state may be taken by deposition in an action at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein, in the following cases'—when he is a party to the action. It conclusively appears that the witness whose deposition was sought to be taken was a party to an action as distinguished from a special proceeding, and that he had appeared therein, and the statute in plain and explicit terms provides that the testimony of such witness may be taken by deposition in an action *at any time after his appearance.* [Also citing San Francisco Gas & Electric Co. v. Superior Court, supra.] * * *

"The filing of the complaint constituted the bringing of the action (Code Civ.Proc., section 405), and plaintiff's right to have defendant's deposition depends not alone upon whether it is material to issues tendered thereby, but the right thereto is equally clear if it would be material to any possible issue raised by new allegations contained in an amended complaint which the court might properly permit plaintiff to file. San Francisco Gas etc. Co. v. Superior Court, supra.

"Moreover, the ruling of the court in sustaining the general demurrer to the complaint might, on an appeal by plaintiff, be reversed, thus bringing the case within the facts considered in the case last cited, upholding the right to have a deposition taken for use in a possible new trial granted on an appeal from an order denying a motion therefor."

Also see Kibele v. Superior Court, 17 Cal.App. 720, 722, 121 P. 412; St. Clair Estate Co. v. Superior Court, 41 Cal.App. 2d 389, 107 P.2d 45; California, etc., Co. v. Schiappa-Pietra, 151 Cal. 732, 91 P. 593.

[4] From the foregoing cases the conclusion seems inevitable that defendant is entitled to take depositions and secure inspection of documents in anticipation of issues that may hereafter arise either by reason of amendment of the pleadings or by reason of a new trial that might be the result of an appeal.

In the recent case of Emde v. San Joaquin County, etc., Council, 23 Cal.2d 146, 143 P.2d 20, the Supreme Court reversed the judgment of the trial court entered after verdict of a jury in favor of plaintiffs, and on the appeal considered the scope and effect of the publication sued upon as libelous and held that plaintiffs' plea by way of innuendo, that the publication was intended to convey the charge that plaintiffs were dishonest, was broader than the meaning which the words used naturally bear; that an innuendo cannot add to, enlarge or change the sense of published words, and that the words used did not charge dishonesty, and that the charge that plaintiff had openly violated its word was within the permissible limitations of fair comment by the Labor Journal; and that the "gist" or "sting" of the aforesaid statement in the publication had been sufficiently proven. It also held that it was immaterial whether the publisher believed his statements were true at the time they were made so long as they were in fact true.

In view of the foregoing decision rendered since the making of the rulings of the trial court herein complained of, the trial court may well reconsider its rulings on the demurrers to defendant's special defenses, and allow amendments thereto; but at any event the said ruling of the trial court may be reversed on an appeal, and the evidence sought to be educed by defendant by the depositions denied to it, then become relevant and pertinent.

[5, 6] Furthermore, we do not agree with the trial court's holding that the language of the publication under consideration is susceptible of but one construction—that it charges corruption in office. That said language is ambiguous was conceded by plaintiff when he found it necessary to plead an innuendo, for an innuendo need be pleaded only when language used is ambiguous. If it is unambiguous, an innuendo has no place in the complaint. 33 Am.Jur. 40. And, as said in the Emde case, supra, and as stated in 33 Am.Jur. 220, an innuendo cannot be used to alter, enlarge, extend, or restrict the language theretofore set out. It is for the jury to determine the true import of language having a covert meaning. Hearne v. De Young, 119 Cal. 670, 680, 52 P. 150, 499.

[7] In this case the answer sets up several special defenses, including that of privilege, under section 47 of the Civil Code, and detailed statements of facts tending to show the truthfulness of the alleged libelous publication for the purpose of showing that that publication was justifiable. The answer also claims the right of privilege of publication, both absolute and qualified. With respect to the defense of privilege it is claimed the defendant Newspapers had a right and duty to inform the public of the character and fitness of a candidate for public office in Sacramento County provided the statement was true. It has been held that either a newspaper or an individual may make statements re-

garding the character or fitness of public officers or candidates therefor "so long as they are confined to the truth." Christal v. Police Commission, 33 Cal.App.2d 564, 92 P.2d 416; Taylor v. Lewis, 132 Cal.App. 381, 384, 22 P.2d 569; Jones v. Express Pub. Co., 87 Cal.App. 246, 255, 262 P. 78; Snively v. Record Pub. Co., 185 Cal. 565, 576, 198 P. 1; Estelle v. Daily News Pub. Co., 99 Neb. 397, 156 N.W. 645; Bailey v. Kalamazoo Pub. Co., 40 Mich. 251; Scripps v. Foster, 41 Mich. 742, 3 N.W. 216; Palmer v. Concord, 48 N.H. 211, 97 Am. Dec. 605; 36 C.J. 1287, sec. 292.

[8] The authorities are uniform to the effect that the truth of alleged libelous publications is a complete defense to an action for damages therefor. Newell on Slander and Libel, 4th Ed., 764, sec. 696; Odgers on Libel and Slander, 4th Ed., p. 173. In the text found in Newell, supra, page 764, it is said in that regard: "In civil actions, and against a party coming into a court of justice on a claim for damages, it has long been held, as a rule of the common law, that the truth of the facts imputed constituting the slanderous or libelous charge may be pleaded by way of justification, and if proved constitute a good bar to the action. In such case, of course, the motive and purpose are immaterial, and cannot be the subject of inquiry."

[9-12] Assuming, but not deciding, that the published article which is involved in this proceeding is libelous per se, whether because it charges corruption in office or the engaging in business in violation of Section 78 of the Charter, nevertheless it is clear that petitioner has an absolute right to set up and prove as matters of defense either a privileged communication, or facts which justified the publication, or the truth of the proper inferences to be drawn therefrom. If the inferences from the published article should be deemed to be a charge of dishonesty, evidenced by the acquiring of numerous pieces of real property valued far in excess of his income obtained during his term of office, the defendants would be relieved from liability by proof of the truth of that charge. Even though the defense merely amounts to a qualified privilege, the defendants are entitled to the evidence sought to be elicited for the purpose of reducing the amount of any judgment which might be rendered against them. In any event, to establish the defenses of absolute privilege, qualified privilege or justification by proving the truth of the charge, the evidence is competent, and the defendant Newspapers would therefore be entitled to the statutory privilege of ascertaining the facts by means of depositions taken under the provisions of Section 2021 of the Code of Civil Procedure. The court therefore exceeded its jurisdiction and virtually denied the defendant Newspapers the statutory right provided by the last mentioned section. The subpoena duces tecum was wrongfully quashed and the court was not authorized to deny defendants the right to take the testimony of the witnesses named.

Defendants' right to an inspection of documents for similar purposes under Section 1000 of the Code of Civil Procedure was also unduly restricted. It was said in Austin v. Turrentine, supra, 30 Cal.App.2d at page 762, 87 P.2d at page 78, that the enactment of statutes relative to the remedy of obtaining evidence by inspection was had with a view of providing a more speedy and less expensive remedy than by the proceedings in chancery, and, being remedial in their nature, such rules should be liberally construed. Liberality in the matter of granting inspection cannot be better exemplified than by referring to Chapter V of the new Rules of Civil Procedure, adopted by the Supreme Court of the United States, 28 U.S.C.A. following section 723c. Also see Union Trust Co. v. Superior Court, 11 Cal.2d 449, 462, 81 P.2d 150, 118 A.L.R. 259.

It is therefore ordered that a peremptory writ issue as prayed.

62 Cal.App.2d 577

WALDTEUFEL v. SAILOR

Civ. 6991.

District Court of Appeal, Third District,
California.

Jan. 27, 1944.

Hearing Denied March 23, 1944.

1. Principal and agent 🔑169(2)

A real estate broker, who was fully informed of his agent's oral agreement with vendor of realty for payment of specified commission from sums paid by purchaser only, but made no objection thereto, accepted sums paid, and made no demand for payment of additional sum due under previous written agreement with vendor for payment of commission of 5 per cent. of purchase price, was not entitled to recover such additional sum from vendor.

2. Appeal and error 🔑1010(1)

The sufficiency of evidence and inferences to be drawn therefrom are matters for determination by trial court, whose conclusions, supported by evidence, will not be disturbed on appeal.

3. Evidence 🔑445(6)

An oral agreement between vendor of realty and real estate broker's agent for payment of specified commission solely from sums paid by purchaser was fully performed by payment to broker of full amount of commission due on payments made by purchaser, so as to render evidence of such agreement admissible in broker's action for additional commission under previous written contract. Civ.Code, § 1698.

4. Appeal and error 🔑1008(1)

In broker's action for commission on purchase price of realty sold for defendant, whether plaintiff's agent had authority to modify written commission agreement or enter into new oral agreement for payment of smaller commission solely from sums paid by purchaser, and whether plaintiff ratified oral agreement, were fact questions for trial court.

5. Principal and agent 🔑170(3)

It was real estate broker's duty to repudiate his agent's acts in modifying written agreement or entering into new oral agreement respecting commission for selling realty as soon as broker was informed thereof, if agent exceeded his authority, and broker's ratification of such acts might be implied from his failure to repudiate them.

6. Contracts 🔑254

A written agreement, which is not to continue for any definite time, may be abrogated by oral agreement, and statutory provisions authorizing modification of written contract by fully executed oral agreement do not apply. Civ.Code, § 1698.

7. Contracts 🔑252

A written agreement is terminated by parties' oral agreement to new terms and conditions.

8. Contracts 🔑350(3)

An agreement to abandon or rescind written contract may be inferred from parties' acts.

9. Contracts 🔑316(1)

One may be estopped by his conduct from relying on a written contract.

Appeal from Superior Court, Lake County; Benjamin C. Jones, Judge.

Action by J. A. Waldteufel against E. P. Sailor for the unpaid balance of a commission earned as a real estate broker. Judgment for defendant, and plaintiff appeals.

Affirmed.

Charles Kasch, of Ukiah, for appellant.

H. G. Crawford, of Lakeport, for respondent.

ADAMS, Presiding Justice.

Plaintiff herein sued defendant, E. P. Sailor, for a balance alleged to be due plaintiff on account of a commission claimed to have been earned by plaintiff as a real estate broker in effecting a sale of certain land owned by defendant and his brother. Plaintiff relied upon a writing, signed by defendant, E. P. Sailor, only, dated September 27, 1940, by the terms of which defendant authorized plaintiff to sell all or portions of said land, and agreed to pay plaintiff a commission of five per cent on any price defendant might accept for same. Plaintiff alleged that he had secured a purchaser for two different portions of said land who had entered into written contracts with defendant at a total purchase price of $17,108, and that defendant accordingly became indebted to plaintiff for commissions in the sum of $855.40, only $200 of which had been paid.

Defendant answered, admitting the execution of the written contract alleged by plaintiff and the securing by plaintiff of a purchaser as alleged by him, but set up, as a separate defense, that on or about December 5, 1940, defendant and plaintiff had agreed that the total sum to be paid plaintiff for his commission on said sales was to be the sum of $1,000, but that said sum was to be paid as follows: $100 out of the down payments made by the purchaser, Johnson, and the balance out of installment payments provided to be paid by Johnson, and then only if and when said installment payments were made by Johnson, and not otherwise. Defendant also alleged payment to plaintiff of $200 out of the down payment and one installment payment made by the vendee, but further alleged that no other installment payments had been paid. He also alleged that the agreement of December 5th was agreed to be substituted for the agreement of September 27th, and that plaintiff had ratified and confirmed such substitution.

The cause was tried before the court which made findings that one Larkin J. Younce, a real estate broker, who was associated with and employed by plaintiff in his real estate business, had, while acting as agent for and with the authority of plaintiff, obtained from defendant the authorization to sell contained in the listing agreement of September 27th, and that thereafter Younce as such agent had secured one Johnson as a purchaser; that on December 5th Younce, acting as agent for plaintiff, and acting within the scope of his authority, agreed with defendant, E. P. Sailor, and with Charles W. Sailor that plaintiff should be paid $1,000 as commission on the two sales to Johnson, said sum to be paid in part out of the down payments, the balance to be paid out of installments received from Johnson, but only if and when said installment payments were made by the purchaser. It was further found that Johnson had made only the down payment and one installment payment, that defendant and his brother had paid to plaintiff the amount of commission due him from said payments, that plaintiff had accepted said payments, and had paid Younce one-half thereof as his agreed share of the commission for his services, that plaintiff, on December 5th, had knowledge of all of the terms of the agreement between Younce and the Sailors prior to any payments on account of commissions, that he accepted $100 on account of same on December 5th, and $100 thereafter, and that he never repudiated any of the acts of Younce, but ratified and confirmed same.

Judgment for defendant followed.

[1] On this appeal it is contended by appellant that the evidence does not prove the affirmative defenses set up by respondent; but we are of the opinion that there was ample evidence to sustain the findings of the trial court. While the written memorandum of September 27th appointed plaintiff as the agent of E. P. Sailor to sell the real property, the whole transaction was carried on by Younce, who, under his arrangement with plaintiff, was authorized to act in such matters, and was to receive one-half of the commissions earned. Younce found the purchaser, and also made the second agreement of December 5th for a commission of $1,000, on the sales to Johnson, payments of same to be made only out of payments as and when made by Johnson. Plaintiff was fully informed as to all of these matters, made no objection to them, and accepted the sums paid in three different checks, only one of which was signed by E. P. Sailor. He made no demand for the payment of the sum of $855.40, all of which would have been due to him immediately under the original agreement. That he considered the agreement of December 5th as the one in effect is evidenced also by the fact that when, in 1941, he sold his real estate business to Younce and another, the "Agreement and Escrow Instructions," signed by plaintiff, referred to the "E. P. and C. W. Sailor and John S. Johnson contract," thus indicating a recognition on plaintiff's part of the oral agreement.

[2] The sufficiency of the evidence and the inferences to be drawn therefrom were matters for the determination of the trial court, and as its conclusions find support in the evidence, they will not be disturbed on appeal.

[3] It is argued by appellant that the written contract of September 27th could not be modified by parol; that there was no cancellation, modification or alteration of that agreement, and that any subsequent agreement, being oral only, was not binding upon plaintiff. Conceding the general principle that a written contract cannot be modi-

fied by parol, appellant nevertheless recognizes that a written contract may be modified by an oral agreement which has been fully executed. Civil Code, sec. 1698. But he argues that the oral agreement relied upon by respondents was not fully executed, as plaintiff received only $200. But appellant overlooks the fact that under that oral agreement the commission was to be paid only if, as and when payments were made by Johnson, and that the evidence establishes that Johnson failed to make payments other than the down payment and one installment payment and then abandoned his contracts, and that the $200 received by plaintiff was the full amount of commission due on the payments made by Johnson and received by defendants. Therefore, the oral agreement was fully performed.

[4, 5] As for a contention by appellant that Younce, as his agent, had no authority to modify the original written listing agreement, or enter into a new one, this was a question of fact to be determined by the trial court (State Finance Co. v. Hershel, etc., Co., 8 Cal.App.2d 524, 527, 528, 47 P.2d 821), as was the question of ratification (Harris v. Seidell, 1 Cal.App.2d 410, 413, 414, 36 P.2d 1104; Currier v. Oakland Association, 131 Cal.App. 371, 374, 21 P.2d 462); and both questions were resolved against plaintiff. If Younce had exceeded his authority in the premises it was the duty of plaintiff to repudiate his acts as soon as he was informed of them. This he failed to do, and his ratification might, therefore, be implied. Ralphs v. Hensler, 97 Cal. 296, 303, 32 P. 243.

[6-9] Also, a written agreement which is not to continue for any definite time may be abrogated by an oral agreement, and the provisions of section 1698 of the Civil Code do not apply; and when parties agree to new terms and conditions, the effect is to terminate a prior written agreement (Klein Norton Co. v. Cohen, 107 Cal.App. 325, 331, 290 P. 613); and an agreement to so abandon or rescind such a contract may be inferred from the acts of the parties. Treadwell v. Nickel, 194 Cal. 243, 259, 228 P. 25. Furthermore, one may be estopped by his conduct from relying upon a written contract. Wilson v. Bailey, 8 Cal.2d 416, 65 P.2d 770.

There is evidence in this case sufficient to support the conclusion that Younce had authority to enter into the agreement of December 5th, or, if he exceeded his authority in that respect, that plaintiff subsequently ratified his acts and accepted the benefits of the later contract, such as they turned out to be. The evidence is also sufficient to support a conclusion that plaintiff agreed to an abandonment of the written agreement of September 27th, and that, by his subsequent conduct, he estopped himself from relying thereon.

The judgment is affirmed.

SCHOTTKY, Justice pro tem., and THOMPSON, J., concur.

62 Cal.App.2d 357

HANSEN et al. v. SALINAS VALLEY ICE CO., Limited.

Civ. 12509.

District Court of Appeal, First District, Division 2, California.

Jan. 17, 1944.

1. Commerce ⚷16

Where over 85 per cent. of working time of ice manufacturer's employees was spent in hauling ice from ice plant to buyers' packing sheds, and at sheds, ice was put in vegetable crates and freight cars into which the crates were loaded, and 95 per cent. of the vegetables were shipped to consumers outside the state, the employees were engaged in "production of goods for commerce" within coverage of Fair Labor Standards Act and were not exempt from such coverage by the Motor Carrier Act. Fair Labor Standards Act of 1938, and §§ 3(b, i), 6(a), 13(b), 29 U.S.C.A. §§ 201 et seq., 203(b, i), 206(a), 213(b); Interstate Commerce Act §§ 201 et seq., 203(a) (10, 17), 204(a), 49 U.S.C.A. §§ 301 et seq., 303(a) (10, 17), 304(a).

See Words and Phrases, Permanent Edition, for all other definitions of "Production of Goods for Commerce".

2. Automobiles ⚷126

The scope of the Motor Carrier Act is determined by the specific definitions found therein of "private carrier" and "interstate commerce". Interstate Commerce Act §§ 201 et seq., 203(a) (10, 17), 204(a), 49 U.S.C.A. §§ 301 et seq., 303(a) (10, 17), 304(a).

3. Automobiles ⚿126

The clear purpose of the Motor Carrier Act is to reach employees engaged directly in transportation of goods in interstate or foreign commerce, and the act is confined to the motor carrier and its employees engaged in interstate transportation and has no relation to the employer who carries his own goods from warehouse or place of shipment to other points within the state for sale and distribution. Interstate Commerce Act §§ 201 et seq., 203(a) (10, 17), 204(a), 49 U.S.C.A. §§ 301 et seq., 303(a) (10, 17), 304(a).

◆

Appeal from Superior Court, Monterey County; H. G. Jorgensen, Judge.

Suit by Carl B. Hansen and another against Salinas Valley Ice Company, Limited, a corporation, for minimum wages and overtime under the Fair Labor Standards Act. Judgment for plaintiffs, and defendant appeals.

Affirmed.

Rosendale, Thomas & Muller, of Salinas, for appellant.

Stanley Lawson and Paul L. Pioda, both of Salinas, for respondents.

NOURSE, Presiding Justice.

This was a suit by two employees of the defendant to recover minimum wages and overtime provided for by the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 et seq. The case was tried on an agreed statement of facts, and the trial court made findings and gave judgment in favor of plaintiffs. The defendant appeals from the judgment and presents two grounds of appeal: (1) That the agreed statement of facts does not support the finding that defendant corporation "was engaged in the manufacture and production of ice for interstate commerce," and (2) assuming for the purposes of argument that it was engaged in interstate commerce within the meaning of the Act, the plaintiffs' rights were governed by the Motor Carrier Act, 1935, 49 U.S.C.A. § 301 et seq.

The defendant was engaged in the manufacture and production of commercial ice. Over 85% of the two plaintiffs' working time was spent in hauling ice from the ice plant to the buyers' packing sheds. At the buyers' packing sheds the ice was crushed and put in the tops of crates of vegetables, the remaining ice being put in the tops of the freight cars into which the crates of vegetables were loaded. Ninety-five percent of these vegetables were shipped to consumers outside of the State of California.

The pertinent provisions of the Fair Labor Standards Act read as follows:

Section 206 (a), 29 U.S.C.A. "Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates * * *."

Section 203 (b). "'Commerce' means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof."

Section 203 (i). "'Goods' means goods * * *, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof."

Section 213 (b). "The provisions of section 207 of this title shall not apply with respect to (1) any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service pursuant to the provisions of section 304 of Title 49 * * *."

In respect to the first point urged by appellant, it contends that the ice which was produced was delivered to the "ultimate consumer" when it was delivered to the buyers and hence was expressly exempted from the Fair Labor Standards Act by section 203 (i); and that by reason of the delivery to the buyer who used the goods within the state these employees were not engaged in commerce or in the production of goods for interstate commerce. The respondents assert that the manufacture of ice for the refrigeration of vegetables was essential to the interstate commerce in vegetables and constituted engaging in the production of goods for commerce within the meaning of the Act.

In some of the early cases coming under the Act an interpretation was put on its provisions in harmony with the contentions here made by the appellant. But the scope of the Act in the area of operations here under controversy was set at rest in Chapman v. Home Ice Co. of Memphis, 6

Cir., 136 F.2d 353, where the authorities herein cited by appellant were either disapproved or overruled. As the decision is not readily available we quote at length from it as fully determining the question here raised:

"The issue in this appeal involves the coverage of the Fair Labor Standards Act of June 25, 1938, 29 U.S.C.A. § 201 et seq., and relates specifically to the employees of a Tennessee company producing ice of which a substantial portion is sold to railroad companies and merchants for refrigeration of perishable commodities moving in interstate commerce, and for refreshment of passengers on interstate trains. * * *

"We come then to the cases which deal with the production of ice for the purpose of refrigerating the cars of interstate carriers transporting perishable goods. In Hamlet Ice Co. v. Fleming, supra [4 Cir., 127 F.2d 165], it was pointed out that ice is clearly within the connotation of the word 'goods,' so that if produced with knowledge that its shipment, delivery, or sale in commerce is intended, and it is transported from state to state, the employees engaged in the production come within the scope of § 15 (a) (1). Here, as there, it was claimed that the defendant's activities were outside the statutory scheme, because the goods in question are delivered within the state to the ultimate consumer and therefore fall outside the definition of 'goods' in § 3 (i) of the Act * * *.

"It is contended that the railroad companies are here the ultimate consumers of the ice delivered to them within the state, so that the ice company produces nothing and sells nothing within the intendment of the Act. The identical argument was rejected in the Hamlet Ice Co. case as unsound because the goods under consideration were not only the subjects of commerce but entered into the very means of transportation by which the burdens of traffic were borne, and that to exempt the producer would run contrary to the manifest purpose of the Act to eliminate all sub-standard labor conditions in respect to goods produced for transportation in interstate commerce. With this reasoning we agree. * * * It is idle, therefore, to deny that the production of ice intended for refrigeration of perishable merchandise in transportation is not a necessary element of transportation, if, indeed, it is not also a 'part or ingredient' in production itself for ultimate consumer use. Moreover, as pointed out in the Hamlet case, the exclusion clause in § 3 (i) is intended to apply to goods which have come into the hands of the ultimate consumer after transportation is ended, and after they have been withdrawn from further traffic or sale. The decision in Atlantic Co. v. Walling, supra [5 Cir., 131 F.2d 518], was reached by a parity of reasoning though pointing out, without deciding, that the non-inclusion provision of § 3 (i) but exempts the ultimate consumer from the penalty of § 15 (a) (1), and has no effect in limiting the scope of the Act as to the producer of goods intended for shipment in interstate commerce. In the light of these decisions and the admonition in Overstreet v. North Shore Corporation, 318 U.S. 125, 63 S.Ct. 494, 87 L.Ed. 656, decided February 1, 1943, that the Fair Labor Standards Act aims at protecting commerce from injury through adjustment of the master-servant relationship by eliminating sub-standard working conditions, we are constrained to hold that the employees of the appellee who were engaged in the production, transportation or delivery of ice intended for servicing interstate facilities were engaged in the production of goods for commerce."

[1] The Chapman case, supported as it is by sound reasoning and citation of numerous authorities, is controlling upon the first three questions stated by appellant relating to the application of the Act to the activities of the parties as shown by the agreed statement of facts.

But appellant argues that, aside from these considerations, its employees are not governed by the Act because of the provisions of the Motor Carriers Act of 1935. The pertinent provisions of the latter Act are:

"Section 304 (a) It shall be the duty of the Commission—

* * * * *

"(3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment."

"Section 303 (a) (10). The term 'interstate commerce' means commerce between any place in a State and any place in another State or between places in the same State through another State, whether such commerce moves wholly by motor vehicle or partly by motor vehicle and partly by rail, express, or water.

* * * * *

"(17) The term 'private carrier of property by motor vehicle' means any person not included in the terms 'common carrier by motor vehicle' or 'contract carrier by motor vehicle', who or which transports *in interstate or foreign commerce* by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent or bailment, or in furtherance of any commercial enterprise." (Emphasis ours.)

[2, 3] The scope of the Act must be determined by the specific definitions found therein of "private carrier" and "interstate commerce." A private carrier is one who "transports in interstate or foreign commerce by motor vehicle." "The term 'interstate commerce' means commerce between any place in a State and any place in another State." The wider scope of the Fair Labor Standards Act is apparent. Sec. 206(a). "Every employer shall pay to each of his employees who is engaged in commerce or *in the production of goods for commerce* * * *." (Emphasis ours.) Under the rule of the Chapman case, supra, the respondents come under the provisions of the Fair Labor Standards Act because they are engaged in the production of goods for commerce, and not because they are actually engaged in interstate commerce. The clear purpose of the Motor Carrier Act is to reach those employees engaged directly in the transportation of goods "in interstate or foreign commerce." It is very definitely confined to the motor carrier and its employees engaged in interstate transportation. It has no relation to the employer who carries his own goods from warehouse or place of shipment to other points within the state for sale and distribution. What is said in Derer v. Snow Ice Co., Inc.,[1] D.C.N.D.Ill., December 8, 1941; and McDaniel v. Clavin, Cal.App., 128 P.2d 821, the contrary is dicta, and all the language in the latter decision upon which appellant here relies was eliminated by the Supreme Court when the cause was transferred there for hearing. In the final opinion (22 Cal.2d 61, 136 P.2d 559) the Supreme Court confined its decision to the one question involved—that the employee's duties in taking the goods from the warehouse, transporting them to the employer's plant and then to the customers were not within the purview of the Fair Labor Standard Act. The facts of that case are widely different from what we have here where the employees are engaged directly "in the production of goods for commerce" as that phrase is interpreted in the Chapman case, supra.

The judgment is affirmed.

STURTEVANT and SPENCE, JJ., concur

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62 Cal.App.2d 388

JOHN HANCOCK MUT. LIFE INS. CO. v. MARKOWITZ.

Civ. 13919.

District Court of Appeal, Second District, Division 3, California.

Jan. 18, 1944.

Rehearing Denied Feb. 15, 1944.

Hearing Denied March 16, 1944.

1. Insurance ⇔400

Provision making life policies incontestable after one year except for nonpayment of premiums would defeat insurer's action to void policies for fraud after expiration of one year.

2. Insurance ⇔601

Neither the law nor provision of life policies making policies incontestable after one year except for nonpayment of premiums would preclude insurer from maintaining action against insured to recover payments of disability benefits under policies made under a mistake arising from reliance on false representations that insured had no disease before issuance of policies.

3. Insurance ⇔400

An incontestable clause of a life policy providing for benefits for disability originating after issuance of policy does not extend coverage of policy to disease contracted before issuance of policy.

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[1] No opinion for publication.

4. Insurance ⚷400

Where life policies providing for disability benefits and containing incontestability clause excluded from coverage any disability originating before policies became effective, insured never acquired insurance against disability originating before policies were issued.

5. Insurance ⚷371

A waiver of a condition does not broaden the coverage of a life policy so as to make policy cover risk not within its terms.

6. Insurance ⚷601

Fraud in original application for policy in representing nonexistence of tuberculosis could be considered by court in later suit to recover disability payments made in reliance on insured's failure in disability claim to correct the previous fraudulent representation that tuberculosis did not originate before policy date.

7. Insurance ⚷601

In insurer's action to recover payments of disability benefits on ground of fraud in procuring waiver of premiums, evidence justified finding that insured falsely represented that disability from pulmonary tuberculosis occurred after issuance of policies, whereas he had suffered from such disease prior to issuance of policies.

8. Insurance ⚷601

In insurer's action to recover disability payments on ground of insured's fraudulent representations in application for insurance and for disability benefits, false statements made by insured, respecting previous illness and hospitalization for pulmonary tuberculosis in applications for insurance and for disability benefits, sustained finding of fraud in collection of disability benefits.

9. Insurance ⚷601

The fact that insurer relied and acted on insured's fraudulent representations as to date of occurrence of pulmonary tuberculosis in making disability payments and waiving payment of premiums under life policies covering diseases originating after issuance of policies was not required to be proved by direct evidence, but could be established by circumstances and inferences deducible from acts of parties.

10. Witnesses ⚷311

Where insured by his own testimony admitted that he procured life policies providing for disability benefits by false representations and denial that he had ever been treated for tuberculosis, trial court was not bound to give him full or any credence in what he said in his effort to collect for alleged disability occurring after issuance of policies because of pulmonary tuberculosis.

11. Insurance ⚷601

Evidence sustained finding that insured was not free of tuberculosis when he subsequently applied for life policies providing for disability benefits originating after policies were issued, and that, therefore, the disease was not covered by policies.

12. Estoppel ⚷56

A person asserting an estoppel must be induced to act or refrain from acting by his opponent's conduct.

13. Estoppel ⚷59

The equitable doctrine of estoppel cannot operate to protect one from consequences of his fraud.

14. Insurance ⚷399

Where insured, by fraudulent representations, induced insurer to recognize his claim for disability from tuberculosis and make payments thereon and waive payment of premiums, under life policies providing benefits for disability originating after issuance of policies, insured could not assert that insurer was estopped to deny that disability arose from disease originating after issuance of policies on theory that because of such payments and waiver, insured refrained from paying premiums to his prejudice.

15. Insurance ⚷377(2), 399

Under life policies providing benefits for disability originating after issuance of policies, insurer, which had paid disability benefits for tuberculosis for many years, was not estopped from setting up tuberculosis history of insured previous to issuance of policies as defense, on ground that by using reasonable diligence it could have discovered such previous history, nor did insurer by its long continued payments of benefits waive right to set up as ground of action any claim of mistake or fraud because records of city health department showed that insured had been reported by physician as a tubercular patient prior to issuance of policies, in view of evidence that such records were available only on subpoena.

16. Insurance ⇨377(2)

Under life policies providing benefits for disability from disease originating after issuance of policies, insurer is not required to keep constant check on municipal health records to determine whether applicants for policies are telling truth regarding their health, in absence of anything in application for policies suggesting source of particular inquiry.

17. Insurance ⇨392(2)

Under life policies providing benefits for disability originating after issuance of policies, letter from insurer to insured stating that as result of medical examination it was discontinuing disability payments because insured was no longer disabled from tuberculosis, and calling on insured to resume payment of premiums, did not estop insurer from subsequently declaring forfeiture of policies and suing to recover disability payments made when it discovered that insured had employed gross fraud in securing disability payments and waiver premiums.

18. Insurance ⇨601
Limitation of actions ⇨100(3)

An action commenced in December, 1933, by insurer to recover disability payments made under life policies issued in August, 1926, providing benefits for disability originating after issuance of policies for insured's fraud in procuring payments by representing that tuberculosis causing disability originated after issuance of policies, was not barred by limitations or laches, where insurer first received information in September, 1933, leading to discovery of alleged fraudulent representations. Code Civ.Proc. § 338, subd. 4, § 597.

19. Limitation of actions ⇨100(11)

A court will not lightly seize on a small circumstance to deny relief to defrauded party under statute of limitations because defrauded party did not discover fraud as soon as he might have done, and only where defrauded party plainly should have discovered fraud except for inexcusable inattention will he be charged with discovery of fraud before actual knowledge. Code Civ.Proc. § 338, subd. 4.

20. Insurance ⇨371

Under life policies providing benefits for disability originating after issuance of policies, insured's tender of cashier's checks to insurer for premiums, after insurer had been paying disability benefits for several years for tuberculosis, did not estop insurer from declaring that premiums on policies had not been paid, where insurer's letter to insured showed that insurer declined to accept the checks because policies had lapsed for nonpayment of premiums, and insurer returned checks to insured for fraud of insured in obtaining disability payments by representing that tuberculosis originated after issuance of policies.

21. Insurance ⇨668(11)

Under life policies providing benefits for disability originating after issuance of policies, whether disability from tuberculosis arose from severe bodily injury occurring after issuance of policies, or from tuberculosis contracted before issuance of policies, and which was apparently arrested when policies were issued, was question of fact.

22. Pleading ⇨236(3)

Where, during two years after commencement of insurer's action to recover disability benefits paid under life policies on ground of fraud, various demurrers and motions to strike were passed upon and amended pleadings filed, and thereafter five years elapsed before complaint was amended, and, on trial, objection to introduction of evidence on ground that amended complaint did not state cause of action was sustained, trial court's action in giving insurer further time to amend complaint was not abuse of discretion.

23. Pleading ⇨229

Great liberality should be used in allowing amendments to pleadings.

24. Pleading ⇨236(1)

The allowance of amendments to pleadings is within court's discretion.

25. Insurance ⇨133(1)

Where provision of life policies for benefits for disability originating after issuance of policies was boldly displayed on page three of policies, insurer's alleged failure to comply with Massachusetts statute requiring policies delivered in Massachusetts to set forth on face thereof in bold letters a plain description and peculiarities thereof was not available to insured, in insurer's action to recover benefit payments allegedly made as result of insured's fraud, where insured could not have been misled. G.L.Mass. c. 175, § 129.

26. Appeal and error ⚷428(2)

Notice of appeal filed over 60 days after entry of judgment on trial of special defense of statute of limitations relating to actions for relief from fraud or mistake was not effective as to that judgment. Code Civ.Proc. § 338, subd. 4, § 597.

27. Appeal and error ⚷870(3)

Though notice of appeal filed over 60 days after entry of judgment on trial of special defense of application of statute of limitations relating to actions for relief from fraud or mistake was ineffective so far as that judgment was concerned, the decision thereon was reviewable on timely appeal from judgment on the merits. Code Civ.Proc. § 338, subd. 4, § 597.

* * *

Appeal from Superior Court, Los Angeles County; Charles S. Burnell, Joseph W. Vickers, and Parker Wood, Judges.

Action by John Hancock Mutual Life Insurance Company against Joseph Markowitz, to recover disability benefits paid to defendant under life insurance policies, with interest, on the ground that the policies had lapsed for nonpayment of premiums before such payments were made, in which defendant filed cross-complaint. From a judgment for plaintiff and from a decision that the action was not barred by limitations, and from an order denying defendant's motion for new trial, defendant appeals.

Judgment for plaintiff affirmed, and appeals from decision as to statute of limitations and from order denying new trial dismissed.

Arthur Rosenblum, of Los Angeles, for appellant.

Meserve, Mumper, Hughes & Robertson, of Los Angeles, for respondent.

DESMOND, Presiding Justice.

This case presents an appeal from a judgment in favor of plaintiff insurance company and also an attempted appeal from a decision of the court, erroneously denominated a judgment, rendered in a proceeding upon a special defense under section 597 of the Code of Civil Procedure, holding that the action in chief, immediately hereinafter mentioned, was not barred by the statute of limitations, section 338, subdivision 4, Code of Civil Procedure. The judgment appealed from was rendered in the action which plaintiff filed after sending the following letter, dated November 20, 1933, to the defendant:

"Dear Sir: In re: Policies # 1329930-1334357

"Joseph Markowitz

"The Company duly received your letter of November 6th in reference to your claim for disability benefits under the above numbered policies.

"The disability clauses in these policies provide that benefits are payable for total and permanent disability caused by bodily injury or disease sustained or contracted after the dates of issue of the policies.

"These policies were issued August 5th and 18th, 1926, respectively, and the Company has paid you disability benefits thereunder since April 28, 1927, upon the assumption that the claim which you presented therefor was based upon a disease which was contracted subsequent to the aforesaid dates.

"The Company has just received evidence that clearly indicates that the disease causing your disability, namely, tuberculosis, was contracted prior to the dates of issue of these policies, and that you were suffering from that disease as far back as 1924, nearly three years prior to the inception of the payment of these benefits.

"Upon this evidence it is plain that, notwithstanding the incontestable clause in these policies, they by their express terms exclude and do not cover this claim, so that you were not entitled to the benefits which have been paid to you amounting to about $7600, or to the waiver of the premiums which was granted for the past six or more years.

"This is to inform you that since you were not entitled to a waiver of the aforesaid premiums, the Company considers that these policies lapsed as of the date of the last payment by you of the premiums thereon, and that said policies are void and out of benefit except for any nonforfeiture value accruing thereon in accordance with their terms, and that the Company disclaims all liability for your claim for any disability benefits under these policies, that it will not pay any further benefits to you on account thereof and that unless the full amount paid to you is immediately refunded, it will start legal action against you to recover that amount, for the payment of which the Company hereby makes demand upon you.

"The Company in writing this letter does not in any way waive any of its legal rights in connection with any matter pertaining to these policies or your claim thereunder for disability benefits, and it does not in any way waive any right to raise any other matter in defense to your claim that is not specifically mentioned in this letter, but, on the contrary, expressly reserves and retains all of its rights and defenses.

"Very truly yours,
"Harold J. Taylor,
"Associate Counsel."

The judgment rendered in this action by Honorable Charles S. Burnell decreed "That any alleged disease from which defendant has heretofore or does now claim to be suffering and which defendant claims has caused or is now causing him to be wholly and permanently disabled, was contracted prior to the date of issuance of both of the policies involved in the within entitled action, and such disability, if any, was not and is not a disability insured against in said policies, and was a risk not assumed under said policies of insurance, and plaintiff company never has been and is not now liable for or required to pay to defendant any disability benefits or to waive the payment of any premiums under the terms and conditions of said policies, or either of them." The court ordered that plaintiff should have and recover from defendant the sum of $7,600 theretofore paid him as disability benefits as well as interest accrued from the dates of such payments in the sum of $6,212.50, and decreed that both policies mentioned in the company's letter had lapsed for non-payment of premiums upon the first anniversary of issuance and "that since said dates, respectively, said policies, and each of them, have been and are now of no further force or effect and that defendant be, and he is, hereby directed to deliver up to plaintiff the said policies, and each of them, for cancellation." The court, by its judgment, also decreed "That defendant and cross-complainant is not entitled to any recovery, relief or judgment in the within entitled action by reason of his cross-complaint or otherwise."

Each policy had been written on the life of defendant for $5,000, in favor of his wife, and contained a proviso under a special clause entitled "Total and Permanent Disability Benefit Provision," reading as follows:

"1. If after the first premium or regular instalment thereof shall have been paid hereunder and under the policy, the Insured prior to the anniversary of the policy nearest his sixtieth birthday shall become wholly and permanently disabled by bodily injury or disease sustained or contracted after the date hereof, so that thereby he will be wholly, continuously and permanently prevented from the pursuit of any form of mental or manual labor for compensation, gain or profit whatsoever, then, if there is no premium in default, and the policy is not being continued as paid-up or extended insurance under the nonforfeiture provisions thereof, the Company will upon receipt of due proof of such disability, grant the following benefits subject to the terms and conditions herein set forth.

"Beginning with the anniversary of the policy next succeeding the commencement of such disability, the Company will waive the payment of further premiums, during the continuance of the disability, and will pay to the Insured, from the date of the commencement of such disability, or to the beneficiary if disability results from insanity, subject to the conditions and limitations of this provision, with the written consent of the assignee, if any, a sum equal to one per centum of the face amount of the policy exclusive of any policy additions, and a like sum monthly thereafter during the continuance of the disability, until the maturity of the policy. * * *

"2. Disability Premium.—The disability benefits as set forth in this provision are granted in consideration of the statements and representations in the application for this policy and of a special yearly premium of $9.55. * * *

"4. Proof of Continued Disability.—The Company shall have the right to require at any time, but not oftener than once a year, due proof of the continuance of the disability. If the Insured shall fail to furnish such proof when required to do so, or shall so far recover as to be able to perform work of any kind for compensation, gain or profit, the disability benefits will be discontinued. * * *"

While the company's letter to the defendant, which we have quoted above, made no specific mention of fraud, the second amended complaint (as amended), upon which the case went to trial, definitely charged that fraud was practiced by defendant upon plaintiff company, thereby inducing the issuance of the policies containing the disability clause, followed by defendant's additional fraud which procured payment of disability benefits beginning in April, 1927, namely, misrepresentations in his proofs of disability and proofs of continuance of disability. The trial court found that such fraud was perpetrated, and further that "* * * the present disability of defendant and the disability claimed by him to have commenced on or about April 28, 1927, in fact was caused by the disease of pulmonary tuberculosis contracted prior to the issuance of each of said policies involved in the within entitled action and is, and was, due to the same disease of pulmonary tuberculosis.

"It is true that the disease of pulmonary tuberculosis from which defendant suffered and for which and on account of which he received disability and waiver of premium benefits from plaintiff company, all as hereinbefore set forth, was the same disease contracted by defendant before the date of the issuance of each of said policies of insurance involved in the within action. * * *

"The court finds that any pulmonary tuberculosis, tuberculosis of the intestines, and tuberculosis of any organs of the body in or about the abdomen, intestines or otherwise, from which the defendant was or is suffering or is now afflicted, were and are the same disease of tuberculosis and the extensions thereof which was contracted by defendant prior to the date of the issuance of each of said policies of insurance involved in the within action.

"The court further finds that the defendant Joseph Markowitz suffered from no disability within the terms and conditions of said policies of insurance involved in the within action subsequent to the issuence thereof, except such disability as may have resulted from the disease of tuberculosis which defendant contracted prior to the date of the issuance of each of said policies of insurance involved in the within action."

Other findings were to the effect "that in September, 1933, plaintiff company first received information leading it to believe that the disease causing the disability of defendant Joseph Markowitz, to wit, pulmonary tuberculosis, was contracted prior to the date of the issuance of the policies of insurance involved in the within entitled action," and "that in paying said disability benefits and in waiving said premiums, plaintiff company did rely solely upon the representations and statements made by said defendant Joseph Markowitz in his proofs of disability and proofs of continuance of disability made by said defendant and his attending physicians, and upon the application for said policy and the reports as a part of said application, without any knowledge on the part of plaintiff company or any of its officers or agents that any of said representations, information or statements were false or untrue * * * that if the said company had known at the time of the receipt of said proofs of disability and proofs of continuance of disability that the representations made therein were false and untrue, and that the representations and statements made in the application of defendant for said policy of insurance were false and untrue, plaintiff company would not have paid to defendant the disability benefits which it did pay to defendant as hereinbefore set forth and would not have waived the payment of premiums on said insurance contract by defendant to plaintiff during said period of disability."

These policies were issued by plaintiff, a Massachusetts corporation, to defendant then residing in the neighborhood of Boston, and, as required by the law of Massachusetts (Gen.Laws, 1921, Chap. 175, Life Insurance, Sec. 132(2), each contained an incontestability clause. It read as follows: "This policy * * * shall be incontestable after it has been in force during the lifetime of the Insured for a period of one year from its date of issue except for nonpayment of premium; but in case the age has been misstated, the amount payable hereunder shall be that which the premium paid would have purchased at the correct age." The respondent states in its brief "we concede that the incontestable clause applies to disability benefits. In other words, if the insured had become disabled by some disease contracted after the policy had been issued, the insurance company could not contest regardless of the fraud in the procurement."

The case of Cohen v. Metropolitan Life Ins. Co., 1939, 32 Cal.App.2d 337, 89 P.2d 732, presents a situation similar in many particulars to that which we are considering. In that case Cohen sued the insurance company to recover permanent disability benefits which had been discontinued and the company successfully cross-complained in an action to recover a sum equivalent to disability payments which it had previously made to Cohen and premiums which it had waived, both actions induced by the fraud of Cohen. The policies which figured in the Cohen case contained an incontestable clause, the effect of which was fully recognized by the court. A similar incontestable clause was held, by the writer of this opinion then sitting in the Superior Court of Los Angeles County, to be binding upon the insurance company in two cases in which gross fraud was perpetrated by the insured in securing a policy. These are Mutual Life Ins. v. Margolis, 1936, 11 Cal.App.2d 382, 53 P.2d 1017, and Coodley v. New York Life Ins. Co., 1937, 9 Cal.2d 269, 70 P.2d 602. One of defendant's present counsel represented the insured in both these cases and in cases of similar import, which he cites in his brief, namely, Mutual Life Ins. Co. of New York v. Markowitz, 9 Cir., 1935, 78 F.2d 396, and New York Life Ins. Co. v. Kaufman, 9 Cir., 1935, 78 F.2d 398. We are quite familiar by reason of the decisions in these cases with the principles stated therein and we note that the same effect was again given the incontestable clause in the instant case by the trial court. This appears from the following: "In this connection, the court finds that plaintiff in this action is not contesting the validity of the policies involved herein, or either of them, but on the contrary is relying in this action upon the said policies, and each of them, to recover the amount of disability benefits paid to defendant and to set aside the waiver of premiums by reason of the fraud of defendant and for the reason that the disease for which defendant claimed disability was contracted prior to the issuance of the policies involved herein, and each of them, and is, therefore, not a disability insured against in either of said policies."

[1-5] While the incontestable clause would serve to defeat an action to void the policies upon the ground of fraud, there is nothing in the policies or in the law, so far as we know, which bars an action to recover payments made under a mistake arising from reliance upon false representations that there was no disease contracted or sustained before the issuance of the policies, when as a matter of fact the insured was suffering from the same disease several years previously, as the court found in the present instance. We note several recent cases in which the courts have recognized that an incontestable clause does not operate to extend the coverage of a policy to a disease contracted before the issuance of the policy. As stated in Apter v. Home Life Ins. Co. of New York, 1935, 266 N.Y. 333, 194 N.E. 846, 848, 98 A.L.R. 1281, "From the inception of the policies the defendant excluded from their coverage disability which originated before the policies became effective. The plaintiff never acquired any insurance against such disability." The same thought is given expression in John Hancock Mut. Life Ins. Co. v. Hicks, 1931, 43 Ohio App. 242, 183 N.E. 93, 95, where the court says, "The incontestable clause does not have the effect of enlarging the diseases or bodily injuries for which the company agrees to compensate the insured or his beneficiary. * * *" In the latter case, the total and permanent disability provision is exactly the same as in the instant case. In Palumbo v. Metropolitan Life Ins. Co., 1935, 293 Mass. 35, 199 N.E. 335, 336, the following appears, "whatever may be the scope of waiver in the law of insurance, it does not extend to the broadening of the coverage, so as to make the policy cover a risk not within its terms. That would require a new contract, and cannot be accomplished by waiver (cases cited). * * *" If the annual premiums due upon these $5,000 policies had been paid as they fell due they would not have been subject to cancellation, no matter how gross the fraud employed in securing them, but as part of his fraudulent scheme in procuring disability benefits to which he was not entitled under the terms of the policies, defendant secured also, by the mistake into which he led the plaintiff, a waiver of annual premiums to which he was not entitled. This appears from the conclusion reached by the trial court, based upon its findings just quoted. The policies, in the view of the court, were not subject to cancellation but lapsed, because defendant failed to pay the premiums due thereon, the only proper reason for lapsation, as specified in the incontestability clause itself.

In reaching its conclusion that defendant obtained disability payments and waiver of premiums to which he was not entitled, the court determined that the officers of the plaintiff were designedly misled by defendant into believing that he was not suffering from tuberculosis contracted before his policies were issued in 1926, when, as a matter of fact, he had the disease as early as December, 1924. The trial court was called upon to consider, as bearing upon that question, certain documents which were admitted in evidence, including the application of the defendant dated August 3, 1926, upon which both the policies were issued. This application consisted in part of statements to the company's medical examiner in which the following questions were propounded and answered as indicated:

"7. Q. Are you now in good health so far as you know or believe? A. Yes. * * *

"9. Q. Have you within six months lived with or been intimately associated with any person suffering from consumption? A. No. * * *

"13. Q. Have you ever been treated for any of the following? * * * hemorrhage from the lungs or stomach, consumption, pleurisy * * * or any other illness or any injury or surgical operation. A. Yes.

"Q. If Yes. Give full particulars with date, duration and result. A. Severe cold 1924, no pleurisy.

"14. Q. Have you had any medical advice during the past five years? State every instance with illness, dates, duration, severity and results and the names and addresses of the physicians who treated you. A. Yes.

"Q. If Yes, Give full particulars with date, duration and result. A. Injury to shoulder 1924. 1 visit. No sug.

"15. Q. Have you ever received or applied for treatment at any hospital, dispensary, sanitarium, cure or other institution? A. Yes.

"Q. If Yes, Give full particulars with date, duration and result. A. Tonsils removed 1914. New Haven Hospital."

Almost immediately after one year had elapsed from the date of issuance of the second policy, the defendant, on August 29, 1927, wrote the following letter to the plaintiff: "On March 24th I met with an accident to my back and shoulder and upon the advice of a doctor I was not allowed to work for four weeks. One week after I returned to work I became ill again and I consulted my present doctor on April 28th. He ordered me to discontinue all work for several months. His latest diagnosis is that I have 'Incipient Pulmonary Tuberculosis,' and that it will be several months before I can safely return to work. As this disables me from work for an indefinite period I believe I am entitled to compensation under my policy #1329930 and #1334357. Please advise." (Parenthetically, it may be noted that the diagnosis by the doctor, according to the evidence submitted, was not "incipient pulmonary tuberculosis" but "pulmonary tuberculosis".) This letter was followed by a disability benefit claim executed under oath by defendant on October 31, 1927. The following questions and answers appear in that claim as to both policies:

"6. State nature of disability. Pulmonary Tuberculosis.

"7. When did you become wholly disabled? April 28, 1927.

"8. When did you stop working? April 28, 1927.

"9. When were you first treated by a physician? March 24, 1927, consulted doctor Dr. C. M. Hensley for injury to my back and shoulder.

"10. Names and addresses of all physicians from whom you have received treatment and names of all hospitals in which you have been treated. Dr. C. M. Hensley, Colorado Blvd., Eagle Rock, Los Angeles, California. Dr. John W. Nevius, 1052 W. 6th St., Los Angeles, California. X Ray of chest by Dr. Johnson, Professional Bldg. Los Angeles, California. * * *

"14. Give names of other companies or associations from which you are receiving or have made claim for total and permanent disability benefits. Travelers Ins. Co., Equitable Life Assurance Co; New York Life Ins. Co., Mutual Life Ins. Co."

In support of his claim, defendant attached an attending physician's statement, made under oath on October 21, 1927, by John W. Nevius, M. D., in which the following questions and answers appear:

"3. Date of first visit in present disability? Apr. 28, 1927.

"4. When did the illness begin, that led up to insured's present disability? Mch. 24, 1927.

"5. State diagnosis and describe fully the injury, infirmity or disease causing disability. Cough & expect; hemoptysis, loss of wt & strength afternoon fever. Diag. Pulmonary tuberculosis.

"6. Has insured been treated by any other physician or received treatment in any hospital, dispensary or public institution—Names and Addresses? When? D. K.

"7. Is insured now wholly disabled? Yes.

"8. If now wholly disabled, do you believe the disability will permanently prevent insured from the pursuit of any form of mental or manual labor for compensation, gain or profit whatsoever? Yes.

"9. When did insured become so wholly disabled? Apr. 28, 1927."

At the trial it appeared from the deposition of Dr. Nevius that his abbreviation "D. K.," employed in answer to question 6 above, stands for "Don't Know," and in that same deposition the following appears:

"Q. Dr. Nevius, with respect to the history of tuberculosis, if Mr. Markowitz had told you that he had been in the Loomis Sanatorium, [do] you think you would have remember*ed* that? A. I should think I would. If he had said that, I certainly would have put it in my notes.

"Q. To the John Hancock? A. Yes."

This reference by counsel to the Loomis Sanatorium arose from the following situation: The defendant, while living at Mattapan, a suburb of Boston, was taken ill in the month of December, 1924. He was attended by Dr. Bradford Kent, on whose recommendation he entered Loomis Sanatorium in Sullivan County in the State of New York on February 9, 1925, where he was treated for tuberculosis. He stayed there until August 20, 1925, and during that time filed with the Standard Accident Insurance Company a claim, sworn to at Liberty, New York, on March 20, 1925. In support of his claim, two attending physicians' statements were presented, one by Dr. Kent, dated March 24, 1925, the other by Dr. Bertram H. Waters, physician in chief at Loomis Sanatorium, and in each of these physicians' certificates was a statement that he was suffering from pulmonary tuberculosis. On November 7, 1925, he filed another claim with the Standard Accident Insurance Company, in which he advised that corporation that he was disabled by "lung trouble," and with this was another certificate from Dr. Kent stating that his examination of the defendant in December, 1924, disclosed as the cause of his disability "pulmonary tuberculosis," and in which the following questions and answers appear:

"12. Do you consider the claimant a perfectly healthy man and subject to no chronic recurrent or other ailment which could in any way have prolonged or complicated his total disability above described? Ans. Has Pulmonary T. B. * * *

"16. Give any facts which would throw any further light upon the case. Ans. Still ill but is able to get out daily for a little exercise."

This attending physician's statement is dated November 2, 1925.

[6] Defendant resumed his employment as an automobile salesman that same month, having received from Standard Accident Insurance Company, between March and November of 1925, the sum of $620 for his disability, pulmonary tuberculosis. Approximately eight months later he indicated his approval of that kind of insurance by applying to plaintiff company for disability protection in connection with the two life insurance policies which were issued to him. Similar action was adopted with a number of other companies, with the result that approximately one year later he was claiming disability benefits from at least four other companies, according to his statement in the claim which he filed with plaintiff company. Evidence was before the trial court which indicated that before the present suit was brought, about six years later, defendant was in receipt of monthly disability payments from various companies amounting to approximately $600. Whether, as in the present instance, he designedly failed in his applications to give the other insurance companies a true account of prior hospital experience or prior illness with tuberculosis we are unable to say. It is clear, however, that in determining whether his claim for disability benefits in the present case had been founded on fact or falsity, the court had a right to consider the now admitted fact that contrary to the statements made in his application, this defendant had had such hospital experience and further that he had had pulmonary tuberculosis. The testimony given by certain of the physicians produced by the defendant, all of whom were experts in the treatment of tuberculosis, related to this hospital experience and prior illness of the defendant, and automatically, we might say, the false statements made

by this defendant in his application for insurance came to the attention of the court. That deception, as we have previously stated, would not be sufficient to invalidate the policies, because of the incontestability clause, but that does not mean that the court could not consider the false statements made in the application as part of the fraud which a year later came into full bearing when it misled the company into the view that defendant had suffered his disability after the policies were issued, a fraud which was not corrected by the defendant when, becoming disabled from the disease whose existence he had denied, he made proof of the beginning and the continuance of his disability. In other words, the question which the trial court had to determine in this case was not whether the policies containing the disability benefit provisions were procured by fraud, but whether the disability payments and waiver of premiums were secured by fraud. The fraud which procured the policies did not cease to operate when they were issued; it continued, as it should have been expected that it would, to determine plaintiff's course of action after the policies were incontestably in effect.

[7] Defendant insists that his answers to the questions in the proof of disability were truthful and did not amount to a representation that he first contracted and became wholly disabled from tuberculosis after the issuance of the policies. The trial court had authority for the construction which it placed upon the statements, namely, that they constituted misrepresentations as to those material facts. They were practically identical with the statements contained in the proof of disability considered in the Cohen case, supra. We have examined the opening brief of the appellant in that case and we find that throughout some 16 pages he made the identical argument and cited the same authorities in attacking the finding of fraud as are presented to us on the same point. It was held on the trial of the Cohen case that the representations of Cohen constituted false and fraudulent statements to the effect that it was subsequent to the issuance of the policies that the disease originated and occurred and he was first disabled thereby. Upon the appeal the representations in the proof of disability were held sufficient to support the finding. We regard that holding as directly applicable to the facts of the present case.

[8] The trial court had a right to consider the false statements which defendant made in regard to his previous illness and hospitalization in his application for the policies, the false statements in the proof of disability which we have quoted, and also his representation in his letter of August 29, 1927, that his disease had been diagnosed as "incipient tuberculosis." The finding of fraud in the collection of disability payments by defendant has ample support in the evidence.

[9] Also without merit is the attack made upon the findings that plaintiff believed, relied and acted upon defendant's false representations in making the disability payments and waiving payment of premiums. There was no direct evidence of such belief and reliance but direct evidence was not required. In such circumstances inferences which may be drawn from the acts of the parties are often more convincing than their sworn testimony as to their beliefs and motives. The success which crowned defendant's deceit is convincing evidence of its effectiveness. Mathewson v. Naylor, 1937, 18 Cal.App.2d 741, 64 P.2d 979; De Garmo v. Petitfils Confiserie, 1928, 93 Cal.App. 261, 269 P. 692.

Notwithstanding the record and testimony submitted to the court which showed that Dr. Kent in November, 1925, stated that defendant was still ill with pulmonary tuberculosis and that he had been hospitalized for tuberculosis as late as August, 1925, at which time he was discharged from the Loomis Sanatorium as an apparently arrested case, the defendant contended at the trial that his tubercular illness in 1927 was not the same disease which incapacitated him in 1924 and 1925. His contention is that clinical symptoms of tuberculosis which appeared in March of 1927, marked the outbreak of a new disease of the same name.

[10] In his examination of four tuberculosis specialists produced by defendant, his counsel asked each a hypothetical question as to the effect of an injury suffered by appellant on March 24, 1927, when he was struck on his chest by an automobile crank while attempting to start his car. Upon the answers elicited in response to this question and others propounded in his

inquiry into this particular subject, appellant's counsel lay great stress in arguing that their client had been cured of tuberculosis prior to the issuance of the policies. That argument, however, did not convince the trial court. The hypothetical question which was propounded to the four specialists included an assumption that the hypothetical patient during the period from November, 1925, to March, 1927, "had no expectoration and had no clinical symptoms such as night sweats, loss of appetite, pains in the chest, flushes, fever, and had no medication of any kind * * * and was not attended by physicians." This assumption was based upon appellant's testimony to the effect that the items inquired about described his own condition, but as respondent says in his brief, "the court was not obliged to believe that testimony. Defendant, by his own admissions, is a confessed liar. He confessed that he lied to get the policies and, of course, the court is not bound to give him full or any credence in what he said in his effort to collect upon them. (See Cal.Jur. Witnesses, par. 156; * * *)." This is plain language but is hardly subject to contradiction since the trial judge, by his own comments, showed that he was applying to the testimony of the defendant the time honored rule that has prevailed in regard to the credibility of witnesses. The hypothetical questions propounded to the four specialists also occasionally assumed other unproved conditions which eliminated this defendant as the hypothetical patient, as, for example, the inquiry of Dr. Pottenger, hereinafter mentioned, concerning a patient who was "free of tuberculous disease prior to the trauma."

The hypothetical question addressed to Dr. Anderson concluded, "have you an opinion as to whether or not the trauma, that accident, reactivated the old infection, and inducing [induced?] a new tuberculosis episode of [or?] clinical tuberculosis or disease?" He answered that "it would be very logical to assume that if he had not had the trauma he would probably have been able to continue his work." Dr. Anderson was also asked whether between the time the patient was discharged when the disease was apparently arrested, up to the date of March 27, 1927, sufficient time had elapsed to be certain that the old disease or episode had disappeared. He answered, "Well, I do not think that you can use the word certain * * *. You can use the word logical, and I think it was logical to assume that it was cured, but to be certain that it was cured is another story."

Dr. Pottenger was asked if he had "an opinion as to whether or not the trauma caused the reactivation of the tuberculous disease of which he was free prior to the trauma." He answered that he assumed it did, but under cross-examination stated that when after a period of arrestment of a year or a year and a half, the patient again shows constitutional symptoms of tuberculosis "I would say it might be an extension from the preceding disease—an extension or reactivation." He further stated that he did not make a distinction between infection or disease. In this same examination the doctor said, "We would not say he was cured until two years or later," and when he stated that the defendant's condition was a reactivation of his old disease, was asked, "Was that the same disease?" and answered, "The same infection. He had his old infection in 1924 and 1925, and the disease quieted down and was arrested, as we speak of it, and then he went about his work and had no symptoms from August or September, 1925, until March of 1927. We would have to assume then that the disease was arrested. Then a blow—the disease is not healed; it is not completely eliminated. The bacilli are in the tissues. And then a blow on the lung, being a compressible organ, would throw—might throw, but not necessarily—would throw a certain amount of pressure on all portions of it, and where the tissues are diseased, it is apt to cause a rupture or disturbance, and that is the way these hemorrhages usually occur." At another point, Dr. Pottenger's testimony was as follows:

"Q. So that what he had after the trauma in the way of activity would be called a new episode of clinical tuberculosis from an old infection, is that correct, Doctor? A. Yes, that is correct.

"Q. And so far as that episode was concerned, it first began with the administration of the trauma, is that right, Doctor? A. Yes, that is right."

Dr. Pottenger further stated that he would say the defendant contracted the disease "in 1924, 1925, but it had quieted down, and then through some cause, the trauma presumably, brought on a reactivation, of a disease which was apparently arrested." He later qualified this answer saying he meant "it was a reactivation of the old infection or the bacilli in the system." All of this gives point to the inquiry made by counsel for respondent as follows: "Q. Dr. Pottenger, when we get down to attempting to be very fine in our definition between tberculer infection and tuberculer disease, after it has once manifested itself, it really amounts to a play on words, doesn't it? A. Yes." One gets the impression from reading the testimony of Dr. Pottenger and the other specialists that within the profession certain terms are occasionally used interchangeably, particularly, "clinical manifestation," "episode," "disease," and "infection."

The hypothetical question addressed to Dr. Howson concluded, "have you an opinion as to whether or not the trauma, the injury, was the proximate cause or reactivating agent of a tuberculous disease that was manifest in March or April, 1927?" He testified that "it is the logical assumption that the trauma was the activating agent," and further that with the history as given by defendant's counsel in his hypothetical question there would be a presumption that "the patient was free from the disease of tuberculosis, or tuberculous disease," prior to the trauma.

Dr. Sokol was asked, "have you an opinion as to whether or not the concussion [contusion?] and trauma, was the proximate cause or activating cause that produced the disease of pulmonary tuberculosis which the doctor found and diagnosed in April, 1927?" He stated that in the case of the hypothetical patient "this trauma eventually caused a reactivation of the tuberculous infection which eventually caused a breakdown in his healing process, causing a hemorrhage." This physician further stated that when there is a reactivation he would say the reactivation is the new disease, but that "A common ordinary person wouldn't know the difference between infection and disease."

The testimony of these specialists produced by the defendant, recorded in some 175 pages of the transcript, is in many instances quite confusing and sometimes contradictory, but upon one thing they all agreed and that is, that after a case is diagnosed as "apparently arrested" a considerable time must elapse before the disease of pulmonary tuberculosis may be called "cured" or "apparently cured." The minimum period fixed by Dr. Sokol was 21 months; by Dr. Howson, 2 years and 3 months; the period fixed by Drs. Anderson and Pottenger was 2½ years. As we have stated, the defendant had been discharged as an "apparently arrested" case on August 20, 1925, but was still ill with tuberculosis in November of that year, according to Dr. Kent's sworn statement. His policies were issued in August, 1926, approximately a year after his discharge and, according to his own testimony, he had a hemorrhage in March, 1927, prior to the expiration of the minimum time which, according to Dr. Sokol, must elapse between the classifications of "apparently arrested" and "apparently cured." It is worthy of note that both Dr. Sokol and Dr. Howson stated that they would want to examine the patient after the lapse of the period mentioned by each of them before determining that a cure had been effected.

[11] The question which the court was called upon to decide was whether on March 24, 1927, the date when he was injured while cranking his automobile, the defendant had been cured or was free from the disease from which he had been suffering. The trial judge was justified, on the testimony of all four of the specialists produced by the defendant, in determining that he was not at that time free of the tuberculous ailment which he had when discharged from the hospital on August 20, 1925, approximately 19 months previously and, therefore, that the disease resulting in the disability for which he claimed payments were due was contracted before the policies were issued; consequently, was not included in the coverage of the policies. In this case, the trial judge announced his decision from the bench at the conclusion of testimony, and certain language used by him at that time is quoted in an affidavit of counsel for the defendant made in support of his motion for new trial. The passage is rather lengthy, but a single excerpt from it will show the process of the trial judge's reasoning, and we do not take exception to it. It reads as follows:

"In other words, he had tuberculosis and he had it back in 1924 or 1925 and it was apparently arrested although never pronounced cured, and then, within less than the minimum period testified to by Dr. Howson this morning, the disease flared up again. Very probably what caused it to flare up again was the blow of the automobile crank, but the disease must have been there or it could not have flared up. I think it is something like a fire that flares up then finally dies down, and there is no flame visible, and yet, if you apply the bellows to it, it will break out again. There must have been a fire there in the first place, and the fire had to be there all the time to make it break out again. It was the same fire but it had died down, and to all intents and purposes as far as any one could see there was no fire but just ashes. So here the disease could not reactivate or flare up again if it had not been there to be reactivated. In other words, the popular meaning, I think, is more sensible than the medical meaning, and under the general rules of statutory construction we must accept the popular meaning of the word.

"So the Court finds as a fact that the tuberculous disease, from which the defendant suffered from and after the time that he had the trouble in cranking his machine was the same tuberculous disease that he had in 1924 or 1925, and was not contracted after the date of the policy but had been contracted before the date of the policy."

[12-17] In an effort to extricate their client from the difficult situation in which he has landed by reason of his fraud, appellant's counsel have presented a lengthy answer and in addition thereto seventeen separate and distinct defenses. In these they have leaned heavily on the doctrines of estoppel and waiver. So far as estoppel is concerned, we find the simple rule stated in Kemper v. Industrial Acc. Comm., 1918, 177 Cal. 618, 621, 171 P. 426, 427, that "The person asserting an estoppel must be induced to act or refrain from acting by his opponent's conduct. Barnhart v. Fulkerth, 93 Cal. 497, 29 P. 50." There can be no question that in the present case the defendant refrained from paying his annual premiums and he wants us to believe that he was led into that position to his prejudice by the action of the plaintiff insurance company in recognizing his claim for disability and making payments thereon; but, as we see it, that would be a complete perversion of the doctrine of estoppel for the company was led into the position of making payments to its prejudice by the fraudulent action of the defendant. The equitable doctrine of estoppel can never operate to protect one from the consequences of his fraud. Nor can we accept the appellant's view that in September, 1933, the respondent forever waived its right to declare the policies void when, acting upon a report made by Dr. English that the defendant was no longer wholly or permanently disabled, it demanded premium payments from the defendant. At the time of that demand plaintiff had not discovered the fraud of the defendant in connection with his claim for disability. That discovery came approximately two months later when the plaintiff learned from another insurance company that the defendant, contrary to the statements made in his application for policies and in his application for disability benefits, had been hospitalized for tuberculosis in the year 1925. There seems to us no merit in defendant's additional contention that plaintiff had waived its right and is now estopped from setting up the previous tuberculosis history as a defense on the ground that by using reasonable care and diligence it could have discovered whether or not the defendant had any previous history of tuberculosis, or that by its long continued payments of disability benefits it waived its right to set up as a ground of action any claim of mistake or fraud. In support of this claim the appellant calls attention to the fact that one Joseph Cahalan, custodian of the records of the Health Department of the City of Boston, testified in a deposition taken in that city that the records of the department showed that Dr. Kent had reported the defendant as a tubercular patient in December of 1924 and that a search of the public records would have disclosed that fact before the plaintiff company began to make the disability payments. Mr. Cahalan, however, testified that the records of his department were available only upon subpoena and we do not subscribe to the theory that it is necessary, when there is nothing in the application for a policy suggesting a source of particular inquiry, for an insurance company to keep a constant check upon municipal records to determine whether or not its applicants for policies are telling the truth. Another claim of the defendant was that the plaintiff was estopped from changing its position as first announced in its letter of September 12th, 1933, whereby it notified defendant that it was discontinuing disability payments because he was no longer wholly and permanently disabled. He characterizes the sending of Mr. Taylor's letter of November 20, 1933, as an attempt on the part of the insurance company to "mend its hold," claiming that the plaintiff is estopped from changing its position as de-

fined in the letter of September 12th, which reads as follows:

"Mr. Joseph Markowitz
"1032 Kagawa Street,
"Pacific Palisades, Calif.
"Dear Mr. Markowitz:

"The Company has received the medical examination completed by our Dr. English and according to the information submitted, it appears that you are no longer wholly and permanently disabled within the terms of your policy. They are, therefore, discontinuing payment of further disability benefits as a result of which you should resume payment of premium as of August 5, 1933 under policy # 1329930 and August 18, 1933, under policy # 1334357. You will be granted thirty days from the date of this letter in which to pay the premiums, the due date of which are mentioned above.

"Very truly yours,
"H. G. Saul, General Agent
"EGJ:LML by E. G. James"

Shortly before this letter was written and on August 19, 1933, the Aetna Insurance Company had written the respondent stating that they had been paying the defendant $100 a month since July 27, 1927, "because of disability given as tuberculosis," and making inquiry as to the present status of defendant's case with the respondent. Immediately thereafter on August 25, 1933, the respondent asked its physician, Dr. English, for a report upon the defendant's condition. This report was furnished on September 1, 1933, and stated that "There is no doubt that this man has had a slight attack of pulmonary tuberculosis, but it is entirely healed at this time. This involvement was only on the right side." As a result, the letter of September 12th, discontinuing payment of further disability and calling upon the defendant to resume payment of his premiums, was sent. Further correspondence ensued between the Aetna Life Insurance Company and the respondent with the result that on October 5, 1933, the respondent received information from still another insurance company that the defendant had suffered from pulmonary tuberculosis during the period, December 20th, 1924, to November, 1925. On investigation and within a month thereafter, Mr. Taylor's letter of November 20, 1933, was sent to the defendant and on December 27, 1933, the original complaint in this case was filed. There is nothing in this record to support the claim that the defendant suffered any injury or impairment of his rights by plaintiff's "mending its hold." On the contrary, the record clearly indicates that there was no intention on the part of plaintiff in September, 1933, to terminate the policies held by the defendant, but when it became apparent that he had employed gross fraud in securing his disability payments as well as the waiver of the regular annual premium payments, then the decision was reached seasonably, and in our opinion rightfully, to forfeit the policies and seek to recover the amounts that had been obtained through fraud.

[18] The foregoing recital has a special bearing upon the matters that they were decided by the Honorable Parker Wood when, upon motion of the defendant made under section 597 of the Code of Civil Procedure, the court proceeded to the trial of the defense appearing in defendant's answer alleging that plaintiff's second amended complaint, as amended, and each of the counts thereof, were barred by section 338, subdivision 4, of the Code of Civil Procedure. At that hearing the judge, then presiding in the Superior Court, found that the plaintiff company, in September, 1933, first received any information leading it to believe that the representations made by the defendant in his proofs of disability, in his applications for his policies of insurance, as well as in his representations made through his attending physicians in the proofs of disability and proofs of continuance thereof, were untrue; further, that the plaintiff company in September, 1933, first received information leading it to believe that the disease causing the disability of the defendant, namely, tuberculosis, was contracted prior to the dates of the policies of insurance involved in the action and prior to the date of the application for each of said policies. Accordingly, the court decided that the bar of the statute of limitations was not effective and that the cause of action was commenced within the period of time required by the statute; also, that the plaintiff was not guilty of laches in any particular. We are impressed by the statement in respondent's brief "that the action did not have for its purpose the rescinding of the insurance contracts because of the fraud committed in 1926 when the policies were obtained. The suit is to recover disability payments made under the policies for the years 1927 to 1933. The suit is based upon fraud and mistake in making the disability payments.

The fraud (and/or mistake), therefore *was a continuing fraud* (and/or mistake). This fraud continued up to approximately the time of filing suit."

[19] The respondent calls attention to the fact that "During the period from 1927 to 1933, the defendant continued to assert that he was entitled to disability payments for a disease contracted after the issuance of the policies. Even as late as September, 1933, when he was examined by Dr. Glenn English at the company's request, he maintained that he had suffered from tuberculosis for only five years previous. * * * At no time in the interval did he disclose the previous existence of the disease or the names of the doctors who had treated him in 1925 or that he had been in a tubercular sanitarium in 1925." Under all the circumstances, we feel that the statement in Rutherford v. Rideout Bank, 1938, 11 Cal.2d 479, 485, 80 P.2d 978, 982, 117 A.L.R. 383, is applicable, "The rule is clearly stated in Victor Oil Co v. Drum, 184 Cal. 226, 241, 193 P. 243, 249: 'The courts will not lightly seize upon some small circumstance to deny relief to a party plainly shown to have been defrauded against those who have defrauded him on the ground, forsooth, that he did not discover the fact that he had been cheated as soon as he might have done. It is only where the party defrauded should plainly have discovered the fraud except for his own inexcusable inattention that he will be charged with discovery in advance of actual knowledge on his part.' "

[20] On the trial of the case before Judge Burnell, it appeared that there was no merit in various other grounds of estoppel mentioned among the separate defenses, for example, the claim that a tender of two cashier checks to the plaintiff in the sum of $317.40 each, as premiums on the two policies for the years 1934 and 1935, operated to estop the plaintiff from declaring that the premiums on the policies had not been paid. A letter was introduced showing that the company declined to accept the checks "because said policies lapsed as of the due date of the premium falling due after the premium last actually paid by your client" and returned them, counsel for the defendant then stating that he had received them. The defendant's additional claim that the plaintiff company waived all rights it had to declare the policies void when it demanded premium payments from the defendant on the policies in September, 1933, was also shown to be groundless. The letter of September 12th was introduced clearly indicating that the company then had no intention of forfeiting the defendant's policies but, on the contrary, granted him an extension of 30 days from that date in which to pay the annual premiums which had fallen due on August 5th and August 18, 1933, and enable him to meet those payments by applying "the sum necessary for payment of said premium from the cash surrender value of the policy in accordance with the automatic application of the Policy Loan Provision thereunder," according to a notice dated October 4, 1933. Then, two months later, the plaintiff company determined that it had been defrauded and took the position that the defendant by means of the fraud had secured not only disability payments but waiver of the annual premiums due thereon. This same fraud, of course, vitiated the payment of the premium which was made "by application of the cash surrender value," which was in fact non-existent because it could have accrued only while the policies were in good standing during the preceding seven years. The court in its judgment decreed that one of the defendant's policies lapsed on the 5th day of August, 1927, and the other on the 18th day of August, 1927, for the non-payment of the premium due thereon and "that since said dates, respectively, said policies, and each of them, have been and are now of no further force or effect. * * *"

[21] In his cross-complaint, as amended, defendant claimed that he was entitled to disability benefits and also alleged that "cross-complainant, on or about March 24, 1927, sustained a severe bodily injury and trauma to his chest, shoulders and back, and by reason of, and as a result thereof, cross-complainant, from and after said date, suffered from, and became afflicted with, the disease of pulmonary tuberculosis, tuberculosis of the intestines, and with tuberculosis of the organs of the body in and about the abdomen and intestines; and that on or about April 28, 1927, cross-complainant became wholly and permanently disabled by bodily injury and disease, sustained and contracted after the date of the issuance of said policy; * * *." Upon these allegations defendant's counsel argues that the bodily in-

jury sustained in March of 1927 caused the disability of the defendant and that since that injury was sustained after the issuance of the policy the disability payments were within the coverage of the policy. This contention we believe is answered by counsel for respondent where he says, "Assuming, however, arguendo, that appellant may now at this late date rely on the accident provisions of the policies, respondent nevertheless insists that the position of appellant is not well taken. The question, of course, as to whether or not the disability arose from the accident or from a prior contracted disease, is a question of fact. It is a question of proximate cause of the disability and proximate cause is a factual question. The court has resolved the factual question against the appellant and appellant's contention that there is no evidence to support the finding is not supported by the record." In regard to the bodily injury, the court found that while the defendant received a blow upon his chest on or about March 24, 1927, "it is not true that on or about said date defendant sustained a severe bodily injury or trauma * * * and it is not true that by reason of any such blow or the result thereof, defendant suffered from or became afflicted with any disease and in particular the disease of pulmonary tuberculosis." Dr. Hensley, who attended the defendant at the time of his bodily injury, stated that he found an abrasion at about the inner angle of the clavicle and the neck where the skin was rubbed off over an area of approximately one inch in length and one-half inch wide. He also testified that there was a bruise below the abrasion approximately three inches in diameter.

[22-24] As we have stated, the original complaint in this action was filed in December of 1933, and in the ensuing two years various demurrers and motions to strike were passed upon and amended pleadings filed. Then, according to the record, after a lapse of five years present counsel for appellant first appeared officially when he stipulated on March 14, 1940, that the amendment to the plaintiff's amended complaint might be filed. However, among the exhibits in the case is a letter of July 27, 1935, in which he notified the plaintiff company that he represented Joseph Markowitz. On May 1st of 1940 the case was assigned to the court of the Honorable Joseph W. Vickers for trial, but before testimony was introduced an objection was made to the introduction of evidence on the ground that the amended complaint did not state facts sufficient to constitute a cause of action. This objection was sustained and the plaintiff given until July 1, 1940, to amend its pleading, the defendant being allowed an additional month to plead or answer thereto. The appellant assigns this action as error on the part of the trial court and asserts that it was an abuse of the court's discretion in view of the fact that the case had been pending at that time for nearly seven years. However, it is apparent that for some reason with which we are not familiar, but which may have been disclosed to Judge Vickers, no one was in any hurry to have this action tried, and we do not feel that there was any abuse of discretion, especially in view of the statement in Frost v. Witter, 1901, 132 Cal. 421, 424, 64 P. 705, 706, 84 Am.St.Rep. 53, "that great liberality should be used by the courts in allowing amendments (Burns v. Scooffy, 98 Cal. [271], 276, 33 P. 86, and cases cited); and that the allowance of amendments is a matter within the discretion of the courts. Coubrough v. Adams, 70 Cal. [374], 378, 11 P. 634; Lestrade v. Barth, 17 Cal. 285. And in practice the courts have been extremely liberal, * * *."

[25] Some reliance is placed upon the claimed failure of the plaintiff company to comply with a Massachusetts statute (Chap. 175, sec. 129, Gen.Laws of Mass. 1921), requiring insurance companies delivering policies in that state to set forth on the face of the policy in bold letters a plain description thereof and its peculiarities. We have inspected the policies and note that the clause governing total and permanent disability benefit provisions is boldly displayed on page 3 thereof. Knowing that the appellant is, by his own statement in court, a graduate of one of the oldest and best of our universities, and further, that he is a man of keen intelligence, as indicated by his performance as a witness at the trial and also by documents which were admitted as exhibits, the trial court was justified in concluding that he was not misled by the form, print, or content of the total and permanent disability benefit provision, but understood the clause in its entirety and, particularly, that he was protected from financial loss resulting from disability arising from bodily injury or disease sustained or contracted after,

and not before, the respective dates of the policies.

[26, 27] Two judgments were entered in this case, one by Judge Wood, on November 6, 1941, on the issues presented under section 597 of the Code of Civil Procedure, the other by Judge Burnell, on the 18th day of May, 1942, on all issues raised by the pleadings. The notice of appeal was filed June 18, 1942, more than sixty days after the entry of Judge Wood's judgment and, therefore, cannot be effective so far as that judgment is concerned. However, his decisions may be and have been reviewed on the appeal taken from Judge Burnell's judgment within the time fixed by the statute. The appeal from Honorable Parker Wood's judgment is ordered dismissed and the judgment entered by Honorable Charles S. Burnell is ordered affirmed. The purported appeal from the order denying defendant's motion for a new trial is dismissed.

SHINN, J., and BISHOP, Justice pro tem., concur.